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DISSERTATION

“The shift of energy regulatory powers under the framework of Directive 2009/72/EC”

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Vorwort

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List of Abbreviations

Am. U. Int'l L.Rev.	American University International Law Review
Art.	Article
BayVBl	Deutsche Zeitschrift „Bayerische Verwaltungsblätter“
BverfGE	Bundesverfassungsgerichtsentscheidung
BDG	Österreichisches Beamten-dienstrechtsgesetz 1979 (BGBl 333/1979) idF BGBl I 111/ 2010
BEGTPG	Gesetz über die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen vom 7. Juli 2005 (BGBl. I S. 1970, 2009) idF BGBl. I S. 160
BGBI	Bundesgesetzblatt
BNetzA	Die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen
BVerfGE	Entscheidungen des Deutschen Bundesverfassungsgerichts
B-VG	Bundes-Verfassungsgesetz vom 1. Juli 1934 (BGBl 1/ 1930 (WV)) idF BGBl. I Nr. 98/2010
CEER	The Council of European Energy Regulators
CML Rev.	Englische Zeitschrift “Common Market Law Review”
DG TREN Commission	Directorate General for Energy and Transport, European Commission
DÖV	Deutsche Zeitschrift „Die öffentliche Verwaltung“
DVBl	Deutsche Zeitschrift „Deutsches Verwaltungsblatt“
EC	The European Communities
E-control GmbH	Österreichische Gesellschaft für die Regulierung in der Elektrizitäts- und Gaswirtschaft mit beschränkter Haftung” (bis 01.03.2011)
E-control Kommission	Energie Control Kommission
ECJ	European Court of Justice
ECR	European Court Report
EEC	European Economic Community
EG	Europäische Gemeinschaften
e.g.	exempli gratia, for example

EGV	Vertrag zur Gründung der Europäischen Gemeinschaft
ELJ	Englische Zeitschrift „European Law Journal“
e/m/w	Deutsche Zeitschrift für Energie, Markt, Wettbewerb
ENISA	European Network and Information Security Agency
EnLAF	Energieleitungsausbaugesetz vom 21. August 2009 (BGBl. I S. 2870) idF BGBl. I S. 338
EnWG	Deutsches Energiewirtschaftsgesetz vom 7. Juli 2005 (BGBl. I S. 1970, 3621) idF BGBl. I S. 338
E-RBG	Energy Regulatory Authorities Act (Energie-Regulierungsbehördengesetz) vom 24. August 2002 (BGBl. I Nr. 121/2000) aufgehoben am 2. März 2011 durch BGBl. I Nr. 110/2010
ERGEG	European Regulators' Group for Electricity and Gas
et seq.	Und der/die folgende
ETSO	European Transmission System Operators
EuR	Deutsche Zeitschrift „Europarecht“
EurActiv	Online-Portal für EU-Angelegenheiten
ELJ	Englische Zeitschrift „European Law Journal“
EUV	Vertrag über die Europäische Union
EGV	Vertrag zur Gründung der Europäischen Gemeinschaften
EUZBLG	Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union vom 12. März 1993 (BGBl. I S. 313) idF BGBl. I S. 3031
EuGH	Europäischer Gerichtshof
EuZW	Deutsche Zeitschrift „Europäische Zeitschrift für Wirtschaftsrecht“
EuGRZ	Deutsche Zeitschrift „Europäische Grundrechte-Zeitschrift“
GG	Grundgesetz für die Bundesrepublik Deutschland in der im Bundesgesetzblatt Teil III, 100-1 idF BGBl. I S. 944
GmbHG	Österreichisches Gesetz über Gesellschaften mit beschränkter Haftung (GmbH-Gesetz – GmbHG) vom 6. März 1906, RGBl. Nr. 58/1906 idF BGBl. I Nr. 111/2010
Ibid (Ibidem)	Ebenda
ICl	Österreichische Zeitschrift über „International Constitutional Law“
IEB	TFInformation Exchange & Benchmarking TF

TSO	Transmission system operator
IR	Deutsche Zeitschrift „InfrastrukturRecht“
ITC	Agreement Inter-TSO compensation Agreement
JRP	Deutsche Zeitschrift „Journal für Rechtspolitik2
JZ	Deutsche Zeitschrift “JuristenZeitung“
MEPs	Members of the European Parliament
MLR	Englische Zeitschrift „Modern Language Review“
no.	Number
NRA	National Regulatory Authorities
N&R	Deutsche Zeitschrift „Netzwirtschaften und Recht“
NVwZ	Deutsche Zeitschrift „Neue Zeitschrift für Verwaltungsrecht“
ÖZW	„Österreichische Zeitschrift für Wirtschaftsrecht“
OJEC	Official Journal of the European Community
OJEU	Official Journal of the European Union
p.	Page
para.	Paragraph
RdE	Deutsche Zeitschrift „Recht der Energiewirtschaft“
REGTP	Die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen
RGBL.	Reichsgesetzblatt
TEC	Treaty establishing the European Communities
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
TKG	Telekommunikationsgesetz vom 22. Juni 2004 (BGBl. I S. 1190) idF BGBl. I S. 78
VfSlg	Sammlung der Erkenntnisse und wichtigsten Beschlüsse des österreichischen Verfassungsgerichtshofes
VVDStRL	Tagungsband Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
ZNER	Deutsche Zeitschrift „Die Zeitschrift für Neues Energierecht“

Preliminary note

Former 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 (“*Directive 2003/54/EC*”)¹ introduced for the first time a compulsory regime of energy regulation. Upon former article 23 para. 1 sent. 1 of Directive 2003/54/EC, Member States were required to “*designate one or more competent bodies with the function of regulatory authorities*”. These authorities were vested, upon article 23 para. 1 sent. 2 of Directive 2003/54/EC, with a minimum set of competences (shall “*at least be responsible*”).

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 (“*Directive 2009/72/EC*”)² modifies the regulatory regime established under Electricity Directive 2003/54/EC. Indeed, under the framework of Directive 2009/72/EC, the duties of national energy regulators have considerably been increased, extending to further areas of monopoly markets as well as to market areas, where effective competition exists. For this purpose, they are vested with a minimum set of powers (“*shall at least have the following powers*”), comprising new investigation powers, new decision-making as well as new enforcement powers.

This paper will demonstrate that, although the powers of national energy regulators have undoubtedly been increased, their position has not been strengthened, as claimed by the European Commission. Based upon a careful selection of legal issues and underlined by specific provisions of Directive 2009/72/EC, it will reveal that it is the European Commission, which benefits from the increase of powers of the national energy regulators. It will prove that the new regulatory regime of Directive 2009/72/EC leads to a drastic shift of powers in the area of energy regulation.

¹ OJEU L 176/37.

² OJEU L 211/55.

This paper reflects the legal status as of 28th of February 2011. The dissolution of the *E-control GmbH*, the main Austrian energy regulator, in its present form and its new foundation into an institution under public law (*Anstalt des öffentlichen Rechts*) on 3rd of March 2011 could therefore not be considered.³ The elaborations on the *E-control GmbH*⁴ remain however of relevance, since they deal *also in general* with the problem of outsourcing administrative tasks to entities of private law, including the possibilities of control through civil and company law (*zivil - und gesellschaftsrechtliche Steuerungsmöglichkeiten*), which produce similar effects to those of governmental instructions.

The Introductory Part (1) will, in form of a historical overview, outline the development that national energy regulators underwent under European energy legislation. It will, in particular, show that these authorities attract increased attention and that, as a result of it, their regulatory powers are continuously strengthened. In order to understand the huge impact that the regime of Directive 2009/72/EC has on the regulatory regimes of the Member States, the Introductory Part will, by way of example, examine the current powers of national energy regulators under Austrian and German law.

Part Two (2) will analyse whether the powers conferred upon national energy regulators under the framework of Directive 2009/72/EC have been enhanced in comparison to those established under the regime of Directive 2003/54/EC. It will examine whether the requirement of article 35 para. 1 and 2 of Directive 2009/72/EC to establish a single national regulatory authority at national level constitutes *indeed*, as the European Commission claims, an effective tool of enhancing the powers of

³ Few details on the establishment of the *E-control GmbH* as an institution under public law are available under website of the *E-control GmbH*, <http://www.e-control.at/de/econtrol/projekte/zehn-jahre-e-control> (26.03.2011).

⁴ See section 3.2.2.2.1 as to the structure and legitimacy of the *E-control GmbH* within the hierarchical structure of public administration; section 3.2.2.2.2 concerning the principally existing powers of governmental control by virtue of article 20 para. 1 of the B-VG; section 3.2.3.2.1.1 with regard to the requirements of European law in the light of the new regime of Directive 2009/72/EC and article 20 para. 2 sent. 1 no. 5 and 8. of the B-VG and section 3.2.3.2.2 regarding the establishment of adequate rights of supervision through civil and company law.

national energy regulators.⁵ Part Two will, in form of an in-depth analysis, assess whether art. 35 para. 1 and 2 of Directive 2009/72/EC is compatible with the constitutionally guaranteed principle of Federalism as it is prevalent in Germany and Austria (2.1). The analysis will conclude with an examination of the duties and powers that have been attributed to national energy regulators under the regime of Directive 2009/72/EC in addition to those of Directive 2003/54/EC (2.2).

Part Three (3) will demonstrate that the increase of national energy regulators' powers, on one side, leads to a loss of powers of the Member States over their own energy regulators, on the other side. While comparing national energy regulators' status of independence under the regime of former Directive 2003/54/EC and Directive 2009/72/EC, it will reveal that the loss of power suffered by the Member States is mainly triggered through article 35 par. 4 sent. 2 (b) (ii) of Directive 2009/72/EC, which requires national energy regulators' independence in also *political terms* (3.1). Whether the required political independence can be regarded as compatible with Austrian and German constitutional law will be dealt with, in form of an in-depth analysis, in the last section of Part Three (3.2).

Part Four (4) will prove that it is the European Commission, which benefits from the enhancement of powers and strengthening of independence of national energy regulators. The European Commission's gain of power over national energy regulators appears either in form of *direct* powers of control, such as in form of binding guidelines (4.1) or in form of *indirect* powers of control exercised through its European institutions, such as the European Network of Transmission System Operators or the Agency for the Cooperation of Energy Regulators (4.2).

Part Five (5) will come to the conclusion that the powers of national energy regulators, which have undoubtedly been enhanced under the framework of Directive 2009/72/EC, are of benefit of the European Commission rather than of the Member States. It is indeed the European Commission, which, equipped with a powerful set of powers, is

⁵ Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity, COM (2007) 528 final at 2.1.

the real “winner” as to the regulatory powers of the energy markets. Under the regime of Directive 2009/72/EC, the energy regulatory powers shift. They shift away from the Member States on a national level towards the European Commission on a European level.

1 Introduction: a historical overview of the powers of national energy regulators

European energy legislations and, based upon them, Austrian and German energy laws illustrate well that the powers of the national energy regulators are on a constant rise.⁶ These legislations reveal how national energy regulators made up their way from unknown regulatory authorities to the powerful regulatory authorities they are today. Whereas under the regime of Electricity Directive 1996/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (“*Directive 1996/92/EC*”)⁷, national energy regulators were barely noticed (**1.1**), their existence under the regime of Directive 2003/54/EC was well recognized. Having had, however, no clearly defined scope of action, they were of little relevance (**1.2**). Today, under the regime of Directive 2009/72/EC, national energy regulators are powerful authorities vested with regulatory powers, which reach deeply into various monopoly markets and which extend even to areas, where effective competition exists (**1.3**).

1.1 Under the framework of *Electricity Directive 1996/92/EC* and Austrian and German energy laws

Under the framework of Directive 1996/92/EC, the regulation of the internal electricity market was entirely left within the hands of the Member States. No obligation existed, which required Member States to designate a body with the regulatory functions of the electricity market. Member States were merely required to provide effective regulation, whoever carried out this function. Directive 1996/92/EC⁸

⁶ For a historical overview of the liberalisation of the European energy market, see *e.g.* C. Schalast, Das EU-Energiepaket 2007 – Wettbewerb, Binnenmarkt und Umweltschutz, IR 4/ 2007, p. 74 *et seq*; see also O. Philipp, Elektrizitätsbinnenmarkt und Energiecharta, EuZW 17/ 2998, p. 517 *et seq*.

⁷ OJEU L 027, 30/01/1997, p. 0020 – 0029.

⁸ 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, OJEU, L 027, 30/01/1997 p. 0020 – 0029.

stipulated in this regard that, due to the “structural differences” in the Member States”⁹ and the “different systems for regulating the electricity sector”¹⁰, the detailed implementation of the general principles provided for by European law, “*should be left to Member States, thus allowing each Member State to choose the regime which corresponds best to its particular situation*”¹¹. Where a Member State opted for the “regulated system of access procedure”¹², the role of the national regulator could either be assumed through the Member State itself or through any other “competent body”¹³, “competent authority”¹⁴ or “public body or private body”¹⁵. Hence, under the regime of Directive 1996/92/EC, the European institutions were in no way involved in the regulation of the internal electricity markets of the Member States.

As a result of the freedom of action given to the Member States on the implementation of the internal electricity markets, there was “*significant variation in the powers of national regulatory authorities*”¹⁶ within the different Member States.

⁹ See Recital (10) of Directive 1996/92/EC.

¹⁰ *Ibid.*

¹¹ See Recital (11) of Directive 1996/92/EC.

¹² See art. 17 para. 4 of Directive 1996/92/EC; the alternative approach to regulatory network access was the “negotiated access to the system”, see art. 17 para. 1 of Directive 1996/92/EC. See also *B. Holznagel/ M. - S. Göge*, Die Befugnisse der REGTP zur Regulierung des Netzzugangs nach dem EnWG – KE 2004, ZNER 3/ 2004, p. 218 *et seq.*

¹³ See *e.g.* art. 6 para. 1 of Directive 96/92/EC regulating the drawing up of an inventory of new means of production within the tendering procedure.

¹⁴ See *e.g.* art. 6 para. 2 of Directive 96/92/EC with regards to the drawing up of an estimate of generating and transmission capacity.

¹⁵ See *e.g.* art. 6 para. 5 of Directive 96/92/EC regulating the organization, monitoring and control of the tendering procedure.

¹⁶ See *e.g.* European Commission Staff Working Paper, First Benchmarking Report on the Implementation of the Internal Electricity and Gas Market, 3.12.2001, SEC (2001), 1957 at p. 8 *et seq* and p. 65.

Indeed, whereas in Austria, already by 2001¹⁷, national energy regulators were put in place, in Germany no such regulators existed at that time. Whereas in Austria the access to electricity networks was regulated through the national energy regulators *ex-ante*, giving eligible customers a right of access, in Germany access to electricity networks was organized *ex-post* through negotiated third party access in form of voluntary commercial agreements.¹⁸ Whereas in Austria the network tariffs and network access conditions were established *ex-ante* through the national energy regulators, in Germany they were examined *ex-post* through the national competition authorities.¹⁹ Whereas in Austria the national energy regulators assumed the role of the dispute settlement authorities, in Germany, the competition authorities were the competent authorities.²⁰ In both countries, the national energy regulators were closely

¹⁷ See Energy Regulatory Authorities Act, Federal Act on regulatory authorities in the electricity and natural gas sector and the establishment of Energie-Control GmbH and Energie-Control European Commission, (Energierегulierungsbehördengesetz, Bundesgesetz über die Aufgaben der Regulierungsbehörden im Elektrizitätsbereich und die Einrichtung der Elektrizität-Control GmbH und der Elektrizitäts-Control Kommission), Federal Law Gazette I no. 121/2000 (art. 8 of the Energy Market Liberalisation Act). See also P. Tettinger/ J. - C. Pielow, Zum neuen Regulator für den Netzzugang in der Energiewirtschaft aus Sicht des öffentlichen Rechts, RdE 12/ 2003, p. 289.

¹⁸ See European Commission Staff Working paper, Second Benchmarking Report on the Implementation of the Internal Electricity and Gas Market, 1.10.2002, SEC (2002), 1038 at p. 4. In Germany, it was only by beginning of 2004, that the regulation of network access through a regulatory authority was envisaged; see e.g. DG TREN Draft Working Paper, Third Benchmarking Report on the Implementation of the Internal Electricity and Gas Market, 1.03.2004, p. 4. See also G. Britz, Erweiterung des Instrumentariums administrativer Normsetzung zur Realisierung gemeinschaftlicher Regulierungsaufträge, EuZW 15/2004, p. 462.

¹⁹ For Germany, see e.g. U. Büdenberger, Das System der Netzentgeltregulierung in der Elektrizitäts- und Gaswirtschaft, DVBl 4/ 2006, p. 197 *et seq.* For a detailed overview on the implementation of the internal electricity market by the Member States, see European Commission Staff Working Paper, First Benchmarking Report on the Implementation of the Internal Electricity and Gas Market, 3.12.2001, SEC (2001), 1957 at p. 15 and p. 16; see also European Commission Staff Working Paper, Second Benchmarking Report on the Implementation of the Internal Electricity and Gas Market, 7.04.2003, SEC (2003), 448 at p. 10 and p. 34; see furthermore G. Kühne, in: M. Bartsch/ A. Röhling/ P. Salje/ U. Scholz, Stromwirtschaft: Ein Praxishandbuch, 2. Auflage, Köln 2008, p. 263 and p. 277 *et seq.*

²⁰ See European Commission Staff Working Paper, Second Benchmarking Report on the Implementation of the Internal Electricity and Gas Market, 7.04.2003, SEC (2003), 448 at p. 10; as to the revision of the German Energy Industry Act and the development of a new regime, see P. Cameron, Legal aspects of EU Energy Regulation, Implementing the new Directives on Electricity and Gas across Europe, Oxford 2005, at no. 8.06 *et seq.*

attached to the Federal ministries, which got involved in various areas of energy regulation.²¹

The disparities existent within the Member States in the area of energy regulation were one of the main points of criticism expressed with regard to Directive 1996/92/EC. It was, in particular, the wide scope of discretion left to the Member States through Directive 1996/92/EC, which was being criticized as being “co-responsible for the slow development of the single European energy market”.²²

1.2 Under the framework of *Electricity Directive 2003/54/EC* and Austrian and German energy laws

In 2003, numerous legislative measures were taken at European level, lying down for the first time a compulsory regime of energy regulation under the auspices of national regulatory authorities.

The regulation of the *internal* electricity markets was mainly set forth in Directive 2003/54/EC, which repealed Directive 1996/92/EC.²³ Directive 2003/54/EC required “effective regulation” to be “carried out by *one or more national regulatory authorities*” and emphasised, that it was “important that the regulatory authorities in all the Member States share the *same minimum set of competences*”.²⁴ For this purpose,

²¹ See European Commission Staff Working Paper, DG TREN Draft Working Paper, Third Benchmarking Report on the Implementation of the Internal Electricity and Gas Market, 1.03.2004, p. 4 and p. 14.

²² See *H. Lecheler/ J. Gundel*, Ein weiterer Schritt zur Vollendung des Energie-Binnenmarktes: Die Beschleunigungs-Rechtsakte für den Binnenmarkt für Strom und Gas, *EuZW* 20/ 2003, p. 621 at p. 622.

²³ See in detail, *U. Ehricke*, Die Regulierungsbehörde für Strom und Gas, Eine Abhandlung zu den Vorgaben der Vorschläge für die Richtlinien 2003/54/EG (Beschleunigungsrichtlinien Elektrizität und Gas) im Hinblick auf die in diesen Richtlinien vorgesehene Regulierungsbehörde (Regulator) und deren Umsetzung in das deutsche Recht, Veröffentlichungen des Instituts für Energierechts an der Universität zu Köln, Band 113, 1. Auflage, Baden-Baden 2004.

²⁴ See *e.g.* Recital 15 of Directive 2003/54/EC. For a detailed overview on the terms and definitions of art. 23 of Directive 2003/54/EC, see *B. Leitl*, Regulierungsbehörden im österreichischen Recht, Wien 2006, p. 133 to p. 135; see also *P. Cameron*, Legal aspects of EU Energy Regulation, Implementing the new Directives on Electricity and Gas across Europe, Oxford 2005, at no. 2.36 *et seq.*

article 23 para. 1 of Directive 2003/54/EC required Member States to “designate one or more competent bodies with the function of regulatory authorities” and to provide them with a minimum set of competences (“*shall at least be responsible*”) in the area of monopoly networks. In this area, the national regulatory authorities were mainly entrusted with monitoring duties aimed at ensuring “non-discrimination, effective competition and the efficient functioning of the market”.²⁵

The regulation of *cross-border issues* was mainly governed by Regulation (EC) 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity (“*Regulation (EC) 1228/2003*”).²⁶ National regulatory authorities were, in particular, required to ensure compliance with Regulation (EC) 1228/2003 and the guidelines adopted on its basis.²⁷ They were, for instance, responsible for approving schemes for the calculation of interconnection capacities²⁸ or for deciding upon exemptions of new interconnectors.²⁹

Under the framework of Directive 2003/54/EC, the *Member States* were the ones, which controlled the national energy regulators. Indeed, since article 23 para. 1 sent. 2 of Directive 2003/54/EC required national energy regulators merely to be “*independent from the interests of the electricity industry*”, Member States were able to secure control over their energy regulators through national measures, such as the obligation to comply with governmental instructions (*Weisungsgebundenheit*).

²⁵ See art. 23 para. 1 of Directive 2003/54/EC. For a detailed overview on the powers of regulators, see ERGEG, 3rd Legislative Package Input, Paper 5: Powers and Independence of National Regulators, an ERGEG public document, Ref: C 07-SER-13-06-5-PD, 5 June 2007, p. 3 *et seq.*

²⁶ OJEU, L 176/1; for details on the application of Regulation (EC) 1228/2003, see Communication from the European Commission to the Council and the European Parliament, Report on the experience gained in the application of the Regulation (EC) No 1228/2003 “Regulation on Cross-Border Exchanges in Electricity”, COM (2007) 250 final, 15.05.2007.

²⁷ See Recital (20) in connection with art. 9 of Regulation (EC) 1228/2003.

²⁸ See art. 23 para. 1 of Directive 2003/54/EC.

²⁹ See art. 7 para. 4 (a) of Regulation (EC) 1228/2003.

However, under Directive 2003/54/EC, a first form of control over Member States' national energy regulators appeared, exercised through the European Commission in form of *cooperation and information duties*.³⁰ In addition, the European Commission was able to adopt guidelines for compensation mechanisms (article 8 of Regulation (EC) 1228/2003), which the national energy regulators had to comply with.³¹ Moreover, for the first time, a *European body* was set up, which interfered with Member States' internal electricity markets. Indeed, by Decision of 11 November 2003³², the European Regulators Group for Electricity and Gas ("*ERGEG*") was established. Although the regulatory activities assumed by the *ERGEG* had no external effects (*Außenwirkung*), the *ERGEG* was given the power to "*facilitate consultation, coordination and cooperation of national regulatory authorities, contributing to a consistent application, in all Member States*" of the provisions set out in, *inter alia*, Directive 2003/54/EC and Regulation (EC) 1228/2003.³³ However, although the European Union was exercising a certain control, the regulation of the internal electricity markets remained still firmly in the hands of the Member States. Although Member States were not allowed anymore to assume the regulatory tasks themselves, as it had been the case under Directive 1996/92/EC, they remained nevertheless in control of their internal electricity market through a *control over their national regulatory authorities*. Indeed, Directive 2003/54/EC confirmed that it was the

³⁰ See e.g. art. 23 para. 12 of Directive 2003/54/EC and art. 10 of Regulation (EC) 1228/2003.

³¹ See e.g. G. Britz, Vom Europäischen Verwaltungsverbund zum Regulierungsverbund? – Europäische Verwaltungsentwicklung am Beispiel der Netzzugangsregulierung bei der Telekommunikation, Energie und Bahn -, EuR 1/ 2006, p. 46 at p. 61.

³² See art. 1 para. 1 of European Commission Decision of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas, OJEU, L 296/34, 14.11.2003, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:296:0034:0034:EN:PDF> (25.01.2011).

³³ See art. 1 para. 2 sent. 2 and Recital 6 of European Commission Decision of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas, OJEU, L 296/34, 14.11.2003. See also G. Britz, Vom Europäischen Verwaltungsverbund zum Regulierungsverbund? – Europäische Verwaltungsentwicklung am Beispiel der Netzzugangsregulierung bei der Telekommunikation, Energie und Bahn -, EuR 1/ 2006, p. 46 at p. 61; see also 2007 Annual Report of the European Energy Regulators, website European Energy Regulators CEER & ERGEG, publications & press, annual reports, p. 3, http://www.energyregulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/ANNUAL%20REPORTS/2007/4732CDA067DEE73DE040A8C03C2F2F45 (25.09.2010).

responsibility of the Member States to “*specify the functions, competences and administrative powers of the regulatory authorities*”.³⁴ The ERGEG played merely an advisory role without having any substantive decision-making powers.³⁵

As a consequence of the power of discretion given to the Member States with regard to the regulation of their electricity markets, different regimes were adopted, lead by *different regulatory authorities*, entrusted with *different duties* and vested with *different powers*.

In Austria, the electricity market is mainly regulated through the Energy-Control Austrian Limited Liability Company for the Regulation of the Austrian Electricity and Gas Sector (“*E-control GmbH*”)³⁶ and the Energy-Control Commission (“*E-control Kommission*”)³⁷.

The *E-control GmbH* has been established on the basis of section 5 in connection with section 4 of Federal Act on the Tasks of Regulatory Authorities in the Electricity and Natural Gas Sector and the Establishment of the Energy-Control GmbH and the Energy-Control Kommission (“*Energy Regulatory Authorities Act*, hence *E-RBG*”).³⁸

³⁴ See Recital (15) of 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.

³⁵ See art. 4 of European Commission Decision 2003/796/EC on establishing the European Regulators Group for Electricity and Gas (ERGEG), OJEU L 296/34 of 14.11.2003 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:296:0034:0034:EN:PDF>).

³⁶ “Energie-Control Österreichische Gesellschaft für die Regulierung in der Elektrizitäts- und Gaswirtschaft mit beschränkter Haftung” (*Energie-Control GmbH*), see section 5, para. 2 sent. 1 of the Energy Regulatory Authorities Act. The *E-control GmbH* was incorporated on February 2001; for more details, see E-control website, presentation of the corporation, <http://www.e-control.at/de/econtrol/unternehmen> (03.08.2010).

³⁷ “Energie-Control Kommission”, see section 15 para. 1 of the Energy Regulatory Authorities Act. For details as to their activities, see e.g. E-control GmbH, Annual Report 2006, p. 41 - 61, <http://portalapp.e-control.at/portal/page/portal/medienbibliothek/publikationen/dokumente/pdfs/jb2006en.pdf> (25.09.2010).

³⁸ Bundesgesetz über die Aufgaben der Regulierungsbehörden im Elektrizitäts- und Erdgasbereich und die Errichtung der Energie-control GmbH und der Energie-control Kommission, Federal Law Gazette I no. 121/2000, repealed by Federal Law Gazette I no. 30/2010. For more details, see B. Leith, Regulierungsbehörden im österreichischen Recht, Wien 2006, p. 151 *et seq*; see also P. Draxler/ C. Regehr, E-Recht: Der österreichische Weg, 1. Auflage, Wien 2007, p. 94 *et seq*.

Other relevant provisions as to the establishment of the *E-control GmbH* are contained in the Law on Limited Liability Companies (*Gesetz über die Gesellschaften mit beschränkter Haftung*, hence, *GmbHG*)³⁹, in ordinances issued by the Federal Minister of Economics and Labour and the *E-control GmbH*'s memorandum of association and rules of procedure. The *E-control GmbH* consists of a Supervisory Board, which includes a representative of the Federal Ministry of Finance (section 5 paragraph 4 E-RBG)⁴⁰ and an Electricity Advisory Board, which plays a purely advisory role (section 26 para. 1 E-RBG).⁴¹

The *E-control Kommission* has been set up on the basis of section 15 in connection with section 4 E-RBG. It is established within and managed by the *E-control GmbH*, whose members are bound by the instructions given by the *E-control Kommission* (section 15 paragraph 2 E-RBG).⁴²

Other bodies with regulatory powers are the Federal Ministry of Economics and Labour as the highest electricity (section 2 of the E-RBG) and highest gas (section of the 2a E-RBG) authority as well as the local state authorities.⁴³

The duties of the Austrian energy regulators are mainly codified in the Energy Regulatory Authorities Act as well as in the Federal Act providing new Rules on the

³⁹ RGBI. Nr. 58/1906.

⁴⁰ See E-control website, presentation of the corporation, organs, <http://www.e-control.at/de/econtrol/unternehmen/organe-der-e-control> (03.08.2010).

⁴¹ The Advisory Board advises the Federal Minister of Economic Affairs and Labour and the national regulators on matters of general electricity policy. It includes representatives of the Ministries of Economic Affairs and Labour, Agriculture and Forestry, Environment and Water Management, Finance, Justice as well as of the provinces and social partners (section 26 para. 3 of the E-RBG).

⁴² See E-control website, presentation of the corporation, organs, <http://www.e-control.at/de/econtrol/unternehmen/organe-der-e-control> (03.08.2010); see also B. Leith, *Regulierungsbehörden im österreichischen Recht*, Wien 2006, p. 173 *et seq.*

⁴³ See CEER IEB TF Regulatory Benchmark, Final Version 05-07-05, Draft on Austria – E-Control GmbH, p. 2 and p. 3; see also *E-control*, Annual Report 2001, Institutional framework, p. 9; see also Website of the E-control GmbH, Company, Institutional Framework, http://www.e-control.at/en/econtrol_en/company/institutional-framework (22.03.2011).

Organisation of the Electricity Industry Sector, *i.e.* the Electricity Industry and Organisation Act (*Elektrizitätswirtschafts- und organisationsgesetz*, hence *EIWOG*)⁴⁴

In Germany, the electricity market is mainly regulated through the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railways (“*Bundesnetzagentur*, hence *BNetzA*”) and the regulatory authorities of the Federal States (section 54 para. 1 of the Energy Industry Act (“*Energiewirtschaftsgesetz*”, hence “*EnWG*”).⁴⁵

The *BNetzA* has been established on the basis of section 1 of the Federal Law on the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railways (“*Gesetz über die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen*”, hence “*BEGTPG*”).⁴⁶ The *BNetzA* is the authority, which is principally responsible for the regulation of the *internal* electricity market (section 2 para. 1 no. 1 of the *BEGTPG* in connection with section 54 para. 1 and para. 3 of the *EnWG*)⁴⁷ as well as it is responsible to perform the duties relating to *cross-border* regulation (section 56 of the *EnWG*).⁴⁸

⁴⁴ Bundesgesetz mit dem die Organisation auf dem Gebiet der Elektrizitätswirtschaft neu geregelt wird, Federal Law Gazette I no. 143/1998, repealed by Federal Law Gazette I no. 110/2010. For a detailed overview on the powers and competences of the Austrian energy regulators, see European Commission Staff Working Document, Accompanying document to the Communication from the European Commission to the Council and the European Parliament, Prospects for the internal gas and electricity market, Implementation report, SEC (2006) 1709, 10.01.2007, p. 123 – 127.

⁴⁵ The *BNetzA* is, upon section 35 *EnWG* obliged to monitor the market development of the German electricity and gas market; within its monitoring duties, the *BNetzA* publishes, upon section 63 para. 3 *EnWG*, annual monitoring reports; see *e.g.* Annual Report 2007, <http://www.bundesnetzagentur.de/cae/servlet/contentblob/31280/publicationFile/1105/Jahresbericht2007Id13212pdf.pdf> (19.09.2010); Annual Report 2008, <http://www.bundesnetzagentur.de/cae/servlet/contentblob/113828/publicationFile/1113/Jahresbericht08Id15901pdf.pdf> (19.09.2010); Annual Report 2009 on the adoption of the third energy package of the European Commission, <http://www.bundesnetzagentur.de/cae/servlet/contentblob/152206/publicationFile/6684/Jahresbericht2009Id18409pdf.pdf>, p. 63 - 65.

⁴⁶ Gesetz über die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen of 7 July 2005 (BGBl. I S. 1970, 2009), last amended through art. 15 para. 12 of law of 5.2.2009 I 160.

⁴⁷ *Energiewirtschaftsgesetz* dated 7 Juli 2005, BGBl. I S. 1970, 3621, last amended through Art. 4 of Law of 07.03.2011 (BGBl I, p. 338); For details as to the competences of the *BNetzA*, see *e.g.* *M.*

Article 83 of the German Basic Law (*Grundgesetz*, hence *GG*)⁴⁹ in connection with section 54 para. 1 and *para. 2* of the EnWG provides that, where electricity networks serve fewer than 100,000 customers, directly or indirectly, the regulatory authorities of the Federal States are responsible.⁵⁰ Where, however, these networks extend beyond the borders of *one* Federal State, the *BNetzA* becomes again competent (section 54, para. 2, sent. 2 of the EnWG). The Federal States' regulators, which regulate electricity networks outside the competences of the *BNetzA*, may delegate their competences to the *BNetzA* (*Organleihe*).⁵¹

Regulatory decisions are principally taken through ruling chambers (*Beschlusskammern*), which comprise one chairman and two assessors (section 59 para. 1 sent. 1 and para. 2 of the EnWG).⁵²

Moser, Einwirkungsbefugnisse der Bundesnetzagentur auf die Elektrizitätsversorgung, RdE 12/ 2007, p. 343 *et seq.*

⁴⁸ For an excellent overview on the powers and competences of the *BNetzA*, see European Commission Staff Working Document, Accompanying document to the Communication from the European Commission to the Council and the European Parliament, Prospects for the internal gas and electricity market, Implementation report, SEC (2006) 1709, 10.01.2007, p. 29 - 41.

⁴⁹ See Grundgesetz für die Bundesrepublik Deutschland promulgated by the Parliamentary Council on 23 May 1949, last amended through Art. 1 of Law of 21.07.2010 (BGBl I, p. 944); for more details on art. 83 *et seq.* GG, see *e.g.* B. Pieroth, in: H.D. Jarass/ B. Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 83 GG.

⁵⁰ See *e.g.* Annual Report of the *BNetzA*, 2005, , p. 120 and p. 121, <http://www.bundesnetzagentur.de/cae/servlet/contentblob/31294/publicationFile/1123/Jahresbericht2005Id5278pdf.pdf;jsessionid=BA2F2E9545E742EEEF8C22F95E4E143A> (03.11.2010); Annual Report of the *BNetzA*, 2006, p. 153 *et seq.*, <http://www.bundesnetzagentur.de/cae/servlet/contentblob/31294/publicationFile/1123/Jahresbericht2005Id5278pdf.pdf> (03.11.2010).

⁵¹ See *e.g.* CEER, Regulatory Benchmark, NRA status and resources, C05-IEB-08-03 CEER, 6. December 2005, p. 11, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_ERGEG_PAPER/Cross-Sectoral/2005/CEER_REGULATORY%20BENCHMARK_2005-12-06_PUBLIC.PDF (03.11.2010). The delegation to the *BNetzA* of regulatory tasks, for which the Federal States are principally responsible (section 54 para. 2 EnWG), is laid down in Administrative Agreements (*Verwaltungsabkommen*) between the Federation and the Federal States on the execution of regulatory tasks at Federal States' level; for details, see *e.g.* C. König/ V. Bache, Die örtliche Zuständigkeit der Oberlandesgerichte in Fällen der Organleihe bei der Wahrnehmung der Landesregulierungsaufgaben durch die Bundesnetzagentur, IR 1/ 2008, p. 2 *et seq.*

⁵² For further details, see Federal Network Agency, 2007 Report for Electricity, Gas, Telecommunications, Post and Railway to the European European Commission on the German

The *BNetzA* is assisted through an Advisory Board (*Beirat*), which consists of 16 members of the German *Bundestag* and 16 representatives of the German *Bundesrat* (section 5 para. 1 sent. 1 of the BEGTPG). Its members and deputy members are appointed through the Federal Government upon proposal of the German *Bundestag* and the German *Bundesrat* (section 5 para. 1 sent. 2 of the BEGTPG). The Advisory Board has the duty to advise the *BNetzA* in the preparation of reports on its activities, including on monitoring duties as well as on market development (sections 60 and 63 para. 3 to 5 of the EnWG).⁵³ In order to ensure a uniform regulation at Federal level, a Federal States' Committee (*Länderausschuss*) has been set up (section 8 of the BEGTPG), comprising a representative of each Federal State regulatory authority.⁵⁴ Other bodies with regulatory powers are the anti-trust authorities (section 58 of the EnWG) and the Ministry of Economics and Labour.

1.3 Under the framework of *Directive 2009/72/EC*

Under the framework of Directive 2009/72/EC⁵⁵, a completely different picture presents itself with regard to the allocation of regulatory powers within Member States' internal electricity markets.⁵⁶

electricity and gas market, p. 4 – 6,
<http://www.bundesnetzagentur.de/cae/servlet/contentblob/33592/publicationFile/279/MonitoringReport2007Id12648pdf.pdf> (25.09.2010).

⁵³ See also Annual Report of the *BNetzA*, 2005, p. 121,
<http://www.bundesnetzagentur.de/cae/servlet/contentblob/31294/publicationFile/1123/Jahresbericht2005Id5278pdf.pdf;jsessionid=BA2F2E9545E742EEEF8C22F95E4E143A> (03.11.2010);
see also Annual Report of the *BNetzA* 2006, p. 153 *et seq.*,
<http://www.bundesnetzagentur.de/cae/servlet/contentblob/31294/publicationFile/1123/Jahresbericht2005Id5278pdf.pdf> (03.11.2010).

⁵⁴ The Federal States' Committee is required to meet at least twice a year in closed session (section 9 para. 5 and 6 of the BEGTPG); its tasks are specified in section 60a of the EnWG.

⁵⁵ Directive 2009/72/EG forms part of the so-called „third legislative package“, which consists of Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access

Indeed, under the regime of Directive 2009/72/EC, it is the European Commission which, under the assistance of newly established European institutions, takes control of the electricity markets of the Member States. Although, *in theory*, it is still the Member States, which have control over their electricity markets, *in reality*, it is the European Commission, which assumes control. For this purpose, the European Commission presented in its “Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal

to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, 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 and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC; see *e.g.* W. Koster/ C. Filippitsch, Die neue Europäische Kommission und Kernelemente ihrer Energiepolitik, *e/m/w*, 1/10, p. 7 *et seq*; see also CEER, Key Comments on the European Commission’s Third Package, Ref: C07-GA-36-08, Public version, 20 December 2007; see also Neuordnung der Gas- und Strommärkte, Die 27 EU-Staaten haben sich auf das umstrittene Paket zum europäischen Energie-Binnenmarkt geeinigt. Deutschland ist zufrieden, published in Süddeutsche Zeitung, 10.10.2008.

⁵⁶ The propositions that the European Commission made with regard to the allocation of regulatory powers over the internal electricity markets disappeared in the light of the fierce discussions on the issue of “ownership unbundling”. Indeed, whereas numerous articles were written on “ownership unbundling”, the crucial question as to what institutions shall lead the internal electricity markets of the Member States was left aside. For details on ownership unbundling, see *e.g.* ERGEG, Third Legislative Package Input, Paper 1: Unbundling, an ERGEG public document, Ref: C 07-SER-13-06-1-PD, 5 June 2007; see also J. Kühling/ G. Hermeier, Innovationsoffenheit des Unbundling-Regimes? – Die Einführung neuer Strukturen im grenzüberschreitenden Stromhandel als Bewährungsprobe, *ZNER* 1/ 2006, p. 27 *et seq.*; see also J. - C. Pielow/ E. Ehlers, The Constitutional Challenge of Ownership Unbundling – a European and German Perspective, Jan. 2008, http://www.unecom.de/documents/discussionpapers/UNECOM_DP_2008_01.pdf, 6.05.2009; see furthermore C. König/ M. Schellberg/ K. Spiekermann, Energierechtliche Entflechtungsvorgaben versus gesellschaftsrechtliche Kontrollkompetenzen, *RdE* 3/ 2007, p. 72 *et seq.*; see A. Weitbrecht/ J. Mühle, Art. 86 EG – Liberalisierung ehemaliger Monopole, *EuZW* 18/ 2008, p. 556 *et seq.*; see S. Storr, Die Vorschläge der EU-Kommission zur Verschärfung der Unbundling – Vorschriften im Energiesektor, *EuZW* 8/ 2007, p. 232 *et seq.*; see, furthermore, M. Pießkalla, Die Kommissionsvorschläge zum “full ownership unbundling” des Strom- und Gasversorgungssektors im Lichte der Eigentumsneutralität des EG-Vertrags (Art. 285 EG), *EuZW* 7/ 2008, p. 199 *et seq.*; see C. Kahle, Die Eigentumsrechtliche Entflechtung (Ownership Unbundling) der Energieversorgungsnetze aus europarechtlicher und verfassungsrechtlicher Sicht, *RdE* 10 – 11/ 2007, p. 293 *et seq.* On ownership unbundling in the *German energy market*, see *e.g.* T. Mayen/ U. Karpenstein, Eigentumsrechtliche Entflechtung der Energieversorgungsnetze, *RdE* 2/ 2008, p. 33 *et seq.* On ownership unbundling in the *Austrian energy market*, see *Wiener Zeitung*, 10.10.2008, EU Minister sollen Zerschlagung der Konzerne endgültig abwenden: Österreich bringt Schäfchen ins Trockene, *Der Dritte Weg des Energiebinnenmarkts*, p. 27; see also W. Bolz, Aktuelle Rechtsfragen des Energierechts aus Sicht der österreichischen Regulierungsbehörde, in: *Berichte und Dokumente, Aktuelle Herausforderungen des Energierechts aus deutscher und internationaler Sicht*, *RdE* 1/ 2008, p. 31 *et seq.*; see also K. Blanck - Putz, Die Liberalisierung der Energiemärkte – Revolution oder Strohfeuer, *EuZW* 4/ 2007, p. 101 *et seq.*; see A. Niebler, Brennpunkt Energieversorgung – Quo vadis Europa?, in: *Die neuen Herausforderungen im Lichte des Energierechts*, 2008, p. 11 at p. 13 *et seq.*

market in electricity” on 19.09.07 (“*the European Commission’s Proposal*”) ⁵⁷ the implementation of several consecutive steps.⁵⁸

In a first step, the European Commission proposed to “strengthen the powers of the regulatory authorities”.⁵⁹ In line with the European Commission’s view, the *ERGEG* claimed that there was “a regulatory gap in Europe” and that “EU legislation was (is) not always implemented (at national level) in the spirit of the law”. As a result, “the powers and independence of national energy regulators differed (differ) widely and often they did (do) not have the powers to do the job properly”.⁶⁰ The regulation of the internal electricity markets should thereby not be “carried out by *one or more national regulatory authorities*”, as allowed under former regime of Directive 2003/54/EC, but be exercised through “*a single national regulatory authority at national level*”.

In a second step, the European Commission proposed, disguised under the slogan “demonstrable independence of regulators brings market confidence”⁶¹, to guarantee the independence of national energy regulators in also *political* terms (article 35 para. 4 sent. 2 (b) (ii) of Directive 2009/72/EC). It will be revealed that the obligation to ensure national energy regulators’ political independence applies thereby only to the Member States. The European Commission, on the contrary, reinforces its control over Member States’ national energy regulators. The problem of compatibility encountered with regard to traditional constitutional principles of certain Member States, such as the obligation of administrative organs to comply with governmental instructions could thereby not be resolved.

⁵⁷ Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity, presented by the European Commission on 19.09.2007, COM (2007) 528 final, 2007/0195 (COD).

⁵⁸ See *H. Weyer*, Die Energiewirtschaftsaufsicht im Jahr 2009, N&R, 1/10, p. 18 *et seq*; see also *ERGEG*, *ERGEG’s response to the European European Commission’s Communication “An Energy Policy for Europe”*, Ref. C06-BM-09-05, 6 February 2007.

⁵⁹ See the European Commission’s Proposal, COM (2007) 528 final at 2.1.

⁶⁰ See *ERGEG*, Fact Sheet on a European System of Energy Regulation: Regulatory and EU Network Bodies, Ref: FS-07-05-30, final, p. 1.

⁶¹ See European Commission’s Proposal, COM (2007) 528 final at 2.2.

In a third step, the European Commission vested itself with numerous powers, such as the power to issue binding guidelines. The establishment of European institutions, such as the Agency for the Cooperation of Energy Regulators (*the Agency*)⁶² and the European Network of Transmission System Operators (*the ENTSO*) should thereby assist the European Commission with the regulation of the electricity markets. We will see that it is, in particular, the Agency which, vested with important decision-making powers, interferes within crucial areas of national energy regulators' competences. The European Commission, at the same time, secures control over these European institutions.

Based upon the European Commission's Proposal, Directive 2009/72/EC requires Member States to principally consolidate their national energy regulators to a single regulatory authority at national level (article 35 para. 1 of Directive 2009/72/EC). It increases furthermore their duties (article 37 and 38 of Directive 2009/72/EC) and vests them with a powerful set of regulatory powers (article 37 para. 4 of Directive 2009/72/EC).

⁶² Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJEU, L 211/1, 14.08.2009.

2 The enhancement of powers of national energy regulators under the framework of Directive 2009/72/EC

Directive 2009/72/EC aims, in accordance with the European Commission's Proposal, at enhancing national energy regulators' powers. "*Enhanced powers*" as the European Commission claims, can be achieved, *firstly*, through a consolidation of national energy regulators to a single national regulatory authority at national level (2.1) and, *secondly*, through a substantial increase of national energy regulators' duties and powers in comparison to those established under former regime of Directive 2004/54/EC (2.2).⁶³

2.1 The consolidation of national energy regulators to a single national regulatory authority at national level through article 35 para. 1 of Directive 2009/72/EC

The first step to enhancing national regulators' powers is the consolidation of national energy regulators to a single national regulatory authority at national level, codified through article 35 para. 1 of Directive 2009/72/EC.⁶⁴

In its Proposal, the European Commission explains that, although in several Member States national regulatory authorities are "well-established bodies with substantial powers and resources", in other Member States "*their powers are weaker*". This "*weakness*" stems, according to the European Commission, from the fact that in several Member States their powers are "*dispersed over different bodies*". The "*lack of uniformity*" resulting thereof can, in the European Commission's view, be overcome through the consolidation of national energy regulators to a single national regulatory authority at national level.⁶⁵ Hence, in accordance with article 22a para. 1 of the

⁶³ See European Commission's Proposal, COM (2007) 528 final at 2.1.

⁶⁴ *Ibid.*

⁶⁵ As to the European Commission's critical point of view on the *Austrian* electricity sector in particular, see e.g. *E-control*, Presse-Unterlage, Europäische Kommission präsentiert aktuelle detaillierte Analyse des europäischen Energiemarkts – zahlreiche Mängel aufgezeigt, Vienna (10

European Commission's Proposal, article 35 *para. 1* of Directive 2009/72/EC requires Member States to “*designate a single national regulatory authority at national level*”.⁶⁶

2.1.1 In-depth analysis: the interference of article 35 para. 1 of Directive 2009/72/EC with Member States' Federal structures

2.1.1.1 Introduction

Whereas under article 23 para. 1 sent.1 of Directive 2003/54/EC Member States, were given the choice to designate “*one or more competent bodies*” with the function of regulatory authorities, under article 35 para. 1 of Directive 2009/72/EC, they are obliged to designate “*a single national regulatory authority at national level*”. Article 35 *para. 1* of Directive 2009 has a major impact on those Member States, which have established Federal structures in the area of energy regulation. It affects, in particular, the competences of the *Federal States*. Whereas *paragraph 1* of article 35 *para. 1* of Directive 2009 is established as the basic principle, *paragraphs 2 and 3* of article 35 of Directive 2009/72/EC⁶⁷ are constituted as exceptions to paragraph 1.

Generally, the possibility of the European Union to interfere with the Federal structures of Federally structured Member States derives from the system of division of

January 2007), <http://www.e-control.at/portal/page/portal/medienbibliothek/presse/dokumente/pdfs/PA%2010-01-2007%20EU%20Dokumente.pdf> (2.07.2008).

⁶⁶ In its report “Progress in creating the internal gas and electricity market”, the European Commission claims that “despite the Electricity and Gas Directives requiring regulators to hold a minimum set of powers, the unequal levels of regulatory powers across border have not improved.” According to the European Commission the reason lies in the fact that “in some Member States, powers are split between several regulators at national and regional levels, including the competition authority and/ or ministry”, which is “all likely to add to incoherence”; see Report from the European Commission to the Council and the European Parliament, Progress in creating the internal gas and electricity market, COM (2008) 192 final, 15.04.2008, p.6.

⁶⁷ Paragraphs 2 and 3 of art. 35 of Directive 2009/72/EC have been added to the European Commission's Proposal following the Common Position 1439/08 of the Council, Common Position EC No 8/2009 with a view to the adoption of Directive 2009/.../EC of the European Parliament and of the Council of ... concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, Preparatory Act, OJEU 2009/C 70 E/01.

competences that has been established between the European Union and the Member States. Indeed, despite the principle of conferral (*Prinzip der begrenzten Einzelermächtigung*), the European Union is empowered to extensively use its competences. This is, first and foremost, attributed to the fact that only few areas of competences are *explicitly* assigned to the European Union, limiting its competences to these specific areas.⁶⁸ Moreover, contrary to the constitutional laws of the Member States, the competences of the European Union are characterised through the determination of goals, rather than through the allocation of specific areas of competences. Indeed, whenever a European measure serves the realisation of a common European goal, such as the realisation of a single European market, the European Union may assume competence.⁶⁹ The economical factor that is required, in this regard, is usually established on the grounds that even areas, which, at first sight, show no economical goal almost always bear certain economical aspects. In addition, European principles, such as the principle of harmonisation of a single European market (*Binnenmarktharmonisierung*), the principle of supplement of the Treaty (*Vertragsergänzung*) or the principle of “*effet utile*” are applied by the European Union in an extensive way.⁷⁰ Finally, the principle of subsidiarity, which requires decisions to be taken as closely as possible to the citizens⁷¹, has so far not been very effective.⁷² Indeed, it is neither thoroughly scrutinised by the European European Commission, nor extensively examined by the European Court of Justice.⁷³ The Lisbon Treaty clarifies

⁶⁸ See P. Straub, Das Frühwarnsystem zur Subsidiaritätskontrolle im Vertrag von Lissabon als Hürde vor weiterer Zentralisierung in der Europäischen Union?, in: Jahrbuch des Föderalismus. Föderalismus, Subsidiarität und Regionen in Europa: Jahrbuch des Föderalismus 2008, 1. Auflage, Baden-Baden 2008, p. 15 at 16 *et seq.*

⁶⁹ *Ibid.*

⁷⁰ See W. Pühs, Der Vollzug von Gemeinschaftsrecht. Formen und Grenzen eines effektiven Gemeinschaftsrechtsvollzugs und Überlegungen zu seiner Effektuierung, 1. Auflage, Berlin 1997, 1997, p. 83 *et seq.*

⁷¹ See Preamble of the Treaty on European Union, last paragraph in connection with art. 5 para. 3 TEU.

⁷² See P. Straub, Das Frühwarnsystem zur Subsidiaritätskontrolle im Vertrag von Lissabon als Hürde vor weiterer Zentralisierung in der Europäischen Union?, in: Jahrbuch des Föderalismus. Föderalismus, Subsidiarität und Regionen in Europa: Jahrbuch des Föderalismus 2008, 1. Auflage, Baden-Baden 2008, p. 15 at 17.

⁷³ See R. Streinz, Die Abgrenzung der Kompetenzen zwischen der Europäischen Union und den Mitgliedstaaten unter besonderer Berücksichtigung der Regionen, BayVBl, 2001, 481 at 486; see also

the system of division of competences between the European Union and the Member States. It strengthens, for instance, the principle of subsidiarity and establishes an early warning system (*Frühwarnsystem zur Subsidiaritätskontrolle*), including the possibility of *ex-post* examination through the action of subsidiarity (*Subsidiaritätsklage*). It remains to be seen, whether these measures will limit the European Union in its extensive use of competences.⁷⁴

The Second Part (2) will serve to show that the European Union has the formal competence to take measures in the sector of energy regulation, including the enactment of article 35 para. 1 of Directive 2009/72/EC (*formelle Rechtmäßigkeit des Artikel 35 Abs. 1 der Direktive 2009/72/EG*). The Third Part (3) will demonstrate that the European Union, by using its competences in the sector of energy regulation, has the obligation to respect the Federal structures of federally structured Member States. This part will show that the European Union's obligation to respect Member States' Federal structures derives from various provisions of European law (*Schutz des Artikel 35 Abs. 1 der Direktive 2009/72/EG*). Part Four (4) will prove that article 35 para. 1 of Directive 2009/72/EC interferes with the core areas of Member States' Federal structures (*Eingriff des Artikel 35 Abs. 1 der Direktive 2009/72/EG*). Whether the European Union's interference can be justified upon European law, in particular upon the principle of proportionality, will be dealt with under Part Five (5), (*Rechtfertigung des Artikel 35 Abs. 1 der Direktive 2009/72/EG*). Part Six (6) will come to the conclusion that article 35 para. 1 of Directive 2009/72/EC can only be regarded as compatible with European law if it is applied in combination with article 35 para. 2 and 3 of Directive 2009/72/EC.

P. Straub, Das Frühwarnsystem zur Subsidiaritätskontrolle im Vertrag von Lissabon als Hürde vor weiterer Zentralisierung in der Europäischen Union?, in: Jahrbuch des Föderalismus. Föderalismus, Subsidiarität und Regionen in Europa: Jahrbuch des Föderalismus 2008, 1. Auflage, Baden-Baden 2008, p. 15 at 17 - 19.

⁷⁴In this sense, see P. Straub, Das Frühwarnsystem zur Subsidiaritätskontrolle im Vertrag von Lissabon als Hürde vor weiterer Zentralisierung in der Europäischen Union?, in: Jahrbuch des Föderalismus. Föderalismus, Subsidiarität und Regionen in Europa: Jahrbuch des Föderalismus 2008, 1. Auflage, Baden-Baden 2008, p. 15 at 20 *et seq.*

2.1.1.2 The competence of the European Union to adopt article 35 para. 1 of Directive 2009/72/EC

2.1.1.2.1 The system of division of competences established in the energy sector

The European Union's competences are governed by the principle of conferral, which is laid down in article 5 para. 1 and 2 of the Lisbon Treaty (ex article 5 TEC). It signifies that the European Union is allowed to act only "*within the limits of competences that have been conferred upon it by the Member States in the Treaties in order to attain the objectives set out therein*". Having no competence of its own right, the European Union may therefore act only within areas that are specifically assigned to it and only within the specific form prescribed.⁷⁵ Any activity of the European Union must therefore bear a legal basis (*Ermächtigungsgrundlage*).⁷⁶ As a consequence and in accordance with article 4 para. 1 and article 5 para. 2 sent. 2 Lisbon Treaty (ex article 5 TEC), "*competences not conferred upon the Union in the Treaties remain with the Member States*".

Prior to the Lisbon Treaty, the use by the European Union of its competences has not always been accepted without doubt. Lack of being explicitly specified within the European treaties, the competences of the European Union were either based upon provisions attributing specific power of competence (*Einzelermächtigung*), the doctrine of Implied Powers (*Implizite Kompetenz*) or upon provisions attributing general power of competence (*Generalermächtigung*), such as former article 308 TEC (*Vertragsergänzung*) or article 95 TEC (*Binnenmarktharmonisierung*).⁷⁷

⁷⁵ M. Schweitzer, Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?, VVDStRL 1993, 49 at 49 and 50. See also R. Streinz, Die Abgrenzung der Kompetenzen zwischen der Europäischen Union und den Mitgliedstaaten unter besonderer Berücksichtigung der Regionen, BayVBl 2001, p. 481 at p. 486.

⁷⁶ See R. Streinz, Die Abgrenzung der Kompetenzen zwischen der Europäischen Union und den Mitgliedstaaten unter besonderer Berücksichtigung der Regionen, BayVBl 2001, p. 481 at p. 486.

⁷⁷ *Ibid*; see also I. Pernice, Kompetenzabgrenzung im Europäischen Verfassungsverbund, JZ 18/ 2000, p. 866 *et seq.*

With the *Lisbon Treaty*, the competences of the European Union have been classified into three types of competences. In accordance with articles 3 to 6 Treaty on European Union (hence *TEU*)⁷⁸, the European Union may assume either exclusive power of competence (*ausschließliche Zuständigkeit*), concurrent power of competence (*geteilte Zuständigkeit*), or the power to provide supportive measures (*Befugnis für unterstützende Maßnahmen*).⁷⁹ Each type of competence contains an *exhaustive* list of competences (*Kompetenzlisten*).⁸⁰

2.1.1.2.2 The use of competences of the European Union in the area of energy regulation

Prior to the *Lisbon Treaty*, no separate chapter was dedicated to the energy sector in the European treaties and no provision was therein contained, which conferred upon the European Union the explicit power of competence for energy related matters. In accordance with the principle of conferral, this basically meant, that the Member States remained the competent authorities in the energy sector.⁸¹ However, the European Union took various measures and established, *inter alia*, a regulatory framework in the energy sector. It assumed its competences most of the time on the basis of *general* provisions of competences.⁸² Directive 90/547/EC on the transit of electricity through transmission grids⁸³ was, for instance, enacted on the basis of article 100a EEC Treaty; Directives concerning common rules for the internal market

⁷⁸ Article 1 para. 1 TEU declares that “by this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called ‘the Union’, on which the Member States confer competences to attain objectives they have in common”.

⁷⁹ See *P. Straub*, Das Frühwarnsystem zur Subsidiaritätskontrolle im Vertrag von Lissabon als Hürde vor weiterer Zentralisierung in der Europäischen Union?, in: *Jahrbuch des Föderalismus. Föderalismus, Subsidiarität und Regionen in Europa: Jahrbuch des Föderalismus 2008*, 1. Auflage, Baden-Baden 2008, p. 15 at p. 21.

⁸⁰ *Ibid.*

⁸¹ For more details, see *R. Steinberg/ G. Britz*, Die Energiepolitik im Spannungsfeld nationaler und europäischer Regelungskompetenzen, DÖV 1993, p. 313 at p. 314.

⁸² See *J. A. Kämmerer*, Strategien zur Daseinsvorsorge, Dienste im allgemeinen Interesse nach der „Altmark“-Entscheidung des EuGH, NVwZ 2004, p. 28 at p. 30.

⁸³ OJEU No. L 313/30 of 13 November 1990; OJEU No. L 147/37 of 12 June 1991.

in electricity and natural gas⁸⁴ were based upon articles 57 II, 66 and 100a ECC Treaty.⁸⁵

The possibility of the European Union to assume competence in the energy sector is based upon the fact that tasks carried out in the area of energy supply are defined as tasks of services of general interest (*Staatliche Daseinsvorsorge*)⁸⁶, which are declared by article 14 TEU (ex-article 16 TEC) as a common European goal (“*shared values of the Union*”).⁸⁷ Regarding the establishment of a liberalised European energy market this means that, whenever tasks of services of general economic interest are carried out in a Member State to the exclusion of competition, the European Union may assume competence. It is even *obliged* to take the measures that are necessary in the achievement of the liberalisation of the respective market pursuant to article 106 para. 3 Treaty on the Functioning of the European Union (hence *TFEU*), (ex-article 86 para. 3 TEC). Since the energy sector is a sector where competition is principally possible, it needs to be strengthened.⁸⁸ Based on article 106 para. 3 TFEU (ex-article 86 para. 3 TEC), articles 103 TFEU (ex-article 83 TEC) and 109 TFEU (ex-article 89 TEC) and article 114 TFEU (ex-article 95 TEC), the European Union has established a regulatory framework in the energy sector, which is aimed at demolishing monopoly structures, sanctioning anti-competitive behaviour and, thus, strengthening competition.⁸⁹

⁸⁴ Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market OJEU 30.1.1997, L 27/20; Directive 98/30/EC of 22 June 1998 concerning common rules for the internal market in natural gas, OJEU 21.7.1998, L 204/1.

⁸⁵ See R. Steinberg/ G. Britz, Die Energiepolitik im Spannungsfeld nationaler und europäischer Regelungskompetenzen, DÖV 1993, p. 313 at p. 314.

⁸⁶ For a detailed overview on the services of general interest in general, see C. Heinze, Daseinsvorsorge im Umbruch, BayVBl 2/2004, p. 33 *et seq.*

⁸⁷ See J. A. Kämmerer, Strategien zur Daseinsvorsorge, Dienste im allgemeinen Interesse nach der „Altmark“-Entscheidung des EuGH, NVwZ 2004, p. 28 at p. 28, 29; see also G. Kühne, in: M. Bartsch/ A. Röhling/ P. Salje/ U. Scholz, Stromwirtschaft: Ein Praxishandbuch, 2. Auflage, Köln 2008, p. 248.

⁸⁸ See J. A. Kämmerer, Strategien zur Daseinsvorsorge, Dienste im allgemeinen Interesse nach der „Altmark“-Entscheidung des EuGH, NVwZ 2004, p. 28 at p. 30.

⁸⁹ Prior to the Treaty on European Union, the European Union based its measures in the energy sector upon a variety of provisions; that’s why it is often referred to a “patchwork of laws” (*Flickenteppich*) in the energy sector; see e.g. K. Papenkort/ J.K. Wellershoff, Der Energietitel im Vertrag von Lissabon, RdE 3/2010, p. 77 at p. 77; see also U. Ehrlicke, Zur Rechtfertigung staatlicher Regulierung für die

With the *Lisbon Treaty*, for the first time, a basis of competence (*Kompetenzgrundlage*) has been introduced, which confers upon the European Union the explicit power to adopt measures in the energy sector.⁹⁰ Article 194 TFEU provides in paragraph 1 that, in the context of the establishment and functioning of the internal market and with regard to the need to preserve and improve the environment, the European Union shall aim to “*ensure the functioning of the market*” (a), “*ensure security of energy supply in the Union*” (b), “*promote energy sufficiency and energy saving and the development of new and renewable forms of energy*” (c) and “*promote the interconnection of energy networks*” (d). Pursuant to article 4 para. 2 (i) TEU, the area of energy is thereby part of the *shared competences* between the European Union and the Member States.⁹¹

2.1.1.3 The obligation of the European Union to respect the Federal structures of Federally structured Member States

The European Union has the obligation to respect the Federal structures of federally structured Member States, including those of Austria and Germany **(3.1)**. The question arises from which legal basis the European Union’s obligation may be drawn. It could possibly derive from the Federal structure of the European Union itself **(3.2)**, from a European principle of Federalism **(3.3)**, from the obligation of the European Union to respect the national identities of the Member States pursuant to article 4 para. 2 TEU (ex article 10 TEC), **(3.4)** or from the principle of loyalty (*Prinzip der Gemeinschaftstreue*) pursuant to article 4 para. 3 TEU (ex article 5 TEC) **(3.5)**.

Schaffung von Wettbewerb auf dem Energiemarkt, in: Entwicklungstendenzen des Energierechts nach Inkrafttreten des EnWG, Veröffentlichungen des Instituts für Energierechts an der Universität zu Köln, Band 131, 1. Auflage, Baden-Baden 2007, p. 17 at p. 22 *et seq.*

⁹⁰ See *P. Straub*, Das Frühwarnsystem zur Subsidiaritätskontrolle im Vertrag von Lissabon als Hürde vor weiterer Zentralisierung in der Europäischen Union?, in: *Jahrbuch des Föderalismus. Föderalismus, Subsidiarität und Regionen in Europa: Jahrbuch des Föderalismus 2008*, 1. Auflage, Baden-Baden 2008, p. 15 at 20; for a detailed overview on the system of competences under the European treaties, see *A. Weber*, Vom Verfassungsvertrag zum Vertrag von Lissabon, *EuZW* 1/2008, p. 7 at p. 11 *et seq.*; see also *K. Papenkort/ J.K. Wellershoff*, Der Energietitel im Vertrag von Lissabon, *RdE* 3/2010, p. 77 *et seq.*

⁹¹ For more details on the European energy market since the Lisbon Treaty, see *e.g. G. Hermes*, in: *R. Schulze/ M. Zuleeg/ S. Kadelbach*, *Europarecht, Handbuch für die deutsche Rechtspraxis*, 2. Auflage, Baden-Baden 2010, § 35.

2.1.1.3.1 The core areas of the Austrian and German Federal structures

Austria and Germany have been established as Federal states and therefore dispose of a distinct Federal structure. The core areas of these Federal structures include the physical division of the territory between the different Federal levels, the attribution of representation rights to the Federal sub-entities at Federal level as well as the establishment of a system of division of competences between the Federal levels.⁹²

In Austria, the Federal order emanates from article 2 para. 1 of the B-VG, which stipulates that “*Austria is a Federal state*”. State entities are the Federation (*Bund*), the Federal States (*Länder*)⁹³ and the municipalities (*Gemeinden*). The Federal territory comprises the territories of the Federal States (article 3 para- 1 of the B-VG)⁹⁴, which are divided into municipalities (article 116 para. 1 sent. 1 of the B-VG). According to article 2 para. 2 of the B-VG, the Federal States are “autonomous”, which signifies, that their state power does not derive from the Federation but from the Austrian citizen, forming an independent *Pouvoir Constituant*.⁹⁵ Federal States’ constitutional autonomy includes their financial autonomy as well as the attribution of their own set of competences. According to article 116 para. 1 sent. 2 of the B-VG, the municipalities are territorial corporate bodies entitled to self-administration (*Gebietskörperschaft mit dem Recht auf Selbstverwaltung*). Regarding the division of competences, the legislative and executive competences are divided between the Federation and the

⁹² See e.g. A. Benz, Im Dickicht des Rechts. Die Verfassung des deutschen Föderalismus, in: Jahrbuch des Föderalismus. Föderalismus, Subsidiarität und Regionen in Europa: Jahrbuch des Föderalismus 2009, 1. Auflage, Baden-Baden 2009, p. 109 at p. 111; for more details on the German principle of Federalism, see e.g. K.-P. Sommermann, in: H.v. Mangoldt/ F. Klein/ C. Starck, GG, Kommentar zum Grundgesetz, Band 2, Artikel 20 bis 82, 6. Auflage, München 2010, art. 20 para. 1 GG, para. 24 *et seq.*

⁹³ Pursuant to art. 20 para. 2 B-VG, the Federal State is composed of the autonomous Länder of Burgenland, Carinthia (Kärnten), Lower Austria (Niederösterreich), Upper Austria (Oberösterreich), Salzburg, Styria (Steiermark), Tirol, Vorarlberg and Vienna.

⁹⁴ For more details on the Austrian Federalism, see A. Gamper, Introduction to the Study of the Law of the Austrian Federal Constitution, 2/2008, p. 92 at p. 99 *et seq.* www.ici-journal.com (05.05.2009).

⁹⁵ See T. Giegerich, Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß: Wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung, 1. Auflage, Berlin 2003, p. 89; see also K.-P. Sommermann, in: H.v. Mangoldt/ F. Klein/ C. Starck, GG, Kommentar zum Grundgesetz, Band 2, Artikel 20 bis 82, 6. Auflage, München 2010, art. 20 para. 2 GG, para. 169.

Federal States and are, by means of an explicit enumeration, attributed either *exclusively* to the Federation or the Federal States (articles 10 to 15 of the B-VG).⁹⁶ The legislative powers remain principally within the autonomous sphere of competences of the Federal States, insofar as the matter is not expressly assigned through the Federal Constitution to the Federation (article 15 para. 1 of the B-VG). The legislative powers of the Federation are exercised through the National Council (*Nationalrat*) jointly with the Federal Council (*Bundesrat*), (article 24 of the B-VG), those of the Federal States through the respective parliaments of the Federal States (*Landtage*) pursuant to article 95 para. 1 of the B-VG.

In Germany, article 20 para. 1 of the GG provides that Germany is a “*democratic and social Federal state*”.⁹⁷ Like in Austria, the state entities consist of the Federation, the Federal States and the municipalities.⁹⁸ The Federal States dispose of “existential state

⁹⁶The Government program of 11.01.2007 (<http://www.austria.gv.at>) proposed under the title “Constitutional and Administrative Reform”, *inter alia*, the establishment of a new system of division of competences between the Federation and the Federal States. A first draft, designed to amend the B-VG and presented by a group of experts in 2007, proposed the so-called “Three-Column-Model” (*Drei-Säulen-Modell*). According to this model, the first and second column includes the areas of competences that are exclusively reserved *either* to the Federation *or* the Federal States. The third column attributes common competences to the Federation *and* the Federal States. In this common area of competences, the Federal States are principally competent as long as the Federation does not exercise its power of competence; for more details, see P. Bußjäger, Die Staats- und Verwaltungsreform ist das Herzstück des Regierungsübereinkommens - Österreich vor einem wiederholten Anlauf zur Verfassungsreform, in: Jahrbuch des Föderalismus 2008, p. 350 at 353 and 363; see also G. Pallaver, Ein Jahr im Tiefflug - Föderalismus in Österreich: Ein Rückblick auf das Jahr 2006, in: Europäisches Zentrum für Föderalismus Forschung Tübingen, Jahrbuch des Föderalismus. Föderalismus, Subsidiarität und Regionen in Europa: Jahrbuch des Föderalismus 2007, Band 8, 1. Auflage, Baden-Baden 2008, p. 355 at p. 358 *et seq*; the Three-Column-Model has not been adopted. The second draft, designed to amend the B-VG and presented by the same group of experts in March 2008, emphasising again the importance of a new system of division of competences, has equally not been adopted; see G. Pallaver, Österreich 2008 - Ein föderalistisches Übergangsjahr, in: Ein föderalistisches Übergangsjahr, in: Europäisches Zentrum für Föderalismus Forschung Tübingen, Föderalismus, Subsidiarität und Regionen in Europa, Jahrbuch des Föderalismus 2009, Band 10, 1. Auflage, Baden-Baden 2009, p. 300 at p. 304 *et seq*.

⁹⁷ Being constituted by constitutional act rather than by Federal agreement, Germany is considered as an artificial Federal state (*unechter Bundesstaat*); for a detailed overview as to Germany’s Federal development, see T. Giegerich, Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß: Wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung, 1. Auflage, Berlin 2003, p. 85 *et seq*; for more details, see e.g. K. - P. Sommermann, in: H.v. Mangoldt/ F. Klein/ C. Starck, GG, Kommentar zum Grundgesetz, Band 2, Artikel 20 bis 82, 6. Auflage, München 2010, art. 20 para. 2, para. 144 *et seq*.

⁹⁸ For further details, see B. Remmert, 60 Jahre Grundgesetz: Kommunale Selbstverwaltung, in: Jahrbuch des Föderalismus 2009, p. 161 *et seq*; see furthermore K.-P. Sommermann, in: H.v. Mangoldt/ F. Klein/ C. Starck, GG, Kommentar zum Grundgesetz, Band 2: Artikel 20 bis 82, 6.

quality”, thus enjoying autonomous and sovereign status and disposing of constitutional and financial autonomy as well as of a core set of competences (*Hausgut eigener Aufgaben*).⁹⁹ According to article 79 para. 3 of the GG, this core set of competences is intangible (*unantastbar*).¹⁰⁰ The German Constitutional Court confirmed in its recent *judgment of 30 June 2009 on the compatibility of the Act approving the Treaty of Lisbon with the German Basic Law* that amendments to the principles laid down in article 79 para. 3 of the GG were inadmissible and even withdrawn from the competences of the legislator amending the Basic Law.¹⁰¹ Article 28 para. 2 of the GG guarantees municipalities and associations of municipalities (*Gemeindeverbände*) the right of self-Government according to the laws (*Recht der Selbstverwaltung*). It requires that the municipalities have the right to regulate all local tasks (*Angelegenheiten der örtlichen Gemeinschaft*) on their own responsibility within the limits prescribed by the laws (*eigener Wirkungskreis der Gemeinden*). Like in Austria, the legislative competences are exercised through the Federal States insofar as they are not transferred to the Federation through the Basic Law. Article 30 of the GG stipulates, in this regard that, except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the Federal States (article 70 para. 1 of the GG). The division of competences is thereby governed through the provisions of the Basic Law, which provide for exclusive power (*ausschließliche Gesetzgebung*), particularly through article 73 of the GG, and concurrent legislative power (*konkurrierende Gesetzgebung*), particularly through

Auflage, München 2010, art. 20 para. 1 GG, para. 26; see also *H. Hofmann*, in: B. Schmidt-Bleibtreu/ F. Klein/ H. Hofmann/ A Hopfauf, GG, Grundgesetz, Kommentar, 11. Auflage, Köln 2008, art. 20, p. 640.

⁹⁹BVerfGE 34, 9 at 19 *et seq.*; see *T. Giegerich*, Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß: Wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung, 1. Auflage, Berlin 2003, p. 93 *et seq.*; see also *M. Brenner*, Der unitarische Bundesstaat in der Europäischen Union, DÖV 1992, p. 903 at p. 905 *et seq.*

¹⁰⁰ See *e.g. K. Bretz*, Föderalismus und Regionalismus in Deutschland, Spanien und der Europäischen Union, 1. Auflage, Berlin 2005, p. 259 *et seq.*; see also *H. Dreier*, in: H. Dreier, Grundgesetz Kommentar, Band II, Art. 20-82, 2. Auflage, Tübingen 2006, art. 79 para. 3 GG; see *K. E. Hain*, in: H.v. Mangoldt/ F. Klein/ C. Starck, GG, Kommentar zum Grundgesetz, Band 2: Artikel 20 bis 82, 6. Auflage, München 2010, art. 79 para. 3 GG; see also *H. Hofmann*, in: B. Schmidt-Bleibtreu/ F. Klein/ H. Hofmann/ A Hopfauf, GG, Grundgesetz, Kommentar, 11. Auflage, Köln 2008, art. 20, p. 641.

¹⁰¹ BVerfG, 2 BvE 2/08 of 30 June 2009, para. 261.

article 72 para. 1 of the GG in connection with article 74 of the GG. Hence, contrary to Austria, the legislative competences in Germany are divided by a further category, namely the category of concurrent legislative powers. Whereas in the area of exclusive legislative powers of the Federation, the Federal States dispose of legislative competences only “*when and to the extent*” (*wenn und soweit*) they have been expressly authorised to do so by Federal law (article 71 of the GG), in the area of concurrent legislative powers they have the power to legislate “*so long as and to the extent*” (*solange und soweit*) the Federation has not exercised its legislative powers by enacting a law (article 72 para. 1 of the GG).

2.1.1.3.2 The respect of Member States’ Federal structures deriving from the European Union’s own Federal structure?

The European Union is itself built upon a Federal structure. One could thus draw the conclusion that it is obliged to respect Member States’ Federal structures as well (3.2.1). We will, however, see that the European Union’s Federal structure is a different one. It is built upon a *two-tier structure*, which is principally not concerned about Member States’ internal structures, whether they are Federal or not. This has been confirmed by the judgment of the German Federal Constitutional Court of 30 June 2009 (3.2.2).¹⁰²

2.1.1.3.2.1 The European Union’s Federal structure

The European Union’s Federal structure has firstly been established with the European Communities and is still prevalent today. Indeed, whether under the treaties upon which the European Communities have been founded, the Maastricht Treaty or the European Treaties, *i.e.* the Treaty on European Union and the Treaty on the

¹⁰² *Ibid.*

functioning of the European Union¹⁰³ today, the European Union has always been structured in a Federal way.¹⁰⁴

The European Communities, although interacting with each other in a mere cooperative manner, disposed since their beginnings of a distinct *hierarchical structure*. Within the course of their development, the form of cooperative interaction was gradually elevated to a *system of supra-nationality*. This led, for instance, from unanimous to majority decisions within the European Council and the integration of the European European Commission as independent organ into the law-making process of the European Communities. The establishment of a system of supra-nationality resulted in an increased awareness of the importance attached to the division of competences between the European Union and the Member States.¹⁰⁵

*The Maastricht Treaty*¹⁰⁶, although considerably changing the system of division of competences established between the European Union and the Member States, did not alter the European Union's basic Federal structure.¹⁰⁷

Today, the European Union is still structured in a Federal way. Various European principles highlight the European Union's Federal structure, such as the principle of

¹⁰³ According to article 1 para. 3 TEU, the European Union is founded on the Treaty on European Union and on the Treaty on the Functioning of the European Union. Those two Treaties have the same legal value. The Union replaces and succeeds the European Community. For more details on the historical development, see e.g. K. H. Fischer, *Der Vertrag von Lissabon, Text und Kommentar zum Europäischen Reformvertrag*, 1. Auflage, Baden-Baden 2008, p. 17 *et seq*; see also A. Haratsch/ C. Koenig/ M. Pechstein, *Europarecht*, 7. Auflage, Tübingen 2010, p. 3 – 14.

¹⁰⁴ See M. Schweitzer, *Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?*, VVDStRL 1993, p. 49 at p. 56 *et seq*.

¹⁰⁵ *Ibid.*

¹⁰⁶ The Maastricht treaty, according to its “three-pillar-model” (*Drei-Säulen-Modell*), integrated the European Communities under its “roof” in form of “the European Union”. The Treaty of Amsterdam and the Treaty of Nice are not cited hereunder due to the fact that they do not constitute treaties of their own right, but are merely a series of *amendments to the existing Treaties*. For more details on the European Union architecture, in particular on the three-pillar-model, see D. Wyatt/ A. Dashwood, in: A. Arnulf/ A. Dashwood/ M. Dougan/ M. Ross/ E. Spaventa/ D. Wyatt, *European Union Law*, Fifth Edition, London 2006, p. 324 – 336.

¹⁰⁷ See M. Schweitzer, *Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?*, VVDStRL 1993, p. 49 at p. 52 *et seq*.

conferral or the principle, which confers upon the Member States the role of the “*masters of the Treaties*”.¹⁰⁸ Further Federal elements can be found in the principle of subsidiarity¹⁰⁹, the principle entrusting Member States with the execution of European law or the principle of the supremacy of European law.¹¹⁰ However, various measures, such as the establishment of the Agency, reveal the European Union’s tendency of centralism. The structural problem of the European Union was at the centre of the review of constitutionality in the judgment of 30 June 2009 of the German Federal Constitutional Court.¹¹¹ In this judgment, the Court considered that the European Union’s freedom of action had continuously risen so that its structure resembled, on the one hand, to that of a Federal state, *i.e.* was analogous to that of a state. On the other hand, however, the decision-making and appointment procedures remained predominantly committed to the pattern of an international organisation, *i.e.* was analogous to international law. Hence, according to the German Constitutional Court, the European Union still followed the principle of equality of states.¹¹² It held that, as long as no uniform European people were subject of legitimation, the peoples of the Member States remained the decisive holder of the European Union’s public authority.¹¹³ It can thus be concluded that the European Union remains a union of rule (*Herrschaftsverband*), which is founded on international law and supported by the sovereign Member States. As a result, one can say that the European Union, due to its own Federal structure, has a principle understanding of the principle of Federalism, such as established in Austria and Germany.

¹⁰⁸ *Ibid* at p. 68.

¹⁰⁹ The principle of subsidiarity, introduced in art. 3b TEC as compensation for the European Union’s increasing powers of competences, *presupposes* the Federal structure of the European Union; see *M. Schweitzer*, *Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?*, VVDStRL 1993, p. 49 at p. 52, p. 53.

¹¹⁰ *Ibid*, p. 49 and p. 56.

¹¹¹ BVerfG, 2 BvE 2/08 of 30 June 2009.

¹¹² *Ibid*, para. 279.

¹¹³ *Ibid*, leading principles, para. 1.

2.1.1.3.2.2 The European Union's two-tier structure

However, the European Union is built upon a *two-tier structure*, which consists of the European Union, on one side, and the Member States, on the other side.¹¹⁴

Historically, Member States' internal structures have not been integrated within the European Union's structure. *Under the Treaties, upon which the European Communities were founded*, no reference was made to Member States' internal structures.¹¹⁵ The European Communities were considered as being "blind of the existence of the Federal States" ("*Landesblindheit der Europäischen Gemeinschaften*").¹¹⁶ Indeed, where referring to "countries" (*Länder*), third countries (*Drittländer*) were addressed.¹¹⁷ Where referring to "territories of Member States", the extra-European territories were meant rather than the Federal States.¹¹⁸ Merely article 68 para. 3 EEC, concerned with the liberalised movements of capital, referred to "regional or local authorities". This article was, however, equally addressed to the Member States rather than the Federal States.¹¹⁹

With the European Economic Area and the Maastricht Treaty, the European Union started to integrate Member States' internal structures, including the Federal ones, into European law. This is, for instance, reflected in article 300 para. 1 and 3 and 305 TFEU

¹¹⁴ See art. 1 TEU. See e.g. M. Schweitzer, *Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?*, VVDStRL 1993, 49 at 56 *et seq.*; see K. Bretz, *Föderalismus und Regionalismus in Deutschland, Spanien und der Europäischen Union*, 1. Auflage, Berlin 2005, p. 242 *et seq.*

¹¹⁵ See G. Ress, *Die Europäischen Gemeinschaften und der deutsche Föderalismus*, EuGRZ 1986, p. 549 at p. 550.

¹¹⁶ Used by H.P. Ipsen, in: G. Ress, *Die Europäischen Gemeinschaften und der deutsche Föderalismus*, EuGRZ 1986, p. 549 at 550; see also K. Bretz, *Föderalismus und Regionalismus in Deutschland, Spanien und der Europäischen Union*, 1. Auflage, Berlin 2005, p. 242.

¹¹⁷ See e.g. art. 3b EEC in connection with arts 9 and 110 EEC *et seq.*, which establish a common customs tariff as well as a common commercial policy towards "third countries"; see also art. 3k EEC in connection with art. 131 EEC *et seq.* regarding the "association of the overseas countries and territories".

¹¹⁸ See G. Ress, *Die Europäischen Gemeinschaften und der deutsche Föderalismus*, EuGRZ 1986, p. 549 at 550.

¹¹⁹ *Ibid.*

(ex-article 198a TEC), which establishes the Committee of the Regions, an advisory body that consists of “*representatives of regional and local bodies*”. It is furthermore apparent by virtue of article 16 para. 2 TEU, which entitles a “*representative of each Member State at ministerial level*” to participate within the Council in order to commit the Government of that Member State.

With the European Treaties, the European Union’s awareness of Member States’ Federal structures increased further. Article 5 para. 3 TEU, for instance, refers explicitly to the sub-entities of the Member States, requiring the European Commission, upon examination of the principle of subsidiarity, to take into account the interests of the Federal States, the Regions as well as the Communities (“*either at central level or at regional and local level*”).¹²⁰

Although a certain attenuation of the European Union’s two-tier structure may thus be acknowledged, the European Union nevertheless retains its basic two-tier structure.¹²¹

Hence, the protection of the Austrian and German Federal structures cannot be based upon the argument that the European Union is itself federally structured. The European Union, although considering Member States’ Federal structures, does not prescribe them. It accepts Member States as they are, structured in the way they are. The decision to establish Federal structures remains thus within the sole responsibility of the Member States. Consequently, lack of prescribing them, Member States cannot invoke their *direct* protection through European law.

¹²⁰ See also P. Straub, Das Frühwarnsystem zur Subsidiaritätskontrolle im Vertrag von Lissabon als Hürde vor weiterer Zentralisierung in der Europäischen Union?, in: Jahrbuch des Föderalismus. Föderalismus, Subsidiarität und Regionen in Europa: Jahrbuch des Föderalismus 2008, 1. Auflage, Baden-Baden 2008, p. 15 at p. 21.

¹²¹ See e.g. K. Bretz, who, already in 2005, stated that the European Union could not be considered anymore as having a strict two-tier structure (*partielle Revidierung des Modells der Zweistufigkeit*), in: Föderalismus und Regionalismus in Deutschland, Spanien und der Europäischen Union, 1. Auflage, Berlin 2005, p. 242, 260; see also K. Hailbronner, Die deutschen Bundesländer in der EG, JZ 1990, p. 149 at p. 152.

However, the fact that the European Union regulates exclusively its relationship with the Member States does not signify that it is not obliged to respect Member States' Federal structures.

2.1.1.3.3 The respect of Member States' Federal structures deriving from a European principle of Federalism?

The European Union's obligation to respect Member States' Federal structures, including those of Austria and Germany, could emanate from a European principle of Federalism established as a general principle of European law.

Generally, a general principle of European law is gained through an evaluative comparison of *all* legal orders of the Member States.¹²² Although European law does not prescribe a uniform principle to be present in *all* Member States, it nevertheless requires that a similar principle to the one seeking to be recognised, exists in, at least, the *majority* of the Member States. Only where one can speak of a "European tradition", can a national principle be recognised as a general principle of European law.

It is thus necessary that similar Federal structures have been established in, at least, the majority of the Member States. When comparing the internal structures of the Member States it appears, however, that only few Member States have established similar Federal structures. Indeed, most of the Member States are organised in a centralised way. Even where certain Federal structures can be acknowledged, such as in Belgium, Spain or Italy, they cannot be compared to those existent in Austria and Germany.¹²³ This is particularly true with regard to the extensive competences that are attributed in Austria and Germany to the municipalities, a characteristic that is unknown to most of the Member States. Finally, even where Federal sub-entities have been established in certain Member States, they do not dispose of the same substantial rights of

¹²² See K. Bretz, *Föderalismus und Regionalismus in Deutschland, Spanien und der Europäischen Union*, 1. Auflage, Berlin 2005, p. 260.

¹²³ *Ibid.*

participation at Federal level, as it is the case in Austria and Germany.¹²⁴ Hence, lack of adhering to similar Federal structures in the majority of the Member States, the Federal structures established in Austria and Germany have not reached the status of a general principle of European law.¹²⁵

2.1.1.3.4 The respect of Member States' Federal structures deriving from the "national identities" of the Member States?

Article 4 para. 2 Lisbon Treaty obliges the European Union to respect "*the national identities*" of the Member States. Hence, if the Federal structures of the Member States form part of their "*national identity*", the European Union is obliged to respect them.

2.1.1.3.4.1 The notion of "national identity"

Article 4 para. 2 sent. 1 TEU obliges the European Union to respect Member States' "*national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-Government*". This includes, according to article 4 para. 2 sent. 2 TEU, the obligation to respect "*their essential State functions, including ensuring the territorial integrity of the State*." Article 4 para. 2 TEU is based upon former article 10 TEC, which was introduced as a counterbalance to the European Union's steadily increasing competences. Aimed at protecting Member States' national and regional diversity within the European Union, article 4 para. 2 TEU leaves it to the Member States to determine their own national identity. The "*identity*" of a Member State is formed through the *idea contents (Ideengehalte)* of the People, helping them to find self-determination and inner security. As a result, the "*nationality*" of a Member State can be defined on the basis of two elements

¹²⁴ See G. Ress, Die Europäischen Gemeinschaften und der deutsche Föderalismus, EuGRZ 1986, p. 549 at 551.

¹²⁵ See K. Bretz, Föderalismus und Regionalismus in Deutschland, Spanien und der Europäischen Union, 1. Auflage, Berlin 2005, p. 260.

complementing each other: firstly, the state forming will of the People (*plébiscite de tous les jours*) and, secondly, the People's common language, history and culture.¹²⁶

2.1.1.3.4.2 Member States' Federal structures as part of their "national identity"?

Member States' Federal structures are undoubtedly part of their national identity.¹²⁷ This becomes, first of all, apparent upon article 4 para. 2 *sent. 1* TEU, which obliges the European Union to respect the "national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-Government". The "*fundamental structures*" comprise Member States' Federal structures. It emanates furthermore from *sent. 2* of article 4 para. 2 TEU, which, as part of Member States' "essential State functions", also protects their territorial integrity. Moreover, it is due to the Federal structures and, in particular, the allocation of competences on sub-Federal level that the People are able to participate at the political decision-making process of the Member States. It is due to the establishment of political institutions *at sub-Federal level*, that the People have a closer connection to their nation state, which enables them to better identify themselves with. Indeed, they are more involved in the decision-making process in that they contribute in a more direct way to political decisions. In addition, the establishment of Federal structures increases the responsibility of the Government towards the People in that it must justify its actions in a more direct way.¹²⁸

¹²⁶ See A. Bleckmann, Die Wahrung der "nationalen Identität" im Unions-Vertrag, JZ 1997, p. 265.

¹²⁷ See also K. Bretz, Föderalismus und Regionalismus in Deutschland, Spanien und der Europäischen Union, 1. Auflage, Berlin 2005, p. 260 *et seq.*

¹²⁸ Other interests of the Member States, which are protected, include their cultural diversity and traditions (art. 3 para. 4 subpara. 4, art. 13 TEU) or their linguistic diversity (art. 3 para. 4 subpara. 4 TEU); see e.g. A. Bleckmann, Die Wahrung der "nationalen Identität" im Unions-Vertrag, JZ 1997, p. 265 at p. 266.

2.1.1.3.5 The respect of Member States' Federal structures deriving from the principle of loyalty?

Article 4 para. 3 sent. 2 and 3 TEU codifies the principle of loyalty (*Prinzip der Gemeinschaftstreue*). Whether this principle includes an obligation for the European Union to respect the interests of the Member States, *in general* (3.5.1), and whether it comprises the Federal structures of Austria and Germany, *in particular* (3.5.2), will be dealt with in the following.

2.1.1.3.5.1 The respect of Member States' interests *in general*

The principle of loyalty, initially codified in former article 10 TEC, is now incorporated in article 4 para. 3 sent. 2 and 3 TEU. It states: “the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure, which could jeopardise the attainment of the Union's objectives.” In obliging Member States to support the European Union in the fulfilment of its achievements (*Unterstützungspflicht*), on one side, and to refrain from actions, which jeopardise the European Union's objectives (*Unterlassungspflicht*), on the other side, article 4 para. 3 sent. 2 and 3 TEU is principally addressed *to the Member States* rather than the European Union.¹²⁹ However, despite its clear wording, former article 10 TEC was also applied with the aim to establish an obligation of loyalty *of the European Union towards the Member States*. This was based on the perception that the principle of loyalty constitutes a *mutual principle of European law* and establishes therefore obligations on both side, the Member States *and* the European Union. The fact that the principle of loyalty constitutes a mutual principle of European law can also be seen by virtue of the systematic position it occupies within article 4 para. 3 TEU.

¹²⁹ See e.g. I. Pernice, Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?, DVBl 1993, p. 909 at p. 916; see also R. Halfmann, Entwicklungen des deutschen Staatsorganisationsrechts im Kraftfeld der europäischen Integration, Die Zusammenarbeit von Bund und Ländern nach Art. 23 GG im Lichte der Staatsstrukturprinzipien des Grundgesetzes, 1. Auflage, Berlin 2000, p. 276 *et seq.*

Indeed, its insertion after the *principle of sincere cooperation* according to which “the Union and the Member States shall, *in full mutual respect*, assist each other in carrying out tasks which flow from the Treaties” (article 4 para. 2 sent. 1 TEU), indicates that it is part of the mutual obligations of the Member States *and* the European Union. Moreover, in accordance with the European principle of *effet utile* (*Effizienzgebot*), which requires European provisions to be given their best possible effectiveness, loyalty obligations need to be established on both sides. Indeed, if the European Union was not obliged to respect Member States’ interests, it would risk that Member States withdraw their loyalty from the European Union and refuse to support it in the achievement of its goals.¹³⁰

Based upon the principle of loyalty, established in article 4 para. 3 sent. 2 and 3 TEU, the European Union is therefore obliged to respect Member States’ interests *in general*.

2.1.1.3.5.2 The respect of Member States’ Federal structures *in particular*

The obligation of the European Union to respect Member States’ interests in general, does not automatically include its obligation to respect Member States’ Federal structures *in particular*.

Against such assumption speaks that European law is principally not concerned about Member States’ internal structures. Indeed, contracting partners of the European Union are exclusively the Member States and not the Federal States. Moreover, the principle of the supremacy of European law requires European provisions to be examined independently from the constitutional orders of the Member States.¹³¹ In addition, since only few Member States have established Federal structures, one could argue that these are not significant enough to be taken into account. Finally, obliging the European Union to consider the internal structures of each individual Member State could entail the risk that it obstructs the European Union’s capacity to act (*Handlungsfähigkeit*).

¹³⁰ See K. Hailbronner, Die deutschen Bundesländer in der EG, JZ 1990, p. 149 at p. 152.

¹³¹ *Ibid.*

In my view, Member States' Federal structures should nevertheless be included in the scope of protection of article 4 para. 3 TEU. The fact that Member States' internal structures do not serve as criteria of examination of European law, does not exclude the possibility that they are protected by it. The inadmissibility of deducing such obligation from the constitutional orders of the Member States does not exclude the recognition of such obligation on the basis of European law. Member States' internal structures, although not *directly* serving as criteria of examination, may nevertheless become relevant in the light of the examination of European law. Moreover, the argument that only few Member States have established Federal structures with the result that they should not be taken into account is not convincing. Such conclusion would have the consequence that Member States' interests were only protected, if they existed in more or less *all* the Member States. This would lead to the result that the Member States are not protected in their quality as *individual* nation states, but only in their quality as a *global community*. However, protecting Member States only in their quality as a global community without considering each individual Member State cannot be justified upon European law. The European Union, which is on itself not recognised as a state in the sense of international public law, is built upon the Member States in their quality as autonomous nation states.¹³² In addition, the variety of forms of internal structures that exist within the Member States would make it difficult to find a single common basis. Moreover, at what point would the interests of the Member States as a global community considered as, *indeed*, being affected? How many Member States would need to have established the same principle in order to be declared "worthy enough" to apply it on European level? To leave the decision of whether or not to consider the interests of a particular Member State to the discretion of the European Union, would undermine the power of this Member State to autonomously and independently decide about its internal structures. The European Union would risk losing the support of this Member State, which would rather return to its own national interests. In the end, the protection of the Member States only as a global community would jeopardise the achievement of the European Union's goals, which would in return contradict the

¹³² See A. Epiney, *Gemeinschaftsrecht und Föderalismus: "Landesblindheit" und Pflicht zur Berücksichtigung innerstaatlicher Verfassungsstrukturen*, EuR 1994, p. 301 at p. 315.

European principle of *effet utile*. Hence, the principle of loyalty as a mutual principle of European law includes the European Union's obligation to protect Member States' Federal structures.

As a conclusion it can be said that Member States' Federal structures, including those of Austria and Germany, are protected through European law. They are included within the scope of protection of article 4 para. 2 TEU, which protects Member States' national identities as well as within the scope of protection of the principle of loyalty laid down in article 4 para. 3 TEU.

2.1.1.4 The interference of article 35 para. 1 of Directive 2009/72/EC with Member States' Federal structures

In general, the European Union has been conferred upon the power to interfere with the competences of the Member States (4.1). Considering article 35 para. 1 of Directive 2009/72/EC, its interference is particularly far-reaching (4.2).

2.1.1.4.1 The interference of the European Union with Member States' competences *in general*

The European Union disposes of different forms of interference (*Formen der Kompetenzbeeinträchtigung*) (2.1.1.4.1.1), which may also result in an interference with the competences of the *Federal States* (2.1.1.4.1.2).

2.1.1.4.1.1 The forms of interference of the European Union

The European Union may interfere with Member States' competences either through primary or secondary legislation.

As to primary legislation, provisions may either confer jurisdiction over an entire area of competence to a legal entity, such as the European Union, a Member State or a Region (*Kompetenznormen*) or may assign specific rights and duties within a specific area of competence (*Sachnormen*). Where jurisdiction over an entire area of competence is conferred upon the European Union, the competences of the Member States are at the same time excluded. The exclusion of the competences of the

Federation thereby leads to an exclusion of competences of the Federal States, *if these were competent according to domestic laws*. The degree of exclusion depends on the question of whether the European Union enjoys exclusive or concurrent jurisdiction over that specific area of competence. Where specific rights and duties within a specific area of competence are conferred upon the European Union, the competences of the Member States are limited. Again, the limitation of competences of the Federation leads to a limitation of competences of the Federal States, if these were competent according to domestic laws.¹³³

As to secondary legislation, i.e. legislation enacted by the European legislator on the basis of primary legislation, the competences of the Member States are either further limited (*e.g.* through a European Directive) or entirely excluded, such as through a European Regulation (*Verordnung*) or a very detailed Directive.

2.1.1.4.1.2 The interference with the competences of the Federal States

The interference of the European Union with the competences of the Federal States results from the transfer of sovereign rights of the Federation to the European Union.¹³⁴ The loss of competences born by the Federation may lead to a loss of competences of the Federal States, thereby affecting all three areas of state power, *i.e.* the legislative, executive and judiciary power.

The European Union may, for instance, interfere with Federal States' *legislative competences*. In this case, it affects Federal States' competences not only in respect of their *own* areas of competences, but also in respect of the competences of the *Federation*.¹³⁵ Indeed, through the transfer of competences of the Federation to the

¹³³ See *R. Streinz*, Die Abgrenzung der Kompetenzen zwischen der Europäischen Union und den Mitgliedstaaten unter besonderer Berücksichtigung der Regionen, BayVBl 2001, p. 481 at p. 484 and p. 485.

¹³⁴ See art. 24 GG and art. 23d Abs. 5 B-VG respectively.

¹³⁵ See *D. O. Reich*, Zum Einfluß des Europäischen Gemeinschaftsrechts auf die Kompetenzen der deutschen Bundesländer, EuGRZ 2001, p. 1 at 3; see also *R. Streinz*, Die Abgrenzung der Kompetenzen zwischen der Europäischen Union und den Mitgliedstaaten unter besonderer Berücksichtigung der Regionen, BayVBl 2001, p. 481 at p. 485.

European Union, Federal States may lose their participation rights, via the *Bundesrat*, at the law-making process of the Federation¹³⁶, such as the right to introduce a legislative proposal in the Bundestag (*Initiativrecht*),¹³⁷ the right to comment on the legislative proposal of the Bundestag (*Recht der Stellungnahme*)¹³⁸ or the right to object to a legislative proposal adopted by the Bundestag (*Recht des Einspruchs*).¹³⁹ The European Union may also interfere with the *executive competences* of the Federal States. In this case, it affects Federal States' competences in respect of the execution of Federal law, of Federal States' law¹⁴⁰ as well as of European law or Federal law enacted on the basis of European law.¹⁴¹

2.1.1.4.2 The interference of the European Union through article 35 para. 1 of Directive 2009/72/EC in particular

As to the interference of article 35 para. 1 Directive 2009/72/EC *in particular*, a distinction needs to be drawn between the Federal structures established in Austria and those established in Germany in the area of energy regulation.

In Austria, no Federal structures have been established in the area of energy regulation. Although the Federal Minister of Economics and Labour and local state authorities are involved in the regulatory decision-making process, no real Federal structures have

¹³⁶ Art. 50 GG and art. 41 *et seq.* B-VG respectively.

¹³⁷ Art. 76 para. 1 GG and art. 41 para. 1 B-VG respectively.

¹³⁸ Art. 76 para. 2 GG and art. 42 para. 1 B-VG respectively.

¹³⁹ Art. 77 para. 3 GG and art. 42 paras. 2, 3 and 4 B-VG respectively.

¹⁴⁰ See art. 30, 83 *et seq.* GG and art. 15 para. 1 B-VG; for more details, see *D. O. Reich*, Zum Einfluß des Europäischen Gemeinschaftsrechts auf die Kompetenzen der deutschen Bundesländer, EuGRZ 2001, p. 1 at p. 8; see also *R. Streinz*, Die Abgrenzung der Kompetenzen zwischen der Europäischen Union und den Mitgliedstaaten unter besonderer Berücksichtigung der Regionen, BayVBl 2001, p. 481 at p. 485.

¹⁴¹ As to Federal States' judiciary competences, see *e.g.* *R. Streinz*, Die Abgrenzung der Kompetenzen zwischen der Europäischen Union und den Mitgliedstaaten unter besonderer Berücksichtigung der Regionen, BayVBl 2001, p. 481 at p. 486.

been established.¹⁴² The main regulators are the *E-control GmbH* and the *E-control Kommission* and no regional divisions of these regulatory authorities exist.¹⁴³

In Germany, on the contrary, a strict Federal system has been established in the area of energy regulation. These Federal structures are deeply affected through article 35 para. 1 of Directive 2009/72/EC.¹⁴⁴

Article 35 para. 1 of Directive 2009/72/EC has, *first of all*, a major impact on the *territorial structures* that have been established in the area of energy regulation. Indeed, article 35 para. 1 of Directive 2009/72/EC, considered on its own, would require Germany to *consolidate* its regulatory authorities established at Federal States' level to a single regulatory authority at national level. This would mean that Germany would have to abolish its territorial structure in the area of energy regulation and to replace them through a single and centralised territorial structure.

Article 35 para. 1 of Directive 2009/72/EC affects *furthermore* the *system of division of competences* that has been established in the area of energy regulation between the regulatory authorities at Federal level and Federal States' level. Indeed, article 35 para. 1 of Directive 2009/72/EC, considered on its own, would require Germany to *concentrate* energy regulatory matters on a single energy regulatory authority at national level. This would lead to an entire withdrawal of competences from those authorities, which are responsible for energy regulatory matters at Federal States'

¹⁴² See CEER, IEB TF-Regulatory Benchmark Questionnaire, Final Version, 05-07-05, Draft on Austria – E-control GmbH, p. 2 – p. 3.

¹⁴³ See CEER, IEB TF-Regulatory Benchmark Questionnaire, Final Version, 05-07-05, Draft on Austria – E-control GmbH, p. 2, 3. In 2008, several constitutional provisions have been introduced into sub-constitutional laws, which have an impact on the Austrian Federal framework, including the EWIOG and the E-RBG; for details, see *G. Pallaver*, Österreich 2008 – Ein föderalistisches Übergangsjahr, in: Europäisches Zentrum für Föderalismus Forschung Tübingen, Föderalismus, Subsidiarität und Regionen in Europa, Jahrbuch des Föderalismus 2009, Band 10, 1. Auflage, Baden-Baden 2009, p. 300 at p. 306 – p. 307.

¹⁴⁴ See *R. Streinz*, Die Abgrenzung der Kompetenzen zwischen der Europäischen Union und den Mitgliedstaaten unter besonderer Berücksichtigung der Regionen, BayVBl 2001, p. 481 at p. 484 and p. 485.

level.¹⁴⁵ In Germany, the authorities competent for energy regulatory matters on Federal States' level dispose of their *own regulatory competences*.¹⁴⁶ They are competent for regulating electricity networks, which serve fewer than 100.000 customers directly or indirectly, provided that the electricity networks do not extend beyond the borders of a (single) Federal State (section 54 para. 2 of the EnWG).¹⁴⁷ Their tasks are thereby carried out either through the *BNetzA*, lending its entity to the Federal States (*Organleihe*)¹⁴⁸, or through distinct entities at Federal States' level.¹⁴⁹ Where carried out through distinct Federal States' entities, these competences would be withdrawn through article 35 para. 1 of Directive 2009/72/EC.

As a conclusion, article 35 para. 1 of Directive 2009/72/EC interferes deeply with the Federal structures of Germany established in the area of energy regulation, in particular affecting the competences of the Federal States.

2.1.1.5 The justification of the European Union' interference with Member States' Federal structures

The interference of the European Union with Member States' Federal structures, in order to be legitimate, must be justified on the basis of European law.

¹⁴⁵ See e.g. *T. Eggers/ T. Floren*, Rolle der Regulierungsbehörden zwischen Aufsichts- und Verfolgungsbehörde, ZNER 2010, p. 10 at p. 12.

¹⁴⁶ *Ibid.*

¹⁴⁷ See CEER, IEB TF-Regulatory Benchmark Questionnaire, Final Version, 05-07-05, Draft on Germany – Federal Network Agency, p. 4; see also *T. Eggers/ T. Floren*, Rolle der Regulierungsbehörden zwischen Aufsichts- und Verfolgungsbehörde, ZNER 2010, p. 10 at p. 11 *et seq.*

¹⁴⁸ Distinct regulatory authorities at Federal States' level exist in Bremen, Schleswig-Holstein, Lower Saxony, Berlin, Brandenburg, Mecklenburg-West Pomerania.

¹⁴⁹ North Rhine-Westphalia, Bavaria.

2.1.1.5.1 European law as the sole criterion of examination

Article 35 para. 1 of Directive 2009/72/EC must comply with European law, which serves as sole criteria of examination (*Prüfungsmaßstab und -umfang*).¹⁵⁰ The national laws, including the constitutional laws of the Member States, are principally not taken into account. This stems from the principle of supremacy of European law (*Vorrang des Europarechts*), which provides that any European provision, whether primary or secondary, prevails over the national laws of the Member States, including their constitutional laws.¹⁵¹ As a consequence, national laws opposed to European law become inapplicable to situations of European character (*Anwendungsvorrang*). They are, however, not void (*Geltungsvorrang*), which means that they remain applicable to situations that have a purely national character.¹⁵²

2.1.1.5.2 The violation of the principle of proportionality?

The principle of proportionality (*Verhältnismäßigkeitsprinzip*) has been codified in Article 5 para. 4 TEU (ex-article 5 TEC). Under this principle, the content and form of the European Union shall not exceed what is necessary to achieve the objectives of the Treaties. In the energy sector, this principle is complemented through Article 194 para. 2 TFEU, which provides that the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after having consulted the Economic and Social Committee and the Committee of the Regions, establish the measures *necessary to achieve the objectives set out in paragraph 1*, including the functioning of the energy market, security of energy supply, the promotion of energy sufficiency, energy saving and the development of renewable energies and the interconnection of energy networks.

¹⁵⁰ See e.g. W. Höfling/ S. Augsberg, Grundrechtsfragen im Zusammenhang mit der geplanten Erweiterung der Befugnisse der nationalen Regulierungsbehörden auf den Strom- und Gasmärkten, RdE 12/ 2008, p. 353 at p. 354.

¹⁵¹ Case 6-64, *Flaminio Costa v E.N.E.L.*, Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy, E.C.R (1964), 00585.

¹⁵² See K. Hailbronner, Die deutschen Bundesländer in der EG, JZ 1990, p. 149.

Under the principle of proportionality the question arises whether a European measure can be justified in view of the realisation of its objective *despite* its interference with another interest that is equally protected by European law. The principle of proportionality serves, *firstly*, to control the extent to which measures adopted by the European institutions are permitted to override the interests of particular individuals and, *secondly*, to limit the scope that has been conferred upon the Member States to protect important public interests through derogations from fundamental principle of European law.¹⁵³ Here two legal interests, both protected by European law, are at stake. On one side, there is the legitimate interest of federally structured Member States, in particular Germany, that the Federal structures established in the area of energy regulation remain intact and protected. On the other side, there is the legitimate interest of the European Union that Member States progress with the European process of integration and, in particular, with a single European energy market. On one side, the activities of the European Union may not lead to the result that Member States' Federal structures are deprived of their substance. On the other side, the respect of Member States' Federal structures may not have the consequence that the European Union is obstructed in the realisation of its goals. These two interests relate to each other on an *equal basis* and must *adequately be balanced*, which means that both of them must be given the best possible effectiveness. As a result, the European Union's obligation to respect Member States' Federal structures must not be considered in an isolated way but rather needs to be embedded in the European process of integration.¹⁵⁴ In applying the principle of proportionality, it must be examined whether the measure used is suitable for the purpose of achieving the desired objective and whether it does not go beyond what is necessary to achieve that objective.¹⁵⁵ Hence, article 35 para. 1 of Directive 2009/72/EC, in order to be legitimate, must be suitable (*geeignet*), necessary (*erforderlich*) and adequate (*angemessen*) in view of the realisation of its aim.

¹⁵³ See e.g. D. Wyatt/ A. Dashwood, European Union Law, in: A. Arnulf/ A. Dashwood/ M. Dougan/ M. Ross/ E. Spaventa/ D. Wyatt, Fifth Edition, London, 2006, p. 110 – p. 112.

¹⁵⁴ In this sense, see A. Epiney, Gemeinschaftsrecht und Föderalismus: "Landesblindheit" und Pflicht zur Berücksichtigung innerstaatlicher Verfassungsstrukturen, EuR 1994, p. 301 at p. 318 and p. 319.

¹⁵⁵ For more details, see D. Wyatt/ A. Dashwood, in: A. Arnulf/ A. Dashwood/ M. Dougan/ M. Ross/ E. Spaventa/ D. Wyatt, European Union Law, Fifth Edition, London 2006, p. 110 *et seq.*

2.1.1.5.2.1 Article 35 para. 1 of Directive 2009/72/EC as a suitable measure?

Article 35 para. 1 Directive 2009/72/EC constitutes a suitable measure, if it is able to achieve the aim herewith pursued.

The European Union's overall aim in the electricity sector is the creation of an "*internal market in electricity*", which provides "*efficiency gains, competitive prices, and higher standards of service*", and which "*contributes to security of supply and sustainability*".¹⁵⁶ According to the European Union, Directive 2009/72/EC aims to achieve what Directive 2003/54/EC was unable to provide: a sufficient "*framework for achieving the objective of a well-functioning internal market*".¹⁵⁷ Placed in this wider European context, the establishment of a single national regulatory authority per Member State, as provided for by article 35 para. 1 Directive 2009/72/EC, has the aim to achieve "strong national regulators to oversee the running of electricity and gas markets".¹⁵⁸ According to the European Commission, the dispersion of energy regulatory powers over different bodies leads to a "*lack of uniformity*" and therefore energy regulators' "*weakness*". As a result, in the European Commission's view, the *consolidation* to a single regulatory authority at national level has become necessary.¹⁵⁹ The *concentration* of competences to a single entity undoubtedly strengthens this entity in that it is more effective in terms of organisation, performance, taking of decisions and of execution of energy regulatory matters. Article 35 para. 1 Directive 2009/72/EC can thus be regarded as a suitable measure in view of the achievement of its aim.

¹⁵⁶ See introduction of Directive 2009/72/EC (1).

¹⁵⁷ *Ibid.*

¹⁵⁸ See European Commission's Proposal for a Directive of the European Parliament and the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity, Explanatory Memorandum, Strong national regulators to oversee the running of electricity and gas markets, COM (2007) 528 final, at no. 2.1.

¹⁵⁹ *Ibid.*

2.1.1.5.2.2 Article 35 para. 1 of Directive 2009/72/EC as a necessary measure?

Article 35 para. 1 of Directive 2009 constitutes a necessary measure, if the European Union disposes of no other means, which is as effective as article 35 para. 1 of Directive 2009/72/EC (*gleich geeignetes Mittel*), but which is, at the same time, less intrusive with Member States' Federal structures (*milderes Mittel*).

A less intrusive measure could be the decision to let the *Member States* decide about their internal structures in the area of energy regulation. With a view to the European Union's aim to establish a single internal electricity market, such a decision would, however, not be as effective. Indeed, to let the Member States decide about their internal structures in the area of energy regulation, as it is the case today, results in various different forms of regulatory oversight. This has the consequence that it is more difficult for the European Union to act in a uniform way and to “*talk with a single European voice*” in the area of energy regulation. Given the increasing number of acceding European countries, the decision-making process in the area of energy regulation becomes more and more cumbersome.

Another less intrusive measure could be the enactment of a provision, which differentiates between the different Member States *in dependence of their internal structures*. To differentiate between the different Member States would fulfil the European Union's obligation to respect the history, culture, tradition and national identity of each individual Member State. Such differentiated approach would permit that Member States' individual structures were taken into account. Member States would be presented with alternatives, which would give them the possibility to comply with their obligation to participate at the establishment of a united Europe *without being forced to act in contradiction to their own constitutional laws*.¹⁶⁰

¹⁶⁰ See e.g. art. 23 para. 1 sent. 1 GG; the possibility to distinguish between the different Member States was particularly discussed in connection with the principle of subsidiarity; for details, see D. Schindler, Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz, in: Europäisches Zentrum für Föderalismus Forschung Tübingen, Jahrbuch des Föderalismus. Föderalismus, Subsidiarität und Regionen in Europa: Jahrbuch des Föderalismus 2008, Band 9, 1. Auflage, Baden-Baden 2009, p. 83.

Applied to article 35 Directive 2009/72/EC, this approach would lead to a differentiated Federalism (*differenzierter Föderalismus*).¹⁶¹ A similar solution can, in my view, be seen in the enactment of *paragraph 2 and paragraph 3* of article 35 Directive 2009/72/EC.

Paragraph 2 of Directive 2009/72/EC stipulates, that under certain conditions *paragraph 1* of Directive 2009/72/EC is “without prejudice to (*berührt nicht/ ohne Auswirkung auf*) the designation of other regulatory authorities at regional level” within the Member States. It refers to the Federal structures *established on the different Federal sub-levels* in the area of energy regulation. Safeguarding Member States’ territorial integrity, they are not forced to *consolidate* the authorities established at regional level to a single national regulatory authority at national level.

Paragraph 3 of article 35 Directive 2009/72/EC allows Member States, “by way of derogation” (*abweichend von*), to designate under certain conditions “regulatory authorities for small systems on a geographically separate region”. It refers to the *powers and competences* of regulatory authorities, *independently of the Federal sub-structures*. In this case, Member States are not forced to *concentrate* energy regulatory matters on a single national authority at national level. Such is, for instance, the case in Germany.

The question is whether article 35 para. 1 Directive 2009/72/EC, *in combination with paragraph 2 and 3 of article 35 para. 1 Directive 2009/72/EC*, could be regarded as effective as article 35 para. 1 Directive 2009/72/EC, considered on its own. Given the fact that through such a differentiated approach article 35 para. 1 Directive 2009/72/EC would lose its uniformity, it can, in my view, only be regarded as effective, *if its uniformity can otherwise be guaranteed*. Such has been achieved through the requirement laid down in both, *paragraph 2 and paragraph 3* of Directive 2009/72/EC, to appoint a senior representative for representation and contact purposes at European level within the Board of Regulators of the European Agency. On one side, the attribution of a purely representative role to the senior representative guarantees that

¹⁶¹ *Ibid* at p. 82 *et seq.*

the decision-making power remains with the regulatory authorities established at regional level. On the other side, the representation of a single senior representative at European level facilitates the decision-making process of the European Union in the area of energy regulation.

As a result, in combination with paragraph 2 and 3 of Directive 2009/72/EC, article 35 para. 1 of Directive 2009/72/EC constitutes a measure, which is as effective as article 35 para. 1 of Directive 2009/72/EC on its own, but which is, at the same time, less intrusive with Member States' Federal structures.

2.1.1.5.2.3 Article 35 para. 1 of Directive 2009/72/EC as a proportionate measure?

The progress that shall be achieved through article 35 para. 1 Directive 2009/72/EC within the European process of integration must be proportionate in relation to its interference with Member States' Federal structures.¹⁶²

Article 35 para. 1 Directive 2009/72/EC, *considered on its own*, is in my view *not proportionate* in relation to its aim pursued.¹⁶³ Its scope of applicability (*materielle Anwendungsbereich*) is too far-reaching in that it principally applies to *all* the Member States and in respect of *all* energy regulatory matters and within *all* areas of energy regulation. In addition, its interference with Member States' Federal structures reaches too deeply (*Tiefe des Eingriffs*) in that it affects an area of competence that is typically reserved to the Member States. The energy sector is a sector, which usually depends on the national and regional particularities and traditions of the Member States and which constitutes therefore one of the sectors that are most closely connected to its Member State. Moreover, although article 35 para. 1 Directive 2009/72/EC does not deprive the *Member States* from their sovereignty, it withdraws the sovereignty from

¹⁶² See A. Epiney, *Gemeinschaftsrecht und Föderalismus: "Landesblindheit" und Pflicht zur Berücksichtigung innerstaatlicher Verfassungsstrukturen*, EuR 1994, p. 301 at p. 321.

¹⁶³ See e.g. S. Neveling, *Verschärfte Regulierung der Strom- und Gasmärkte in der EU - Vorschläge der Kommission für ein 3. Richtlinienpaket*, ZNER 2007, p. 378 at p. 379.

the *Federal States* in the area of energy regulation.¹⁶⁴ Finally, article 35 para. 1 Directive 2009/72/EC would oblige federally structured Member States to act in a way that is contradictory to their constitutional laws, plunging them into an unsolvable conflict between European and constitutional law.¹⁶⁵

Article 35 para. 1 Directive 2009/72/EC can furthermore not be justified upon the argument that Federal States dispose of participation rights at European level.¹⁶⁶

Generally, in Germany¹⁶⁷ as well as in Austria¹⁶⁸, Federal States have been conferred upon indirect and direct participation rights at the law-making process of the European Union as a compensation for the loss of competences encountered through the transfer of sovereign rights of the Federation to the European Union (*Mitwirkungskompensation*). The Federal States participate *indirectly* at the law-making process of the European Union by contributing, via the Bundesrat and the Integration Conference of the Federal States (Integrationskonferenz der Länder), to the

¹⁶⁴ The European Union's interference with Member States' competences by virtue of art. 35 para. 1 of Directive 2009/72/EC can therefore not be compared to its interference in the area of monetary policy (*Währungshoheit*), where Member States' sovereignty has almost entirely been transferred to the European Central Bank. However, even in this area, the transfer of sovereignty of Member States' monetary policy does not result in an entire loss of state sovereignty; for details, see *T. Stein*, *Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz*, VVDStRL 53, p. 26 at p. 31 and p. 46.

¹⁶⁵ See *K. Hailbronner*, *Die deutschen Bundesländer in der EG*, JZ 1990, p. 149 at p. 152.

¹⁶⁶ See *e.g. M. Brenner*, *Der unitarische Bundesstaat in der Europäischen Union*, DÖV 1992, p. 903 *et seq.*

¹⁶⁷ See art. 23 para. 2, para. 4 to 6 GG in connection with the Law on the Cooperation between the Federation and the Federal States regarding Matters of the European Union (*Gesetz über die Zusammenarbeit zwischen Bund und Ländern in Angelegenheiten der Europäischen Union*, EUZBLG).

¹⁶⁸ See art. 23 d to 23f B-VG in connection with two agreements concluded, upon art. 15a B-VG, between the Federation and the Federal States, on the one hand, and between the Federal States between themselves, on the other hand (*Vereinbarungen über die Mitwirkungsrechte der Länder und Gemeinden in Angelegenheiten der Europäischen Integration of 12.03.1992*); for details, see *R. Halfmann*, *Entwicklungen des deutschen Staatsorganisationsrechts im Kraftfeld der europäischen Integration*, 1. Auflage, Berlin 2000, p. 327 *et seq.* The difference to the German approach is, that in Austria the Federal States do not participate via the *Bundesrat* at the law-making process of the European Union, but via the so-called "Integration Conference of the Federal States" (*Integrationskonferenz der Länder*). Where the integration conference takes a unanimous decision (*einheitliche Stellungnahme*), art. 23 d para. 2 sent. 1 B-VG stipulates that the Federation is, in principal, bound by it; for a detailed and comparative analysis between German and Austrian law, see *M. Schweitzer*, *Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?*, VVDStRL 1993, p. 49 at p. 59 and p. 64 *et seq.*

law-making process of the *Federation*.¹⁶⁹ The degree of participation depends thereby, in Germany¹⁷⁰ as well as in Austria¹⁷¹, on the degree of interference of the European Union with the competences of the Federal States. They *directly* participate at the law-making process of the European Union¹⁷² through bodies such as the Council of Regional and Local Authorities (*Beirat der regionalen und lokalen Gebietskörperschaften*), a consultative organ without any noteworthy powers¹⁷³, the Committee of the Regions, an assembly of local and regional representatives with

¹⁶⁹ See A. Zoller, Die Weiterentwicklung der Bund-Länder Zusammenarbeit in EU-Angelegenheiten vor dem Hintergrund des Vertrages von Lissabon, Jahrbuch des Föderalismus. Föderalismus, Subsidiarität und Regionen in Europa, in: Jahrbuch des Föderalismus 2008, 1. Auflage, Baden-Baden 2008, p. 570 at p. 575.

¹⁷⁰ In Germany, where a European measure affects *primarily* (*im Schwerpunkt*) the legislative competences of the Federal States, the constitution of Federal States authorities or their administrative procedures, the voting of the Federal States within the *Bundesrat* constitutes a *decisive factor* as to the law-making process of the European Union (*maßgebliche Berücksichtigung*); it has *binding character* (art. 23 para. 5 sent. 2 in connection with section 5 para. 2 LZusAG). Where, on the contrary, the interests of the Federal States are *concerned* (*Berührung von Länderinteressen*), such as in the case of the European Union's interference with exclusive competences of the Federation, the voting of the *Bundesrat* is merely to be taken into account; it has *no binding character*; for details, see A. Zoller, Die Weiterentwicklung der Bund-Länder Zusammenarbeit in EU-Angelegenheiten vor dem Hintergrund des Vertrages von Lissabon, in: Jahrbuch des Föderalismus. Föderalismus, Subsidiarität und Regionen in Europa: Jahrbuch des Föderalismus 2008, 1. Auflage, Baden-Baden 2008, p. 570 at p. 575 *et seq.*; see also M. Schweitzer, Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?, VVDStRL 1993, p. 49 at p. 59 *et seq.*; see also D. Reich, Zum Einfluß des Europäischen Gemeinschaftsrechts auf die Kompetenzen der deutschen Bundesländer, EuGRZ 2001, p. 1 at p. 12.

¹⁷¹ In Austria, where the Federal States have taken a unanimous decision (*einheitliche Stellungnahme*) with regards to a European project that lies within the scope of legislative competences of the Federal States, the Federation is principally bound by it (art. 23 para. 2 sent. 1 B-VG). The opportunity to present their views (*Gelegenheit zur Stellungnahme*) must be given to the Federal States, without delay, in all those cases, in which a European measure affects the autonomous sphere of competence of the Federal States (*selbständiger Wirkungsbereich der Länder*) or which could otherwise be of interest to them (*von Interesse sein könnten*), (art. 23 para. 1 B-VG); for details, see M. Schweitzer, Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?, VVDStRL 1993, p. 49 at p. 62 *et seq.*

¹⁷² For Germany, see art. 23 para. 6 GG in connection with section 6 LZusAG; for a critical view as to art. 23 para. 6 GG, see I. Pernice, Föderalismus im Umbruch, Zur Frage der Europafähigkeit des föderalen Deutschland, 2004, www.whi-berlin.de/documents/whi-paper0604.pdf (28.06.10). For Austria, see art. 23 e para. 1, 6 B-VG.

¹⁷³ European Commission Decision of 24 June 1988 setting up the Consultative Council of Regional and Local Authorities (88/487/EEC), OJEC, 06.09.1988, No. L 247, p. 23; see also M. Schweitzer, Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?, VVDStRL 1993, p. 49 at p. 58 *et seq.*

advisory powers¹⁷⁴ or the European Charta of the Regions, vesting them with veritable participation rights.¹⁷⁵ With the Lisbon Treaty, their participation rights have further been enhanced, establishing a better delimitation of competences as well as an early warning system, aimed at securing compliance with the principle of subsidiarity.¹⁷⁶

However, Federal States' participation rights at the law-making process of the European Union do in my view not justify the withdrawal of competences from the Federal States in the area of energy regulation. First of all, the decisions of the Federal States are, within the *Bundesrat*, subject to majority decisions. Furthermore, the right to participate at the law-making process is not able to compensate veritable decision-making rights.¹⁷⁷

2.1.1.5.3 The violation of article 79 para. 3 of the German Basic Law

Article 79 para. 3 of the GG states: "Amendments to this Basic Law affecting the division of the Federation into the Federal States, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 (GG) shall be inadmissible" (*unzulässig*). The so-called *eternity guarantee* withdraws the disposal of the identity of the free constitutional order even from the hands of the constitution-amending legislature. The constituent power has not granted the representative bodies of the People a mandate to change the constitutional principles, which are, according to article 79 para. 3 of the GG, fundamental.

¹⁷⁴ See *M. Schweitzer*, Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?, VVDStRL 1993, p. 49 at p. 58 *et seq.*

¹⁷⁵ The Charta has, however, no binding character; see *M. Schweitzer*, Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?, VVDStRL 1993, p. 49 at p. 58 *et seq.*

¹⁷⁶ See *A. Zoller*, Die Weiterentwicklung der Bund-Länder Zusammenarbeit in EU-Angelegenheiten vor dem Hintergrund des Vertrages von Lissabon, Jahrbuch des Föderalismus 2008, in: Jahrbuch des Föderalismus. Föderalismus, Subsidiarität und Regionen in Europa: Jahrbuch des Föderalismus 2008, 1. Auflage, Baden-Baden 2008, p. 570 at p. 571 *et seq.*

¹⁷⁷ See *D. Reich*, Zum Einfluß des Europäischen Gemeinschaftsrechts auf die Kompetenzen der deutschen Bundesländer, EuGRZ 2001, p.1 at p. 13.

Although European law prevails over the national laws of the Member States, including their constitutional laws, the German Federal Constitutional Court acknowledges exceptional cases, in which it examines whether European law complies with national constitutional law.¹⁷⁸

Indeed, where secondary European law collides with *German basic rights* (article 1 to article 20 of the GG), the jurisprudence of the German Federal Constitutional Court of the decisions *Solange I*¹⁷⁹, *Solange II*¹⁸⁰, and *Maastricht*¹⁸¹ applies.¹⁸² Where secondary European law stands in contradiction to the *structural principles of the German Constitution* (*Strukturprinzipien des Grundgesetzes*), as guaranteed by article 79 para. 3 of the GG, the German Federal Constitutional Court ruled that it had the competence to assume the no-binding character of European law (*Unverbindlichkeit des Gemeinschaftsrechts*). This view was reaffirmed by the Court in its recent judgment of 30 June 2009 with the German Basic, where it considered that the Basic Law did not permit the specific bodies of the legislative, executive and judicial power to dispose of the essential elements of the constitution, *i.e.* of the constitutional identity (article 23 para. 1 of the GG in connection with article 79 para. 3 of the GG). It ruled that, within the boundaries of its competences, it was necessary that it watched over the European

¹⁷⁸ Case 6-64, *Flaminio Costa v E.N.E.L.*, Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy, E.C.R (1964), 00585.

¹⁷⁹ In the decision *Solange I*, the German Constitutional Court ruled that, *as long as* (“solange”) the European Union did not dispose of its own codified catalogue of basic rights, it remained competent to examine whether secondary European law was compatible with the German basic rights (BVerfGE 37, 271 at 278).

¹⁸⁰ In the decision *Solange II* and the decision of *Maastricht*, the German Constitutional Court ruled that it had no longer the competence to rule on the compatibility of secondary European law with the German basic rights due to the fact that *a sufficient level of protection of basic rights had been established within the European Union* and that it constituted a level comparable to the one guaranteed by the German Basic Law (BVerfGE 73, 339 at 378 – 381).

¹⁸¹ In the decision of *Maastricht*, the German Constitutional Court ruled that it remained competent in two cases: it remained, firstly, competent to guarantee the unalterable level of basic rights (*Gewährleistung des unabdingbaren Grundrechtsstandards*), whereas the European Court of Justice provided, on the other side, the protection of the basic rights for the entire sovereign territory of the European Union; it remained, secondly, competent to examine whether the European Union acted outside of its competences conferred upon it through art. 23 para. 1 GG (*ausbrechender Rechtsakt, ultra-vires Handeln*), BVerfGE 89, 155.

¹⁸² For more details, see e.g. *W. Frenz*, Handbuch Europarecht, Wirkungen und Rechtsschutz, Band 5, Neuauflage, Berlin 2010, p. 105 – p. 106.

Union not violating the constitutional identity by its acts and not evidently transgressing the competences conferred upon it. It held that the transfer of competences, which had further been increased through the Treaty of Lisbon, and the independence of decision-making procedures therefore required an effective *ultra vires* review and an identity review of instruments of the European origin in the area of application of the Federal Republic of Germany.¹⁸³

The principles laid down in article 79 para. 3 of the GG are part of the structural principles of the German Constitution. European law may thus not lead to the result that the sovereignty of the Federal States is eroded (*Aushöhlung der Eigenstaatlichkeit der Länder*).¹⁸⁴ Being part of the German Federal order (*deutsche Bundesstaatlichkeit*), Federal States' existential state quality must be guaranteed, which includes the guarantee of an untouchable core set of own competences (*unantastbares Hausgut eigener Aufgaben*).¹⁸⁵

The assessment of whether article 35 para. 1 Directive 2009/72/EC deprives Federal States of their untouchable core set of competences depends upon the definition of Federal States' untouchable core set of competences. Whereas the *quantitative approach* is based on the *numbers of competences* that are withdrawn from the Federal States, the *qualitative approach* examines *which specific areas of competences* are affected.¹⁸⁶ The competences, which are part of the untouchable core set of competences, are *per se* not transferable. This includes Federal States' organisational, administrative, personal and financial sovereignty.¹⁸⁷ According to the *functional approach*, decisive factor are not the specific areas of competences affected, but rather

¹⁸³ See BVerfG, 2 BvE 2/08 of 30 June 2009, para. 261.

¹⁸⁴ See T. Giegerich, Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß: Wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung, 1. Auflage, Berlin 2003, p. 248 *et seq.*

¹⁸⁵ BVerfGE 34, 9 at 19 *et seq.*

¹⁸⁶ T. Giegerich, Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß: Wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung, 1. Auflage, Berlin 2003, p. 250 *et seq.*

¹⁸⁷ *Ibid.*

whether the Federal States remain in the position of taking measures that are of *political significance*. Federal States must remain in a position, which enables them to constitute a political counterbalance to the Federation. First of all, article 35 para. 1 Directive 2009/72/EC does not withdraw competences from the Federal States that are so numerous that their entire existence is endangered (quantitative approach). Moreover, article 35 para. 1 Directive 2009/72/EC does not withdraw from the Federal States competences that are *per se* not transferable (qualitative approach). Although article 35 para. 1 Directive 2009/72/EC is far-reaching in its consequences in that it not only *reduces* the competences of the Federal States, but *entirely excludes* them, it nevertheless needs to be viewed in a wider European context. Decisive factor is whether Federal States lose the ability to carry out their core competences. This is not the case. Federal States, despite the withdrawal of competences *in the area of energy regulation* remain, *overall seen*, a politically significant counterbalance to the Federation.

2.1.1.6 Other outcome through art. 35 para. 2 and 3 of Directive 2009/72/EC?

Both paragraphs 2 and 3 of article 35 of Directive 2009/72/EC have been added following the Council's Common Position (EC) No. 8/2009.¹⁸⁸ Article 35 para. 2 of Directive 2009/72/EC stipulates that, provided certain circumstances are met, the designation of a single national regulatory authority at national level is “without prejudice to the designation of other regulatory authorities at regional level within Member States”. The term “*without prejudice*” signifies, in my view, that the designation of a single national authority at national level has no effect on the existence of other regulatory authorities at regional level. Prerequisite is, however, that a representative is designated for representation and contact purposes at Community level. It also means that the obligation of paragraph 1 of article 35 of Directive 2009/72/EC exists, *irrespective of whether of other regulatory authorities have been*

¹⁸⁸ Common Position (EC) No 8 /2009 adopted by the Council on 9 January 2009 with a view to the adoption of Directive 2009/.../EC of the European Parliament and of the Council of ... concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, 24.03.2009, C 70 E/01 at 22.

designated at regional level within Member States. Article 34 para. 3 of Directive 2009/72/EC, allows, “*by way of derogation*” and under certain circumstances the designation of other regulatory authorities.¹⁸⁹ One can thus conclude that both, paragraph 2 and paragraph 3 of article 35 of Directive 2009/72/EC *attenuate*, at least to a certain extent, *the impact* that article 35 para. 1 of Directive 2009/72/EC has on Member States’ internal Federal structures. However, decisive factor is that, by virtue of paragraph 1 of Directive 2009/72/EC, the basic principle has been set forth; paragraphs 2 and 3 of article 35 of Directive 2009/72/EC are merely constituted as exceptions. The most important step to consolidate Member States’ existing national regulatory authorities at national and regional level to a single regulatory authority at national level has thus been taken.

2.1.2 Conclusion

Member States’ internal Federal structures are protected through European law. By enacting article 35 para. 1 of Directive 2009/72/EC, the European Union had the obligation to respect these Federal structures. Although its obligation may neither be drawn from its own Federal structure nor from a European principle of Federalism, it may nevertheless be deduced from article 4 para. 2 of the Lisbon Treaty, which protects Member States’ national identities as well as from article 4 para. 3 TEU, which establishes the mutual principle of loyalty. By enacting article 35 para. 1 of Directive 2009/72/EC, the European Union touches the core areas of the Federal structures that have been established in the area of energy regulation. It affects, in particular, the competences of the Federal States. Article 35 para. 1 of Directive 2009/72/EC can, however, be justified upon the principle of proportionality, *if it is seen*

¹⁸⁹ Art. 34 para. 2 and 3 of Directive 2009/72/EC may be seen as an attempt of proposing a solution to Member States, which have adopted a Federal system in the area of energy regulation; C. Schoser, representative of the European Commission, explains, in this regard, that aim of the European Commission is “not the disempowerment of national energy regulators at Federal States’ level and their replacement through a unitary regulatory system, but the intensification of cooperation of national energy regulators at European level”, in: J. Ebbinghaus, *Auf dem Weg zum “echten” Energiebinnenmarkt: Konsens im Ziel, Dissens über die Methoden*, Zur Fachtagung des Instituts für Berg- und Energierecht der Ruhr-Universität Bochum am 21.02.2008, EuZW 9/ 2008, p. 270 at p. 271.

in combination with paragraph 2 and paragraph 3. Article 35 para. 1 of Directive 2009/72/EC can be seen as a suitable measure, which is able to realise a single European energy market: it can furthermore be considered as necessary in order to harmonise and unify energy regulatory matters on European level. And it can finally be regarded as proportionate, *if* it is viewed in combination with paragraph 2 and paragraph 3 of article 35 of Directive 2009/72/EC. Although the jurisprudence of the German Constitutional Court of the decisions *Solange I*, *Solange II*, and *Maastricht* is applicable, article 35 para. 1 of Directive 2009/72/EC does, in my view, not violate article 79 para. 3 of the GG. As a result, although paragraph 2 and paragraph 3 of article 35 of Directive 2009/72/E may attenuate the consequences of paragraph 1 of the same article, the basic principle, requiring Member States to designate a single national authority at national level, has found its way in the European treaties. And it is this principle, which plunges federally structured Member States, such as Germany, in an unsolvable conflict between their national constitutional laws and European law.

2.2 The assignment of further duties and the attribution of a new set of powers upon national energy regulators through Directive 2009/72/EC

The second step to enhancing national regulators' powers is the assignment of further duties and the attribution of a new set of powers.¹⁹⁰

Based upon the European Commission's view, national energy regulators have not been vested with "*substantial powers and resources, allowing them to ensure proper market regulation*"¹⁹¹. Article 37 para. 4 of Directive 2009/72/EC requires Member States therefore to ensure that "regulatory authorities are granted *the powers enabling them to carry out the duties referred to in paragraph 1, 3 and 6 in an efficient and expeditious manner*".¹⁹² Sub-section will elaborate on the duties conferred upon

¹⁹⁰ See European Commission's Proposal, COM (2007) 528 final at 2.1.

¹⁹¹ *Ibid.*

¹⁹² Where independent transmission system operators have been designated, art. 37 para. 5 of Directive 2009/72/EC confers upon national energy regulators additional duties and powers.

national energy regulators through article 37 para. 1, 3 and 6 of Directive 2009/72/EC and will examine whether they have been increased in comparison to those established under Directive 2003/54/EC (2.2.1). Sub-section will critically analyse the new set of powers attributed to national energy regulators by virtue of article 37 para. 4 of Directive 2009/72/EC (2.2.2). Main focus will thereby be put on the issue of applicability of these powers to market areas, where effective competition has been established.

2.2.1 The assignment of further duties under the framework of Directive 2009/72/EC in comparison to the framework of Directive 2003/54/EC

“Regulatory oversight over undertakings active in the electricity (...) market needs to be increased”, the European Commission explains in its Proposal. “Electricity and gas differ fundamentally from other traded goods because they are network-based products that are impossible or costly to store. This makes them sensitive to market abuse (...)”.¹⁹³ As a consequence, compared to former regime 2003/54/EC, the duties of national energy regulators have been increased. They reach into further areas of Member States’ *internal* electricity markets (2.2.1.1) and extend to areas involving *cross-border issues* (2.2.1.2).

2.2.1.1 The increase of duties in Member States’ internal electricity markets

Regarding Member States’ internal electricity markets, article 37 para. 1, 3, and 6 of Directive 2009/72/EC establishes an *exclusive* list of duties for national energy regulators (“*shall have the following duties*”).¹⁹⁴ These duties exist in the areas of network infrastructure (2.2.1.1.1) as well as in areas, where effective competition exists (2.2.1.1.2).

¹⁹³ See European Commission’s Proposal, COM (2007) 528 final at 2.1.

¹⁹⁴ Art. 37 para. 1, 3, and 6 of Directive 2009/72/EC stands in contrast to art. 23 of Directive 2003/54/EC, which contained a *minimum set of competences* (shall “*at least be responsible*”).

2.2.1.1.1 In the areas of network infrastructure

Whereas in the area of *connection and access* to electricity networks, national energy regulators' duties remain unchanged,¹⁹⁵ they have been extended in the area of *operation of electricity networks*.

As to national energy regulators' *monitoring duties*, they have been increased. Under former article 23 para. 1 of Directive 2003/54/EC national energy regulators were, by way of example, entrusted with various monitoring duties. They comprised, for instance, the duty to monitor compliance with interconnection¹⁹⁶ and congestion management,¹⁹⁷ to monitor time management of connections and repairs of transmission and distribution networks¹⁹⁸, certain publication obligations for transmission and distribution system operators,¹⁹⁹ the duty to monitor the effective unbundling of accounts²⁰⁰ or the terms, conditions and tariffs of grid connection of new electricity producers.²⁰¹ Under article 37 para. 1 of Directive 2009/72/EC, national energy regulators have the *additional* duty to monitor investment plans of transmission system operators,²⁰² compliance with network security and reliability rules and monitoring standards and requirements for quality of network service,²⁰³ the level of transparency and ensure compliance with transparency obligations²⁰⁴ as well as to

¹⁹⁵ National energy regulators are required under both, former art. 23 para. 2 of Directive 2003/54/EC and art. 37 para. 6 and 7 of Directive 2009/72/EC, to fix or approve at least the methodologies used to calculate or establish the terms and conditions for connection and access to national networks as well as for provisions of balancing services. National energy regulators are, furthermore, empowered under both, former art. 24 para. of Directive 2003/54/EC and art. 37 para. 10 of Directive 2009/72/EC, to require transmission and distribution system operators to modify the terms and conditions.

¹⁹⁶ Art. 23 para.1 (a) of Directive 2003/54/EC.

¹⁹⁷ Art. 23 para.1 (b) of Directive 2003/54/EC.

¹⁹⁸ Art. 23 para.1 (c) of Directive 2003/54/EC.

¹⁹⁹ Art. 23 para.1 (d) of Directive 2003/54/EC.

²⁰⁰ Art. 23 para.1 (e) of Directive 2003/54/EC.

²⁰¹ Art. 23 para.1 (f) of Directive 2003/54/EC.

²⁰² Art.37 para. 1 (g) of Directive 2009/72/EC.

²⁰³ Art.37 para. 1 (h) of Directive 2009/72/EC.

²⁰⁴ Art. 37 para. 1 (i) of Directive 2009/72/EC.

monitor the implementation of rules by market participants under Regulation (EC) No 714/2009.²⁰⁵

As to national energy regulators' *decision-making powers*, they still act as dispute settlement authority in disputes, which involve transmission or distribution system operators and other market participants and which arise in relation to network connection and access or operation.²⁰⁶

As to *market abuse proceedings* in the area of monopoly networks, the role of national energy regulators is still limited to a mere reporting role. However, whereas article 23 para. 8 of Directive 2003/54/EC required the regulatory authority to provide a specific report on "market dominance, predatory and anti-competitive behaviour", this obligation is now merged into the general obligation of article 37 para. 1(e) of Directive 2009/72/EC, requiring to report "annually on its activity and the fulfilment of its duties to the relevant authorities of the Member States, the Agency and the European Commission."

2.2.1.1.2 In well-functioning competitive markets

In well-functioning competitive markets, the duties of national energy regulators have been increased in comparison to those established under former regime of Directive 2003/54/EC.²⁰⁷

Under former article 23 para. 1 (h) of Directive 2003/54/EC, the monitoring duties of national energy regulators were restricted to the duty to monitor "the level of transparency and competition". Under the new regime of Directive 2009/72/EC, national energy regulators are not only required of "monitoring the level of

²⁰⁵ Art. 37 para. 1 (q) of Directive 2009/72/EC.

²⁰⁶ See former art. 23 para. 5 in connection with para. 1, 2, and 4 of Directive 2003/54/EC and art. 36 para. 9 and 10 of Directive 2009/72/EC.

²⁰⁷ As to the question of whether the application of regulatory means, which aim to establish competition, are compatible with European primary law, see *U. Ehricke*, in *E. Homann*, *Berichte und Dokumente, Erwartungen an das neue Energierecht im nationalen und europäischen Kontext*, 35. Jahrestagung des Instituts für Energierecht an der Universität zu Köln, 9.11.2006, RdE 1/ 2007, p. 30.

transparency, [...] and ensuring compliance of electricity undertakings with transparency obligations” (article 37 *para. 1 (i)* of Directive 2009/72/EC), but also of “monitoring *the level and effectiveness of market opening and competition* at wholesale and retail levels, [...], *as well as any distortion or restriction of competition*, [...]” (article 37 *para. 1 (j)* of Directive 2009/72/EC). The term of article 37 *para. 1 (j)* of Directive 2009/72/EC “distortion or restriction of competition” presupposes, in my view, that competition *is existent* within the market area in question. Hence, based upon its clear wording, article 37 *para. 1 (i)* of Directive 2009/72/EC is also applicable to competitive markets. The application of regulatory means within areas, in which competition exists, can be regarded as compatible with European law, if they aim at “establishing and guaranteeing effective competition within upstream and downstream market areas.”²⁰⁸

2.2.1.2 The increase of duties of national energy regulators in areas involving cross-border issues

In areas involving cross-border issues, national energy regulators’ duties have been clarified and have furthermore been increased compared to those established under former regime of Directive 2003/54/EC. The European Commission justified its view on the grounds that “competitive, secure and environmentally sustainable internal electricity and gas markets within the European Union” can only be achieved by giving national energy regulators a “*clear mandate to cooperate at European level*, in close cooperation with the Agency for the Cooperation of Energy Regulators and the European Commission”.²⁰⁹ Hence, compared to former article 23 *para. 12* of Directive 2003/54/EC, which codified *in a mere general way* the obligation of national energy regulators “to cooperate with each other and with the European Commission in a transparent manner”, the new regime of Directive 2009/72/EC lays down, *in a very detailed way*, their cooperation duties. Whereas national energy regulators’ general

²⁰⁸ See U. Ehricke, in: E. Homann, Berichte und Dokumente, Erwartungen an das neue Energierecht im nationalen und europäischen Kontext, 35. Jahrestagung des Instituts für Energierecht und der Universität zu Köln, 9.11.2006, RdE 1/ 200, p. 30.

²⁰⁹ See European Commission’s Proposal, COM (2007) 528 final at 2.1.

obligation is codified in article 37 para. 1(c) of Directive 2009/72/EC, providing for cooperation “in regard to cross-border issues with the regulatory authority or authorities of the Member States concerned and with the Agency”, the detailed cooperation duties are set out in article 38 of Directive 2009/72/EC, a separate article dedicated to the new “regulatory regime for cross-border issues”.

2.2.2 The attribution of a new set of powers under the framework of Directive 2009/72/EC in comparison to the framework of Directive 2003/54/EC

Article 37 para. 4 sent. 1 of Directive 2009/72/EC requires Member States “*to ensure that national energy regulators are granted the powers enabling them to perform the duties referred to in paragraph 1, 3 and 6 in an efficient and expeditious manner*”. For this purpose, article 37 para. 4 of Directive 2009/72/EC establishes a “minimum set of powers”²¹⁰ (“*shall have at least the following powers*”).

2.2.2.1 Article 37 para. 4 sent. 2 (b) sent. 1 of Directive 2009/72/EC as the central provision of national energy regulators’ powers

Article 37 para. 4 sent. 2 (b) *sent. 1* of Directive 2009/72/EC constitutes the central provision as to national energy regulators’ powers. It sets forth a new set of powers, dividing them into investigation powers, decision-making and enforcement powers. These powers all have in common that they need to “*promote effective competition and ensure the proper functioning of the market*”. Considering this wording, the question arises whether these powers are restricted to monopoly areas of the electricity market or whether they extend to competitive areas as well. Where these powers extend to competitive areas as well, the question is how the national energy regulators and national competition authorities relate to each other and how the cooperation between these authorities can effectively be construed.

²¹⁰ Directive 2003/54/EC uses the term “*minimum set of competences*”, see Recital (15) of Directive 2003/54/EC.

Within monopoly areas, national regulatory authorities may undoubtedly use their entire set of powers. This follows from the term “to promote effective competition” of article 37 para. 4 (b) *sent. 1* Directive 2009/72/EC. Indeed, the promotion of effective competition *presupposes* that effective competition is not yet achieved; such is the case in monopoly areas of the electricity market.²¹¹

Within areas, where competition exists, a distinction needs to be drawn between the areas involved, on the one hand, and the competences concerned, on the other hand. Indeed, the areas involved, whether monopoly or competitive areas do not necessarily correlate with the competences of the national energy regulators or the competent in areas, where competition exists, just the same as national competition authorities may assume competences within monopoly areas of the electricity market. Decisive factor is, in my view, *which sector of law is concerned*.

In areas, where competition exists and where competition laws have been violated, the national competition authorities and not the national energy regulators are competent. This is the case *irrespective of whether these laws have been violated in monopoly or competitive areas*. This view is reflected in article 22c para. 3b of the European Commission’s Proposal, which explicitly stipulated, that the national regulatory authorities are competent only “*in the absence of violations of competition rules*”.

In areas, where competition exists without that, however, competition laws have been violated, the national energy regulators have been attributed certain powers. These powers have, compared to Directive 2003/54/EC, been extended under Directive 2009/72/EC. This conclusion may, for instance, be drawn from the term “to ensure the proper functioning of the market”, as laid down in article 37 para. 4 *sent. 2* (b) *sent. 1* of Directive 2009/72/EC. The term “to ensure” presupposes that competition principally exists. It becomes, furthermore, apparent upon article 37 para. 4 *sent. 1* of Directive 2009/72/EC and its referral to article 37 *para. 1 (j)* of Directive

²¹¹ See e.g. U. Ehricke, Die von der Kommission geplanten Kompetenzerweiterungen der Regulierungsbehörde auf dem Energiesektor nach den Entwürfen zur Änderung der Richtlinien 2003/54/EG und 2003/55/EG und deren Vereinbarkeit mit Art. 3 Abs. 1 lit.g) EG-Vertrag, RdE 6/2008, p. 159 at p. 161.

2009/72/EC. These provisions enable the national regulatory authorities to use their set of powers in order to assume their duty of “monitoring (...) *the effectiveness of market opening and competition* (...), as well as their duty of monitoring “*any distortion or restriction of competition* (...)”. Hence, article 37 para. 1 (j) of Directive 2009/72/EC enables the national energy regulators, in the absence of violation of competition laws, to monitor and evaluate the competitive areas of the electricity market. This includes, according to article 37 para. 1 (j) of Directive 2009/72/EC, the power of “providing any relevant information, and bringing any relevant cases to the relevant competition authorities”.

Directive 2009/72/EC establishes thus the obligation for national energy regulators *and* the competition authorities to monitor and evaluate, *in cooperation*, the electricity market. As such, article 37 para. 1 (j) of Directive 2009/72/EC contributes to a more effective control of the electricity market.²¹²

2.2.2.2 New investigation rights

Article 37 para. 4 (b) *sent. 1* of Directive 2009/72/EC empowers national energy regulators to “*carry out investigations into the functioning of the electricity markets, [...] to promote effective competition and ensure the proper functioning of the market.*” Applying the conclusion drawn above, these investigation rights may, in principle, be exercised in monopoly as well as in competitive areas, however, *below the threshold of a violation of competition laws*. However, as to national energy regulators’ investigation rights, article 37 para. 4 (b) *sent. 2* of Directive 2009/72/EC contains a specific regulation. It gives the national regulatory authorities the additional “*power to cooperate*” with, *inter alia*, the national competition authorities, where “*investigations relating to competition law*” become necessary. Hence, although competition law is relevant, national energy regulators may assume certain cooperation

²¹² U. Ehricke refers to the term “*Mehr-Augen-Prinzip*”; see U. Ehricke, Die von der Kommission geplanten Kompetenzerweiterungen der Regulierungsbehörde auf dem Energiesektor nach den Entwürfen zur Änderung der Richtlinien 2003/54/EG und 2003/55/EG und deren Vereinbarkeit mit Art. 3 Abs. 1 lit.g) EG-Vertrag, RdE 6/2008, p. 159 at p. 161.

powers. These powers exist, however, only “where appropriate”. At what point it is considered to be appropriate is, however, not defined by Directive 2009/72/EC. As to the settlement of disputes, article 37 para. 4 (e) of Directive 2009/72/EC vests national energy regulators with “appropriate rights of investigations”. These rights are restricted to the area of access and connection to electricity networks pursuant to article 37 para. 11 and 12 of Directive 2009/72/EC.

2.2.2.3 New decision-making powers

2.2.2.3.1 The power to decide upon any necessary and proportionate measures

Article 37 para. 4 sent. 2 (b) sent. 1 of Directive 2009/72/EC confers upon national energy regulators the power to “*decide upon [...] any necessary and proportionate measures* to promote effective competition and ensure the proper functioning of the market.”²¹³ Based upon its wording and the conclusion drawn above, the national regulatory authorities may therefore also take measures within competitive areas of the electricity market. Where, however, competition laws become relevant, their decision-making powers are *excluded*. This follows, in my view, from article 37 para. 4 sent. 2 (b) *sent. 2* of Directive 2009/72/EC *argumentum e-contrario*, which explicitly states that, where competition law is concerned, the national regulatory authorities may merely assume certain *cooperation powers*. Here again, it is not determined by Directive 2009/72/EC, at what point a measure can be regarded as “necessary and proportionate”.

As to their form, the decisions taken by national energy regulators must be “fully reasoned and justified to allow for judicial review” and be “available to the public while preserving the confidentiality of commercially sensitive information” pursuant to article 37 para. 4 (16) of Directive 2009/72/EC.

²¹³ National energy regulators may, for instance, impose penalties on public utility companies (section 94 sent. 1 EnWG), decision of the higher regional court Düsseldorf (OLG Düsseldorf), 27.05.2009, VI-3 Kart 45/08 (V), RdE 1/2010, p. 32 *et seq.*

2.2.2.3.2 The specific case of article 37 para. 4 (a) of Directive 2009/72/EC

Article 37 para. 4 sent. 2 (a) of Directive 2009/72/EC empowers national energy regulators to “issue binding decisions on electricity undertakings”. It does not confer further decision-making powers upon national energy regulators, but merely regulates the specific case of decisions taken by national energy regulators on *electricity undertakings*. In specifying that these decisions have *binding character*, it codifies the legal effect of these decisions. It implies, at the same time, that decisions issued on other market participants have no legally binding character.

2.2.2.4 New enforcement powers

Article 37 para. 4 sent. 2 (b) sent. 1 of Directive 2009/72/EC vests national energy regulators with new enforcement powers aimed at promoting effective competition and ensuring the proper functioning of the market (2.2.2.4.1). In addition, article 37 para. 4 (d) of Directive 2009/72/EC regulates the specific case of the imposition of penalties by the national energy regulators on electricity undertakings (2.2.2.4.2)

2.2.2.4.1 The power “to impose any necessary and proportionate measures”

Article 37 para. 4 sent.2 (b) sent. 1 of Directive 2009/72/EC confers upon national energy regulators the power to “*impose any necessary and proportionate measures* to promote effective competition and ensure the proper functioning of the market”. These powers may extend to competitive areas as well, provided that competition law is not concerned. Where competition laws become relevant, their enforcement powers are excluded. Again, Directive 2009/72/EC does not specify, at what point a measure can be regarded as necessary and proportionate.

2.2.2.4.2 The specific case of article 37 para. 4 sent. 2 (d) sent. 1 of Directive 2009/72/EC

Article 37 para. 4 sent.2 (d) sent.1 of Directive 2009/72/EC empowers national energy regulators 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”.

Article 37 para. 4 (d) of Directive 2009/72/EC does not contain further enforcement powers, but regulates the specific case of enforcement-powers taken by national energy regulators on electricity undertakings. Where national energy regulators intend to impose penalties upon electricity undertakings, they must fulfil specific obligations.

Such penalties imposed on electricity undertakings either through the national energy regulators or proposed to the court, must be “*effective, proportionate and dissuasive*”. It is furthermore required that electricity undertakings must have acted in violation of their obligations placed upon them by Directive 2009/72/EC or by binding decisions of the national energy regulators or the Agency.

2.2.2.5 New information rights

Article 37 para. 4 (c) of Directive 2009/72/EC confers upon national energy regulators the power to “request any information from electricity undertakings relevant for the fulfilment of its (their) tasks”. These powers may be assumed within monopoly areas well as competitive areas, *provided that competition law is not concerned*.

2.3 Conclusion

In comparison to former regime of Directive 2003/54/EC, the powers of national energy regulators have, undoubtedly, been enhanced under the regime of Directive 2009/72/EC.²¹⁴ This has, *firstly*, been achieved by virtue of article 35 para. 1 of Directive 2009/72/EC, which requires the consolidation of national energy regulators to a single regulatory authority at national level, thereby bundling their

²¹⁴ See *H. Lecheler*, Verschärfung des Regulierungsregimes durch die drei neuen Verordnungs-Entwürfe im Paket vom 19.09.2007, RdE 6/2008, p. 167 at p. 172.

powers to a single entity. The conflict, which arises in this regard between the constitutional laws of the Member States and European law, has thereby been resolved in an unsatisfactory manner. Indeed, article 35 para. 1 of Directive 2009/72/EC interferes deeply with the core areas of the Federal structures prevalent in Member States, such as in Austria and Germany. The solution that article 35 of Directive 2009/72/EC offers by introducing paragraphs 2 and 3 of Directive 2009/72/EC, does few to attenuate the huge impact of article 35 para. 1 of Directive 2009/72/EC on Member States' Federal structures. The enhancement of energy regulators' powers results, *secondly*, from an *increase of their duties*, extending them not only into further areas of Member States' internal electricity markets, including competitive areas, but also into areas involving cross-border issues. It has, *finally*, been achieved through article 37 para. 4 sent. 2 (b) *sent. 1* of Directive 2009/72/EC, which vests the national energy regulators with a *new set of regulatory powers*, including new investigation rights, decision-making powers, enforcement powers and information rights. The question of whether this set of powers is restricted to monopoly areas of the electricity market or whether it extends to competitive areas as well is, in particular, due to the imprecise wording of the central provision of article 37 para. 4 sent. 2 (b) *sent. 1* of Directive 2009/72/EC, not easy to answer. Its applicability *in areas where competition exists* gives rise to the question of delimitation of competences between the national energy regulators and the national competition authorities. Decisive factor is thereby not which specific area is involved, but rather which sector of law is concerned. As soon as competition laws have been violated, the national competition authorities become competent. An exception constitutes article 37 para. 4 (b) *sent. 2* of Directive 2009/72/EC, which confers upon the national energy regulators additional powers of investigation, however, only in cooperation with the relevant competition authorities.

The enhancement of national energy regulators' power is, however, of no benefit to the Member States. We will see that they lose their powers of control over their own national energy regulators.

3 The loss of power of the Member States over their own national energy regulators

National energy regulators' enhanced powers do not benefit the Member States which, on the contrary, lose power over their own national energy regulators. Their loss of power is mainly a result of the further strengthening of national energy regulators' independence in comparison to former Directive 2003/54/EC (3.1). The independence in also political terms, codified in article 35 para. 4 sent. 2 (b) (ii) of Directive 2009/72/EC, poses thereby a problem of compatibility with German and Austrian constitutional law (3.2).

3.1 The strengthening of national energy regulators' independence under the framework of Directive 2009/72/EC in comparison to the framework of Directive 2003/54/EC

*“Strengthening national energy regulators' independence” is a “key principle of good governance and a fundamental condition for market confidence” and “therefore a priority”, the European Commission claimed in its Proposal.*²¹⁵ As a consequence, compared to former regime of Directive 2003/54/EC national energy regulators' independence has further been strengthened. Whereas under the former regime of Directive 2003/54/EC national energy regulators were required to be independent in *legal, financial and functional terms*, under the regime of Directive 2009/72/EC, they are required to be independent in *also political terms* (3.1.1). As to the Austrian and German energy regulators, their status of independence differs considerably. This has the consequence that the analysis of whether the required political independence complies with Austrian and German constitutional law leads to a different result (3.1.2).

²¹⁵ See the European Commission's Proposal, COM (2007) 528 final at 2.2 and Recital (16).

3.1.1 The status of independence of national energy regulators under Directive 2003/54/EC and the actual situation under Austrian and German laws

Former article 23 para. 1 of Directive 2003/54/EC required national energy regulators to be “*wholly independent of the interests of the gas and electricity industry*”.²¹⁶ Leaving wide room for discretion to the Member States, the regimes, which were adopted in Austria and Germany, differ considerably from each other.

3.1.1.1 The legal, financial and functional independence of the *Austrian* energy regulators

The independence of national energy regulators from the interests of the electricity industry encompasses their legal, financial and functional independence.²¹⁷

As to the *legal* independence, the *E-control GmbH* and the *E-control Kommission* are both legal entities, which are separate from the ministries and other Government bodies. The *E-control GmbH* has been set up as a private non-profit corporation with limited liability. Its shares are fully owned by Austria (section 5 para. 2 sent. 2 of the E-RBG) and managed by the Ministry of Economics and Labour (section 3 para. 2 no. 2 in connection with section 5 para. 2 sent. 3 of the E-RBG).²¹⁸ The *E-control Kommission* has been established as a Federal European Commission, consisting of three members, *i.e.* a Federal judge, a member with relevant technical experience as well as a member with legal and economic experience (section 17 para. 1 of the E-RBG).²¹⁹

²¹⁶ See *e.g.* R. Pirstner-Ebner, Regulierungsbehörden der Elektrizitäts- und Gaswirtschaft – Neuerungen auf Gemeinschaftsebene, NVwZ 2004, p. 69 *et seq.*

²¹⁷ See *e.g.* B. Leitl, Regulierungsbehörden im österreichischen Recht, Wien 2006, p. 132.

²¹⁸ Federal Act on Regulatory Authorities in the Electricity and Natural Gas Sector and the Establishment of the *Energie-Control GmbH* and the *Energie-Control Kommission*, Federal Law Gazette I no. 121/2000 (art. 8 of the Energy Market Liberalisation Act), repealed through Federal Law I no. 30/2010.

²¹⁹ See CEER, IEB TF Regulatory Benchmark, Final Version 05-07-05, Draft on Austria – E-Control GmbH, p. 2; see also CEER, Regulatory Benchmark, Ref: C05-IEB-08-03, 6 December 2005, p. 8,

As to the *financial* independence, the budget process of the *E-control GmbH* is determined by Federal statute (section 6 of the E-RBG) and is separate from the central budget.²²⁰ Its budget is established on the basis of its estimated costs for the actual financial year (section 6 paragraph 2 of the E-RBG). The fees are charged to the operators of ultra-high voltage grids (section 6 paragraph 1 of the E-RBG). The budget is subject to approval by the supervisory board of the *E-control GmbH* (section 6 paragraph 2 sentence 2 of the E-RBG). It must be established in accordance with an ordinance of the Federal Minister of Economics and Labour, which has a right of supervision (section 3 paragraph 3 No.1a of the E-RBG). Annual audits must be performed in accordance with the Private Companies Act and the Commercial Law Statute. The Federal Financial Supervising Authority (*Österreichische Rechnungshof*) may also perform audits.²²¹

As to the *functional* independence, the activities of the *E-control GmbH* are principally supervised through the Federal Minister of Economics and Labour (section 3 para. 2 no.1 of the E-RBG, section 21 para. 1 of the E-RBG).²²² He may give written instructions to the *E-control GmbH* (section 21 para. 2 of the E-RBG)²²³, which must

http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_ERGEG_PAPER/Cross-Sectoral/2005/CEER_REGULATORY%20BENCHMARK_2005-12-06_PUBLIC.PDF (03.11.2010).

²²⁰ For more details on the financial independence of the *E-control GmbH*, see CEER, IEB TF Regulatory Benchmark, Final Version 05-07-05, Draft on Austria – E-Control GmbH, p. 4 *et seq.*

²²¹ See CEER, IEB TF Regulatory Benchmark, Final Version 05-07-05, Draft on Austria – E-Control GmbH, p. 4 *et seq.*; see also CEER, Regulatory Benchmark, Ref: C05-IEB-08-03, 6 December 2005, p. 24, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_ERGEG_PAPER/Cross-Sectoral/2005/CEER_REGULATORY%20BENCHMARK_2005-12-06_PUBLIC.PDF (03.11.2010).

²²² See *e.g.* B. Leith, *Regulierungsbehörden im österreichischen Recht*, Wien 2006, p. 197 *et seq.*; see, furthermore, P. Drexler, *Elektrizitätsrecht*, Österreichischer Verband für Elektrotechnik (ÖVE), Wien 2006, p. 111 *et seq.*

²²³ See CEER, IEB TF Regulatory Benchmark, Final Version 05-07-05, Draft on Austria – E-Control GmbH, p. 2; for the basic organisational structure of the Austrian regulators, see also Market Report 2007, National Report to the European Commission, p. 8 – p. 9, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/NATIONAL_REPORTS/NR_2007/NR_nl/E07_NR_Austria-LL_v2.pdf (25.09.10).

be published (section 22 of the E-RBG). Decisions of the *E-control GmbH* can be repealed to the *E-control Kommission* (section 16 para. 2 of the E-RBG). The members of the *E-control Kommission*, on the contrary, are not subject to governmental instructions within the exercise of office (section 19 of the E-RBG in connection with article 20 para. 2 of the Austrian Constitutional Act (*Bundesverfassungsgerichtsgesetz*, hence *B-VG*). Following the amendment of the Energy Regulatory Authorities Act in 2010, the Federal Minister of Economics and Labour (*Bundesminister für Wirtschaft, Familie und Jugend*) may, however, require the *E-control Kommission* to be informed on all its activities within the exercise of office (section 19a of the E-RBG). Decisions of the *E-control Kommission* cannot be repealed.²²⁴ However, appeal to the Federal Administrative Supreme Court (*Verwaltungsgerichtshof*) and the Federal Constitutional Court (*Verfassungsgerichtshof*) remains possible (section 20 para. 2 of the E-RBG).

3.1.1.2 The legal, financial and functional independence of the German energy regulators

As to the *legal* independence, the *BNetzA* is established as a separate higher Federal authority (*selbständige Bundesoberbehörde*) within the scope of business of the Federal Ministry of Economics and Technology (section 1 of the BEGTPG).²²⁵

As to the *financial* independence, the Federal Budget Code (*Bundeshaushaltsordnung*) is applicable to the budget of the *BNetzA*. The budget of the *BNetzA* is not separate, but is part of the general Federal budget.²²⁶ The network operators are obliged to contribute

²²⁴ See e.g. R. Pirstner-Ebner, *Regulierungsbehörden der Elektrizitäts- und Gaswirtschaft – Neuerungen auf Gemeinschaftsebene*, NVwZ 2004, p. 69 at p. 71.

²²⁵ See CEER, IEB TF Regulatory Benchmark, Final Version 05-07-05, Draft on Germany – Federal Network Agency, p. 3 *et seq*; see also CEER, Regulatory Benchmark, Ref: C05-IEB-08-03, 6 December 2005, p.25 and p. 26, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_ERGEG_PAPER/Cross-Sectoral/2005/CEER_REGULATORY%20BENCHMARK_2005-12-06_PUBLIC.PDF (09.08.2010).

²²⁶ See CEER, IEB TF Regulatory Benchmark, Final Version 05-07-05, Draft on Germany – Federal Network Agency, p. 5.

to the costs of the *BNetzA*, whereby the contributions may not exceed 60% of expenditure (section 92 para. 1 of the EnWG). The Federal Government may, in agreement with the Upper Chamber of Parliament (*Bundesrat*), adopt an ordinance on contributions by energy network operators pursuant to section 92 para. 3 of the EnWG. The *BNetzA* must prepare annual accounts in accordance with the Federal Budget Code. They are reviewed by the Federal Ministry of Finance and the Federal Government Accounting Office (*Bundesrechnungshof*).²²⁷

As to the *functional* independence, the *BNetzA* is bound to the instructions of the Federal Ministry of Economics and Technology. General instructions issued with regard to activities of the *BNetzA* must be published in the Federal Gazette in accordance with section 61 of the EnWG.²²⁸ Decisions of the *BNetzA* can, in first instance, be repealed to the Higher Regional Court (*Oberlandesgericht*) and, in second instance, to the Federal Court of Justice (*Bundesgerichtshof*).²²⁹

3.1.2 The status of independence of national energy regulators under Directive 2009/72/EC

Whereas under former Directive 2003/54/EC, national energy regulators were merely required to be independent from the “gas and electricity industry”, under Directive 2009/72/EC they shall be “truly independent of industry interests and *Government intervention*”.²³⁰

²²⁷ *Ibid*, p. 5 and p. 6; see also CEER, Regulatory Benchmark, Ref: C05-IEB-08-03, 6 December 2005, p.11, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_ERGEG_PAPER/Cross-Sectoral/2005/CEER_REGULATORY%20BENCHMARK_2005-12-06_PUBLIC.PDF (09.08.21010).

²²⁸ See CEER IEB TF Regulatory Benchmark, Final Version 05-07-05, Draft on Germany – Federal Network Agency, p. 6 *et seq.*

²²⁹ *Ibid*, p. 7.

²³⁰ See EurActiv, Liberalising the EU Energy Sector, 4.10.2005, last updated 7.07.2009, <http://www.euractiv.com/en/energy/liberalising-eu-energy-sector/art.-145320> (14.08.2010).

For this purpose, national energy regulators' shall be "*legally distinct and functionally independent from any other public or private entity*" (article 35 para. 4 sent. 2 (a) of Directive 2009/72/EC). "*Its staff and the persons responsible for its management shall act independently from any market interest*" (article 35 para. 4 sent. 2 (b) (i) sent. 1 of Directive 2009/72/EC). In addition, they shall be able to take "*autonomous decisions, independently from any political body*" (article 35 para. 5 sent.1 (a) of Directive 2009/72/EC) to establish "*separate annual budget allocations* as well as "*autonomy in the implementation of the allocated budget*" and shall have "*adequate human and financial resources*" (article 35 para. 5 sent.1 (a) of Directive 2009/72/EC). The members of the board or the top management shall be appointed for at least five years (article 35 para. 5 sent.1 (b) of Directive 2009/72/EC) and may be relieved from office only if "*they no longer fulfil the conditions set out in this Article* [article 34 of Directive 2009/72/EC] or if they have been *guilty of misconduct under national law*" (article 35 para. 5 sent. 3 of Directive 2009/72/EC).

Hence, in addition to national energy regulators' legal, financial and functional independence, Directive 2009/72/EC requires them to be independent in *also political terms*.

3.1.2.1 The political independence of article 35 para. 4 sent. 2 b (ii) of Directive 2009/72/EC

The political independence of an administrative body is mainly characterised through its capacity to take autonomous decisions (*Entscheidungsautonomie*). This again depends upon its place within the hierarchical structure of administration. The release of an administrative body from its obligation to comply with the instructions of its superiors represents, thereby, the "*symbol of political independence*".²³¹

²³¹ See K. Oertel, Die Unabhängigkeit der Regulierungsbehörde nach §§ 66 ff TKG, Zur organisationsrechtlichen Verselbständigung staatlicher Verwaltungen am Beispiel der Privatisierung in der Telekommunikation, Berlin 2000, p. 287.

Article 35 para. 4 sent. 2 (b) (ii) sent. 1 of Directive 2009/72/EC stipulates, that national energy regulators shall “*not seek or take direct instructions from any Government or other public or private entity when carrying out the regulatory tasks.*” To aim for an independence in also political terms has, according to the European Commission, become necessary, because former legislation did “not specify how such independence can be demonstrably ensured”, as well as it did “not guarantee independence from short-term political interests”.²³²

3.1.2.2 The terms and definitions of article 35 para. 4 sent. 2 b (ii) of Directive 2009/72/EC

Article 35 para. 4 sent. 2 b (ii) of Directive 2009/72/EC contains a twofold obligation. National energy regulators are, first of all, prohibited from seeking instructions from their Government upon *their own initiative* (“*seek*”). They are furthermore prohibited from accepting instructions issued upon *initiative of the Government* (“*take*”). The term “from any Government or any other public or private entity” signifies that national regulators must be independent from *any* political entity irrespective of whether this entity is organised according to private or public law. The term “private entity” is thereby to be seen in relation to the term “Government” and refers to the organisational form of a political entity. This becomes also apparent upon article 35 para. 5 (a) of Directive 2009/72/EC, which explicitly states that national energy regulators shall be independent “from any political body”. The independence must thereby be guaranteed during all term of office (“when carrying out the regulatory tasks”).

²³² See the European Commission’s Proposal, COM (2007) 528 final at 2.2.

3.2 In-depth analysis: the compatibility of article 35 par. 4 sent. 2 (b) (ii) of Directive 2009/72/EC with German and Austrian constitutional law

Article 35 para. 4 sent. 2 (b) (ii) of Directive 2009/72/EC is strongly opposed to the hierarchical model of administration as it is prevalent in Germany and Austria. This model is based upon the principle that administrative organs are, in principle, bound by the instructions of their superiors within the exercise of office (3.2.1). German and Austrian energy law follow this basic principle in that they principally require national energy regulators to comply with the instructions of their superiors (3.2.2). Both legal systems recognise, however, specific cases, in which a release of administrative organs from their obligation to comply with the instructions of their superiors is justified as an exception. The question is whether article 35 par. 4 sent. 2 (b) (ii) of Directive 2009/72/EC, in order to be compatible with German²³³ and Austrian²³⁴ constitutional law, can be recognised as such an exception (3.2.3).

3.2.1 The hierarchical model of administration in German and Austrian constitutional law

The principle of democracy as codified in the German (article 20 para. 2 of the GG) and Austrian (article 1 of the B-VG) constitution requires administration to be organised in a hierarchical way. From this principle follows that any state activity must be able to be traced back, directly or indirectly, to the will of the People.²³⁵ According to this connection of legitimation (*Legitimationszusammenhang*), any state organ must either directly be appointed by the People by means of election or must be appointed by an organ that has itself been appointed by the People. Within this democratic

²³³ S. W. Müller, Ministerialfreie Räume, 1985, p. 497; see also H. Schambeck, Regierung und Kontrolle in Österreich, 1. Auflage, Berlin 1997, p. 33 - p. 37.

²³⁴ See e.g. T. Öhlinger, Verfassungsrecht, 8. Auflage, Wien 2008, paras. 519 *et seq.*

²³⁵ For Germany, see e.g. F. E. Schnapp, in: I. v. Münch/ P. Kunig, Grundgesetzkomentar, Band 2, Art. 20 - 69, 5. Auflage, München 2001, art. 20, para. 18; see also B. Pieroth, in: H.D. Jarass/ B. Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 20 GG, para. 9 *et seq.*; see also H. Dreier, in: H. Dreier, GG, Grundgesetz Kommentar, Band II, Artikel 20 – 82, 2. Auflage, Tübingen 2006, art. 20 para. 86 *et seq.* and para. 113 *et seq.*

concept, the accountability of administration towards the organs representing the People plays a crucial role. This is well reflected in article 52 of the B-VG, which empowers the National Council and the Federal Council, *inter alia*, to examine the administration of affairs of the Federal Government, to interrogate its members about executive activities, to demand any relevant information (para. 1) or interrogate the head of institutions exempted from instructions on any subject of the administration of affairs (para. 1a).²³⁶ The parliamentary accountability is thereby linked to the highest administrative organs, which, being accountable towards Parliament for the acts carried out by the administrative organs subordinate to them, must have the power to direct and supervise these organs (*Leitungs-, Aufsichts- und Verantwortungszusammenhang*).²³⁷

As a consequence, based on the hierarchical model of administration, the German²³⁸ and the Austrian²³⁹ constitutional order establish the principle that organs, which carry out administrative tasks under the direction and supervision of the highest administrative organs of the Federation and the Federal States, are responsible to them in the exercise of their office and are, in principle, bound by their instructions.

In Austria as well as in Germany, the highest organs of administration on *Federal level* are the Federal President, the Federal Government and the Federal Ministers, on *Federal States' level* these are the Federal States' Governments. The entities among these administrative organs, which *supervise the tasks of the administrative organs subordinate to them*, are usually the Federal Government and the Federal States' Governments respectively (hence, thereafter referred to as “governmental

²³⁶ See B. Raschauer, Allgemeines Verwaltungsrecht, 3. Auflage, Wien 2009, p. 128, para. 356.

²³⁷ *Ibid.*

²³⁸ See e.g. H. Dreier, in: H. Dreier, Grundgesetz Kommentar, Band II, Art. 20-82, 2. Auflage, Tübingen 2006, art. 20, para. 124 *et seq.*

²³⁹ See e.g. T. Öhlinger, Verfassungsrecht, 8. Auflage, Wien 2008, paras. 503 *et seq.*; see also H. Maurer, Allgemeines Verwaltungsrecht, 17. Auflage, München 2008, § 21 Verwaltungsorganisation, p. 521 *et seq.*; see furthermore H. P. Bull/ V. Mehde, Allgemeines Verwaltungsrecht mit Verwaltungslehre, 8. Auflage, Heidelberg 2009, § 3, p. 43 – p. 61; see S. Detterbeck, Allgemeines Verwaltungsrecht, 6. Auflage, München 2008, p. 65 – p. 70.

instructions”). The Federal Government consists thereby of its *individual members*, *i.e.* the Federal Chancellor, the Federal Vice-Chancellor and the other Federal Ministers, on the one side (art. 69 para.1 *sent. 1* of the B-VG and art. 62 of the GG respectively) and of the Federal Government as *administrative body* under the chairmanship of the Federal Chancellor (art. 69 para.1 *sent. 2* of the B-VG and art. 65 of the GG respectively), on the other side. They are entrusted with the highest administrative business of the Federation (*oberste Verwaltungsgeschäfte des Bundes*), insofar as this is not assigned to the Federal President. On Federal level, the entities among the administrative organs that *usually carry out the specific administrative tasks in question* are the Federal ministries and the authorities subordinate to them (hence, thereafter referred to as “*administrative organs*”). Article 77 para. 1 of the B-VG provides in this regard that the Federal ministries and the authorities subordinate to them shall carry out the business of the Federal administration (*Besorgung der Geschäfte der Bundesverwaltung*). Similarly, article 65 of the GG stipulates that the Federal ministries are responsible to conduct, within the general guidelines of policy (*Richtlinien der Politik*) determined by the Federal Chancellor, the affairs of their departments independently and on their own responsibility. On Federal States’ level, the executive power of the Federation are *principally* exercised through the Federal States (in Austria the Land Governor, *Landeshauptmann* and the authorities subordinate to them) in their own right, *i.e.* in form of *indirect* Federal administration (*mittelbare Bundesverwaltung*), insofar as no Federal authorities exist (article 102 para. 1 of the B-VG) or insofar as the Basic Law does not provide otherwise (article 83 of the GG), *i.e.* in form of *direct* Federal administration (*unmittelbare Bundesverwaltung*). When carrying out indirect Federal administration, the Federal States’ authorities are subject to the instructions issued through the Federal Government and the individual Federal ministers (article 103 para. 1 of the B-VG in connection with article 20 of the B-VG and article 84 para. 5 and 85 para. 3 of the GG respectively).²⁴⁰

²⁴⁰ For more details, see *e.g.* B. Müller, Das österreichische Regulierungsbehördenmodell, Wien 2011, p. 145 *et seq*; see also B. Pieroth, in: H.D. Jarass/ B. Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 84, paras 16-17 and art. 85 para. 5 – 6.

The hierarchical model of administration can be seen as the counterpart to the principle of democratic accountability of the highest administrative organs towards Parliament (*das hierarchische Verwaltungsmodell als Pendant zur parlamentarischen Verantwortlichkeit der obersten Organe*).²⁴¹ Indeed, by virtue of the principle of democratic accountability of the highest administrative organs towards Parliament, the highest administrative organs can be held responsible before Parliament for the acts carried out by administrative organs that are subordinate to them. However, the accountability of the highest administrative organs towards Parliament for acts that are carried out by administrative organs subordinate to them is only justified, if these administrative organs can in return be held responsible before the highest administrative organs for these acts. The connection of responsibility between the administrative organs and Parliament is established by virtue of the obligation of the administrative organs to comply with the instructions of their superiors. It is due to this obligation that a connection of democratic accountability between the administrative organs and Parliament can be ensured.²⁴²

3.2.1.1 The obligation of administrative organs to comply with the instructions of their superiors as basic principle of constitutional law

The obligation of administrative organs to comply with the instructions of their superiors constitutes, in Germany (3.2.1.1.1) as well as in Austria (3.2.1.1.2), a basic principle of constitutional law.

²⁴¹ See e.g. T. Öhlinger, *Verfassungsrecht*, 8. Auflage, Wien 2008, paras. 519 *et seq*; see also H. Schambeck, *Regierung und Kontrolle in Österreich*, 1. Auflage, Berlin 1997, p. 27 *et seq*.

²⁴² For more details, see H.-H. Trute, in: W. Hoffmann-Riem/ E. Schmidt-Aßmann/ A. Voßkuhle, *Grundlagen des Verwaltungsrechts*, Band I: Methoden - Maßstäbe - Aufgaben - Organisationen, München 2006, § 6 Die demokratische Legitimation der Verwaltung, p. 307 *et seq*.

3.2.1.1.1 Article 20 para. 2 of the German Basic Law

In Germany, the principle, upon which the administrative organs are obliged to comply with the instructions of their superiors when carrying out administrative tasks, represents a basic principle of constitutional law.²⁴³

This principle is, contrary to the Federal Austrian Constitution, not explicitly codified in the German Basic Law. Its existence is however undisputedly recognised as a principle emanating from the *fundamental principles of the German Constitution*. Indeed, it is acknowledged by the Federal Constitutional Court and the German law doctrine as a principle of constitutional law and is applied as such in administrative practice. Lack of disposing of an explicit constitutional basis, this principle is deduced from the *principle of democracy*, which is enshrined in article 20 para. 2 of the GG.

Article 20 para. 2 of the GG stipulates: “*all state authority derives from the People. It shall be exercised by the People through elections and other votes and through specific legislative, executive and judicial bodies*”. The reason for deducing this principle from the principle of democracy has been summarised by the German Constitutional Court in two decisions rendered in 1986²⁴⁴ and 1993²⁴⁵: “within a free democracy, all state authority derives from the People [...]. This implies that the People are able to exert an effective influence on the organs of the state authority in the exercise of their office. Their acts must be based upon the will of the People and must be justified before them. The causal connection between the People and the exercise of state authority is established through the election by the People of Parliament, through the laws, which are enacted by Parliament and which serve as

²⁴³ See *H. Dreier*, in *H. Dreier*, *Grundgesetz Kommentar*, Band II, Art. 20-82, 2. Auflage, Tübingen 2006, art. 20, para. 124 *et seq.*; see also *K.-P. Sommermann*, in: *H.v. Mangoldt/ F. Klein/ C. Starck*, *GG, Kommentar zum Grundgesetz*, Band 2: Artikel 20 bis 82, 6. Auflage, München 2010, art. 20 para. 1 GG, para. 39.

²⁴⁴ Decision on foreigners’ right to vote for the Hanburg district elections (*Urteil zum Ausländerwahlrecht für die Hamburger Bezirksversammlungen*), BverfGE 83, p. 60 at p. 71 *et seq.*

²⁴⁵ Decision on the law on co-determination of Schleswig-Holstein (*Urteil zum Schleswig-Holsteinischen Mitbestimmungsgesetz*), BverfGE 93, p. 37 at p. 66 *et seq.*

benchmark for the executive authority, through the influence of Parliament on political decisions of the Government as well as *through a general subjection of public administration to the Government*.²⁴⁶ The German Constitutional Court states furthermore: “this [the democratic legitimation] requires that the public officials act *on behalf of and according to the instructions of the Government* [...] and that, as a result of it, the Government is put in a position, which enables it to assume responsibility before the People and Parliament for the tasks carried out by its public officials”.²⁴⁷

Hence, decisive factor is that the People remain, *at all times*, in a position, which enables them to exert an effective influence on the state authority in enabling them to exert an effective influence on those organs, which are *indeed* carrying out the administrative tasks. However, since the People are not legitimised to exert a *direct* influence on the executive authorities, their influence can only be achieved in an *indirect way*.²⁴⁸ Such indirect influence is achieved through the empowerment of the People to exert an influence *on Parliament*, which in return exerts an influence on the executive authority. The influence of Parliament on the executive authority may thereby be exercised in two different ways. It may, *firstly*, bind the executive authority in a *direct way*, by placing them under the obligation to strictly adhere to the laws. It may, *secondly*, bind the executive authority in an *indirect way*, by exercising a parliamentary control on the Government. The reason why the control of Parliament on the Government may only be exercised in an indirect way results from the fact that the German Basic Law accords a direct form of control only in few specific cases. Such is, for instance, the case with regard to the right of Parliament to require the

²⁴⁶ BverfGE 93, p. 37 at p. 66.

²⁴⁷ BverfGE 93, p. 37 at p. 67; in line with these principles, see BverfG, 2 BvL 5/98 and BvL 6/98, in *F. Becker*, The principle of democracy: watered down by the Federal Constitutional Court, German Law Journal, Vol. 04, No. 08, p. 759 *et seq.*, http://www.germanlawjournal.com/pdfs/Vol04No08/PDF_Vol_04_No_08_759-769_public_Becker.pdf (26.03.2011).

²⁴⁸ People have only a direct influence with regard to decisions that are taken by referendum as well as with regard to elections of the members of Parliament.

attendance of the Federal Government and the Federal Council during parliamentary sessions (*Zitierrecht*)²⁴⁹, the right of Parliament to be heard (*Interpellationsrecht*)²⁵⁰ or the constructive vote of no confidence in the Federal Chancellor (*konstruktives Misstrauensvotum*).²⁵¹ Apart from the control of Parliament on administrative organs through a strict adherence to the laws, administrative organs may be controlled by Parliament only through the possibility of subjecting them to the control of the Government. However, a control of the Government on the administrative organs is achieved through an obligation of the latter to comply with the instructions of the former. It is this obligation, which, in the end, establishes a connection of responsibility between the People and the administrative organs.

3.2.1.1.2 Article 20 para. 1 sent. 2 of the Austrian Federal Constitution

In Austria, the principle, which obliges administrative organs to comply with the instructions of their superiors when carrying out administrative tasks, represents a principle of constitutional law. Codified in article 20 para. 1 sent. 2 of the B-VG²⁵², it stipulates that “*they are responsible to their superiors for the exercise of office and are, save as otherwise provided for by laws pursuant paragraph 2, bound by the instructions of these*”. Article 20 para. 1 sent. 2 of the B-VG highlights the importance that is attached to the obligation to comply with governmental instructions *as a central element of the relationship of supervision and responsibility* (*Leitungs-und*

²⁴⁹ Art. 43 para. 1 GG.

²⁵⁰ Art. 43 para. 2 GG.

²⁵¹ Art. 67 GG.

²⁵² Despite various Federal constitutional laws and ordinary Federal laws containing constitutional provisions, including the high number of amendments, the B-VG of 1920 still represents the main body of Austrian Federal constitutional law. In 2008, the B-VG experienced a far-reaching constitutional reform, BGBl I 2008/2. For details, see A. Gamper, Introduction to the Study of the Law of the Austrian Federal Constitution, p. 92, www.icl-journal.com, (05.02.2008). See furthermore K. Lachmayer, Zwischen Ordnung und Chaos, von der Notwendigkeit der Verfassungsvereinigung und der Illusion des Inkorporationsgebotes, JRP 2007, p. 200 *et seq.*

Verantwortungszusammenhang) as it is laid down in article 20 para. 1 sent. 1 of the B-VG.²⁵³

3.2.1.1.2.1 Instructions

Instructions can be defined as orders (*Befehle*) that are inherent to relationships governed by public law and typically addressed from a superior organ to a subordinate organ (*Über-Unterordnungsverhältnis*). They entitle the superior organ to exercise power of order (*Befehlsgewalt*) solely by virtue of the fact that the organ is superior to the organ subordinate to it. The obligation to comply with the instructions of their superiors exists thus independently from the obligations that may result from the position of the organ as a civil servant (*dienstrechtliche Weisung*), which represents an instrument of supervision that emanates from civil service law (*dienstrechtliche Aufsicht*).²⁵⁴ Instructions constitute internal acts addressed to subordinate organs in their exclusive function as subordinate organs. Lack of specific formal requirements, they may take any form, such as requests (*Anordnungen*) or mandates (*Aufträge*), as long as they are recognisable as orders. They may be addressed to a single person (*individuelle Weisung*) or a specific group of people (*generelle Weisung*). There are no specific consequences laid down in article 20 para. 1 sent. 2 B-VG, which requires merely that the subordinate organs are responsible to the highest administrative organs for their exercise of office. This means that they have to report on and are responsible for their activities.²⁵⁵

²⁵³ See *B. Raschauer*, Art. 20 para. 1 sent. 2 B-VG, in: K. Korinek/ M. Holoubek, Österreichisches Bundesverfassungsrecht, Textsammlung und Kommentar, (Loseblattsammlung, Stand 2000), 2. Auflage, Wien 1999 (März 2000), para. 69.

²⁵⁴ For more details, *Ibid*, para. 20 and 72.

²⁵⁵ For more details, see *B. Raschauer*, Art. 20 para. 1 sent. 2 B-VG, in: Korinek/Holoubek, Österreichisches Bundesverfassungsrecht, Textsammlung und Kommentar, (Loseblattsammlung, Stand 2000), 2. Auflage, Wien 1999 (März 2000), para. 71 and 72.

3.2.1.1.2.2 Organs conducting the administration in the sense of article 20 para. 1 sent. 1 of the B-VG

Article 20 para. 1 sent. 2 of the B-VG, by stipulating that “*they*” are subject to instructions, refers to the organs as determined in article 20 para. 1 *sent. 1* of the B-VG. Considering the wording, subject to instructions are elected organs (*auf Zeit gewählte Organe*), appointed professional organs (*ernannte berufsmäßige Organe*) or contractually appointed organs (*vertraglich bestellte Organe*), which conduct administration in accordance with the laws.²⁵⁶ The term “organ”, as considered by some, is thereby neither restricted to the legal representatives of the respective organs (*Organwalter*), *i.e.* the functionaries who are *leading* the administrative office (*Dienststelle*), nor to public servants (*öffentlich Bedienstete*) or other functionaries of public offices. The Austrian administration is therefore not reserved to civil servants (*Beamtenvorbehalt*).²⁵⁷ Article 20 para. 1 of the B-VG stands in contrast to German constitutional law, which requires, upon article 33 para. 4 of the GG, that the exercise of sovereign authority on a regular basis is principally, conferred upon “*members of the public service who stand in a relationship of service and loyalty defined by public law*” (*öffentliches Dienst- und Treueverhältnis*). Article 33 para. 5 of the GG provides that the law governing the public services shall thereby be regulated and developed with due regard to the traditional principles of the professional civil service (*hergebrachte Grundsätze des Berufsbeamtentums*). Article 20 para. 1 of the B-VG includes therefore *any organ, which conducts administration*.²⁵⁸ This also comprises the entrustment of private entities with sovereign tasks, since they represent organs conducting administration.²⁵⁹ This follows, first of all, from the clear wording of

²⁵⁶ For more details, *ibid*, paras. 36 - 41, paras. 71 and 72.

²⁵⁷ See W. Berka, *Verfassungsrecht, Grundzüge des österreichischen Verfassungsrechts für das juristische Studium*, 3. Auflage, Wien 2010, para. 654; see also B. Raschauer, art. 20 para 1 B-VG, in: K. Korinek/ M. Holoubek, *Österreichisches Bundesverfassungsrecht, Textsammlung und Kommentar*, (Loseblattsammlung, Stand 2000), 2. Auflage, Wien 1999 (März 2000), para. 45.

²⁵⁸ B. Raschauer, Art. 20 para. 1 sent. 2 B-VG, in: Korinek/Holoubek, *Österreichisches Bundesverfassungsrecht, Textsammlung und Kommentar*, (Loseblattsammlung, Stand 2000), 2. Auflage, Wien 1999 (März 2000), para. 35 and 76 - 77.

²⁵⁹ *Ibid*, paras. 49 - 55 and paras. 76 -78. With regard to the legitimacy of outsourcing outsourcing administrative tasks to entities established outside of the hierarchical structure of administration and

article 20 para. 1 sent. 1 of the B-VG, which refers to the general term “organ”. The enumeration of the different types of organs is thereby historically grown and serves to determine the relationship of the organs to each other.²⁶⁰ It is furthermore confirmed by the Constitutional Court, which clearly states that any administrative organ, which is no highest organ of administration, must be subject to the instructions of its superior organ. It finally results from article 20 para. 1 sent. 1 of the B-VG, which contains central principles of constitutional law. It contains aspects of the principle of democracy in that it determines that the highest organs of administration are responsible to representatives elected by the people. It comprises furthermore elements of the principle of rule of law, guaranteeing that the laws are executed through organs, which are either directly democratically legitimised or which are responsible to the highest Federal and Federal States authorities. Another requirement of article 20 para. 1 sent. 1 of the B-VG constitutes the democratic legitimation, which aims to ensure that the organs are appointed either directly through the people or through organs, which dispose themselves of a sufficient legitimate basis. Moreover, article 20 para. 1 sent. 1 of the B-VG includes elements of the principle of separation of powers, highlighting, by virtue of the obligation to comply with governmental instructions, an organisational aspect of administration and herewith the delimitation to the independence of the judiciary. It finally shows the aim to unite the administrative organs by, *inter alia*, governmental instructions, to an administrative entity that is consistent within itself (*Einheit der Verwaltung*).²⁶¹

Hence, the enumeration of organs contained in article 20 para. 1 of the B-VG is neither comprehensive nor exclusive. Whatever organ is entrusted with the exercise of

the limits defined by the Constitutional Court particularly in the case VfSlg 14.473/1996 (*Austro Control Jurisprudence*), see 3.2.2.2.1.2.

²⁶⁰ For more details, see B. Raschauer, Art. 20 para. 1 sent. 2 B-VG, in: Korinek/Holoubek, Österreichisches Bundesverfassungsrecht, Textsammlung und Kommentar, (Loseblattsammlung, Stand 2000), 2. Auflage, Wien 1999 (März 2000), paras. 42 - 45.

²⁶¹ *Ibid*, paras. 6 - 10.

administrative functions is subject to the principles laid down in article 20 para. 1 of the B-VG.

3.2.1.1.2.3 The highest organs of the Federation and the Federal States in the sense of article 20 para. 1 sent. 1 of the B-VG

Article 20 para. 1 sent. 2 of the B-VG states that the administrative organs are responsible to “*their superiors*” and are principally bound by the instructions of “*these*”. The superiors are, in accordance with article 20 para. 1 *sent. 1* of the B-VG, the highest authorities of the Federation and the Federal States. These are principally the Federal ministers, the Federal States’ Governments (article 19 of the B-VG) and, although they do not dispose of their own public office subordinate to them, the Federal president and the Federal Government.²⁶²

As a result, contrary to German constitutional law, the obligation of the Austrian administrative organs to comply with the instructions of their superiors is therefore *explicitly and clearly codified by the Austrian Constitution*. Article 20 para. 1 sent. 2 of the B-VG is thus consistent with the classical hierarchical model of the Austrian administration established by article 20 para. 1 of the B-VG.

As a conclusion it can be said that the obligation of administrative organs to comply with the instructions of their superiors is recognised, in Germany as well as in Austria, as a basic principle of constitutional law. It represents in both countries an essential element of the principle of democracy.²⁶³

²⁶² In this sense also *B. Raschauer*, Art. 20 para. 1 sent. 2 B-VG, in: Korinek/Holoubek, Österreichisches Bundesverfassungsrecht, Textsammlung und Kommentar, (Loseblattsammlung, Stand 2000), 2. Auflage, Wien 1999 (März 2000), paras 28 *et seq.*

²⁶³ *Ibid.*, p. 69 *et seq.*

3.2.1.2 The release of administrative organs from the instructions of their superiors as exception of constitutional law

German (3.2.1.2.1) as well as Austrian constitutional law (3.2.1.2.2) recognise cases, in which administrative organs may be released from their basic obligation to comply with governmental instructions.

3.2.1.2.1 The exceptions recognised by *German* constitutional law

Due to the fact that the principle itself is not codified in the German Basic Law, no reference is made to the fact that cases exist, in which a release of administrative organs from governmental instructions can be justified.

In the German Basic Law, only few provisions explicitly allow for a release of administrative organs from governmental control. Examples are independent bodies such as the Federal Court of Audit (Bundesrechnungshof) according to article 114 para. 2 of the GG (the members of the Federal Court of Audit enjoy “judiciary independence”), the municipalities pursuant to article 28 para. 2 sent. 1 of the GG, the broadcasting stations by virtue of art. 5 para. 1 sent. 2 of the GG or the universities by virtue of article 5 para. 3 of the GG.

In German law doctrine and administrative practice, further exceptions from this principle are recognised. Examples are decisions taken by corporations, institutions or foundations of public law as well as decisions taken by expert committees or by privatised public entities.

The approach of the German law doctrine and administrative practice is consistent with the *German Constitutional Court*, which claimed at no time that this principle was to be applied without exception. On the contrary, the German Constitutional Court made clear that the principle constituted merely a “general” obligation of administrative organs to comply with governmental instructions. In a decision rendered in 2002, the German Constitutional Court pointed out that the principle of democracy was a principle, which was “open for development” (entwicklungsoffen) and “adjustable” (anpassungsfähig) whenever the circumstances so required. In its

judgment of 30 June 2009, the Constitutional Court confirmed this view, stating that the principle of democracy was open to the objective of integrating Germany into an international and European peaceful order.

3.2.1.2.2 The exceptions recognised by *Austrian* constitutional law

Upon article 20 of the B-VG, Austrian constitutional law recognises cases, which justify a release of administrative organs from their basic obligation to comply with governmental instructions.

The constitutional reform in 2008 has brought a fundamental change to article 20 of the B-VG.²⁶⁴ Whereas former article 20 para. 1 of the B-VG permitted a release of administrative organs from their basic obligation to comply with governmental instructions *only in those cases, which were “provided for by constitutional laws”*,²⁶⁵, revised article 20 para. 1 of the B-VG now allows for such a release in *all those cases, which are “otherwise determined by ordinary laws according to para. 2 [of article 20 B-VG]”*. A comparison of former article 20 para. 1 sent. 2 of the B-VG with current article 20 para. 1 of the B-VG shows that administrative organs may be released from their obligation to comply with governmental instructions not only on the basis of a provision with the status of constitutional law, but also on the basis of a provision, which disposes of the status of *sub-constitutional law*, i.e. *ordinary Federal or Federal state law*. However, in this regard, revised article 20 para. 1 sent. 2 of the B-VG requires that one of the categories listed in article 20 para. 2 of the B-VG is fulfilled.

The revision of article 20 para. 1 sent. 2 of the B-VG leads, in my view, to a shift of powers, which have been attributed to the constitutional legislator, the Federal legislator and the Federal States’ legislators. *On the one hand*, revised article 20 para. 1 sent. 2 of the B-VG *restricts* the powers of the constitutional legislator. Indeed,

²⁶⁴ BGBl I/2008.

²⁶⁵ See former art. 20 para. 1 sent. 2 B-VG.

whereas under former article 20 para. 1 sent. 2 of the B-VG the constitutional legislator was free to provide for a release of administrative organs from their obligation to comply with governmental instructions, its powers are now limited to the “categories” listed in article 20 para. 2 sent. 2 of the B-VG. Outside the scope of application of paragraph 2 of article 20 para. 2 sent. 2 of the B-VG no exceptions are permitted anymore. However, upon article 44 para. 1 of the B-VG, the constitutional legislator is still able to release administrative organs from their obligation to comply with governmental instructions. *On the other hand*, revised article 20 para. 1 sent. 2 of the B-VG *extends* the powers of Federal and Federal States’ legislator. They are now empowered to provide for a release of administrative organs from their obligation to comply with governmental instructions in all those cases listed in article 20 para. 2 sent. 2 of the B-VG.

As a conclusion it can be said that Austrian constitutional law sets out in *clear terms* the requirements, which must be met in order to release administrative organs from their obligation to comply with governmental instructions. In contrast, German constitutional law neither codifies the principle nor admits the fact, that exceptions from this principle exist.

3.2.2 The application of the hierarchical model of administration in German and Austrian energy law

3.2.2.1 The current situation under *German* energy laws

3.2.2.1.1 The *BNetzA* as an autonomous higher Federal authority

The *BNetzA* has been established as an autonomous higher Federal authority (*oberste Bundesbehörde*). As such, it is, in accordance with article 86 of the GG, part of the Federal administrative authorities, which carry out Federal administration (*bundeseigene Verwaltung*). The Federal administrative authorities consist of the highest Federal authorities, the higher Federal authorities (*Bundesoberbehörden*), the Federal authorities at intermediate level (*Bundesmittelbehörden*) and the lower

Federal authorities (*Bundesunterbehörden*). The highest Federal authorities exercise oversight, in terms of legality (*Rechtsaufsicht*) and of appropriateness of execution (*Fachaufsicht*), over the higher Federal authorities, which are directly subordinated to them (*unmittelbar nachgeordnet*) and which usually have no authorities subordinate to them. The Federal authorities at intermediate level are placed between the Federal ministries and the lower administrative level. They exercise, together with the lower Federal authorities (*Bundesunterbehörden*) subordinate to them, competences in specific and limited areas, such as in the area of foreign service (*Auswärtige Dienst*), Federal financial administration (*Bundesfinanzverwaltung*), administration of Federal waterways and shipping (*Verwaltung der Bundeswasserstrassen und Schifffahrt*) or Federal defence administration (*Bundeswehrverwaltung*), (article 87 para. 1 of the GG and article 78b of the GG).

The *BNetzA* finds its legal basis in article 87 para. 3 of the GG. It stipulates that an autonomous Federal higher authority may be established through Federal law for matters on which the Federation has legislative powers. Article 87 para. 3 of the GG article enables thus the Federation to establish a *Federal authority, which executes Federal laws*, although the execution of Federal laws is, either in their own right (article 84 para. 1 of the GG) or on Federal European Commission (article 85 of the GG), principally attributed to the Federal States (article 83 of the GG). Hence, article 87 para. 3 of the GG *de facto* establishes a Federal competence of administration (*Bundesverwaltungskompetenz*) within all areas of legislative competences of the Federation. Article 87 para. 3 of the GG represents therefore a *general provision of Federal competence of administration*.²⁶⁶ Article 87 para. 3 of the GG allows the Federation even to establish Federal authorities at intermediate and lower level where

²⁶⁶ See e.g. G. Hermes, in: H. Dreier, Grundgesetz Kommentar, Band III, Artikel 83 – 146, Tübingen 2000, art. 87, para. 65 *et seq.*

it is confronted with new responsibilities on matters on which it has legislative power.²⁶⁷

The Federation disposes of concurrent legislative power (article 74 para. 1 no. 11 of the GG) in the energy sector. In this area as well as in the area of executive legislative powers of the Federation, it is legitimate to establish, by Federal law, an autonomous Federal higher authority, such as the *BEGTPG*. Article 87 para. 3 of the GG establishes in this regard an exclusive competence of the Federation.²⁶⁸

3.2.2.1.2 Governmental control over the *BNetzA*

German energy laws strictly subject the German energy regulators to the instructions of their superiors and do not allow for any exception.

When examining German energy regulations, it becomes, *firstly*, apparent that the German energy regulators are *to the greatest possible extent* integrated into the hierarchical structure of the state. It becomes, *secondly*, apparent that cases exist, where the German Government itself assumes the role of the energy regulator.

Firstly, section 61 of the Energy Industries Act (*Energiewirtschaftsgesetz*, hence *EnWG*) establishes the *BNetzA* as an autonomous higher Federal authority within the business of the Federal Ministry of Economic Affairs and Labour.²⁶⁹ As such it is explicitly subject to the “*general instructions*” of the Federal Ministry of Economic Affairs and Labour. Moreover, the way in which the German energy regulators are

²⁶⁷ See e.g. G. Hermes, in: H. Dreier, Grundgesetz Kommentar, Band III, Artikel 83 – 146, Tübingen 2000, art. 87, para. 65 *et seq*; see also B. Pieroth, in: H.D. Jarass/ B. Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 87 GG, para. 12.

²⁶⁸ See H.-G. Henneke, B. Schmidt-Bleibtreu/ F. Klein/ H. Hofmann/ A Hopfauf, GG, Grundgesetz, Kommentar, 11. Auflage, Köln 2008, art. 87, p. 1756 – p.1757.

²⁶⁹ Section 54 para. 1 EnWG in connection with art. 2 para. 1 of the law establishing the *BNetzA* (Gesetz über die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen vom 7. Juli 2005, BGBl. I S. 1970, 2009), last amended through art. 15 para. 12 of law dated 5.02.09 (BGBl. I p. 160).

appointed also demonstrates their dependence on the Government. Indeed, upon section 3 para. 3 of the law establishing the *BNetzA*, the President and Vice-president of the *BNetzA* are appointed by the Federal Government. In addition, the constitution of the *BNetzA* shows that the German energy regulators are subject to governmental control. The advisory board of the *BNetzA*, which is supposed to assume tasks in an impartial way, is composed, in equal parts, of members of the *Bundestag* as well as of the *Bundesrat*.²⁷⁰ Moreover, the control of the Government on the German energy regulators is reinforced through section 54 para. 2 of the EnWG, which confers important powers to the Federal States in the area of energy network regulation. Finally, section 60a of the EnWG, establishing a Federal States' Committee (*Länderausschuss*) with the aim of securing a consistent Federal execution of national energy policy, is a further prove of German energy regulators' dependence on the Government.²⁷¹

Secondly, the Federal Government assumes certain regulatory tasks itself. Indeed, by virtue of section 24 of the EnWG, the German Government is empowered to establish a framework in the area of energy regulation by means of ordinances. These ordinances contain various provisions, which set out the limit for the tasks of the *BNetzA*. The same applies for the energy regulators on Federal States' level.²⁷²

3.2.2.2 The current situation under *Austrian* energy laws

Austrian energy laws are consistent with article 20 para. 1 sent. 2 of the B-VG in that they require the Austrian energy regulators, *in principal*, to comply with the instructions of the Federal Ministry of Economics and Labour. The *E-control GmbH* and the *E-control Kommission*²⁷³ are thereby subject to a specific regime of

²⁷⁰ Section 5 of the law establishing the *BNetzA* in connection with section 60 EnWG.

²⁷¹ See also art. 8 of the law establishing the *BNetzA*.

²⁷² See section 54 para. 1 sent. 1 no. 3 and 6 E-RBG.

²⁷³ Sections 4 and 15 E-RBG.

governmental control. Whereas the *E-control Kommission* is exempted from governmental control (3.2.2.2.1), the *E-control GmbH*²⁷⁴, as the main Austrian energy regulator, must, to a certain extent, comply with the instructions of the Government (3.2.2.2.2).

3.2.2.2.1 The *E-control GmbH* as a private entity outside of the hierarchical structure of administration

The *E-control GmbH* has been established as a legal entity of private law vested with own regulatory powers and competences. It is thus not merely an organ that supports the administrative authorities as established in article 133 no. 4 of the B-VG, but constitutes a veritable *administrative organ* (*Regulierungsbehörde*), entitled to carry out sovereign acts (*Hoheitsakte*).²⁷⁵ Its establishment outside of the hierarchical structure of administration (*Ausgliederung*), could, *on the one hand*, lead to the assumption that it is not subject to article 20 para. 1 of the B-VG. Its exercise of administrative tasks could, *on the other hand*, signify that it needs to be integrated into the hierarchical structure of administration.

3.2.2.2.1.1 The legitimacy of outsourcing administrative tasks to entities established outside of the hierarchical structure of administration

The outsourcing of administrative tasks to entities outside of the hierarchical structure of administration, either as entities of private or public law, is recognised as being principally compatible with the Austrian constitutional law.²⁷⁶ Neither Austrian constitutional law nor the Austrian Constitutional Court prohibits the outsourcing of

²⁷⁴ Section 5 para. 2 E-RBG.

²⁷⁵ See e.g. B. Müller, *Das österreichische Regulierungsbehördenmodell*, Wien 2011, p. 141 *et seq*; see also B. Raschauer, article 20 B-VG, in: K. Korinek/ M. Holoubek, *Österreichisches Bundesverfassungsrecht, Textsammlung und Kommentar*, (Loseblattsammlung, Stand 2000), 2. Auflage, Wien 1999 (März 2000), para. 47; see furthermore T. Öhlinger, *Weisungsfreie Verwaltungsbehörden nach der B-VG Novelle*, BGBl I 2008/2, JRP 2008, p. 85 at p. 89.

²⁷⁶ See e.g. B. Raschauer, art. 20 para 1 B-VG, in: K. Korinek/ M. Holoubek, *Österreichisches Bundesverfassungsrecht, Text und Kommentar*, (Loseblattsammlung, Stand 2000), 2. Auflage, Wien 1999 (März 2000), para. 47.

administrative tasks *per se*. Indeed, the B-VG, although not referring to it, does not prohibit it either.²⁷⁷ In addition, the Austrian constitution provides in article 10 to article 15 of the B-VG merely that the legislative and executive powers fall either within the competences of the Federation or the Federal States. It does not stipulate whether these competences have to be carried out by the Federation and the Federal States themselves or whether they may also be exercised through entities established outside of the hierarchical structure of administration.²⁷⁸ As a result, article 20 para. 1 of the B-VG does not act as a barrier to the outsourcing of administrative tasks (*Ausgliederungssperre*).²⁷⁹

3.2.2.2.1.2 The limits of outsourcing administrative tasks to entities established outside of the hierarchical structure of administration (*Austro Control Jurisprudence*)

The outsourcing of administrative tasks to entities established outside of the hierarchical structure of administration is subject to limits, which have been clearly defined by the Constitutional Court in the case VfSlg 14.473/1996 (so-called *Austro-Control jurisprudence*).²⁸⁰

In this case, the Constitutional Court ruled that the outsourcing of administrative tasks to entities outside of the hierarchical structure of the state was only permitted insofar as no core functions of the state (*staatliche Kernaufgaben*) were concerned. Core functions included, for instance, tasks relating to criminal law.²⁸¹ In addition, only

²⁷⁷ In this sense, B. Müller, *Das österreichische Regulierungsbehördenmodell*, Wien 2011, p. 146.

²⁷⁸ *Ibid*, p. 45 *et seq.*

²⁷⁹ See e.g. B. Raschauer, art. 20 para 1 B-VG, in: K. Korinek/ M. Holoubek, *Österreichisches Bundesverfassungsrecht, Textsammlung und Kommentar*, (Loseblattsammlung, Stand 2000), 2. Auflage, Wien 1999 (März 2000), para. 55.

²⁸⁰ For more details, *ibid*, para. 54.

²⁸¹ See e.g. K. Pabel, *Judgement on the Mandatory Civil Service: The influence of the Fundamental Rights on the Discussion about Outsourcing*, ICI journal, Vol. 4, 2/2010, p. 222 *et seq.* <http://www.internationalconstitutionallaw.net/download/2dda9e5f8ee22702cc7e944ab5e5e2d3/Pabel.pdf> (26.02.2011).

single administrative tasks (*vereinzelte Aufgaben*) and no entire administrative areas (*ganze Verwaltungsbereiche*) could be conferred upon such entities. The Court did, however, not determine, at which point the threshold from a delegation of single administrative tasks to an entire administrative area was exceeded.²⁸² In the case VfSlg 14.474/1996, the remaining power of the Federal minister to enact ordinances (*Verordnungserlassung*) was established as possible criteria of delimitation. In the case VfSlg 16.995/2003 (ECG), it was the requirement for outsourced entities to dispose of an ordinance as their legal basis (*Verordnungsermächtigung*).²⁸³ Moreover, according to the Constitutional Court, the outsourcing of administrative tasks to entities outside of the hierarchical structure of administration has to comply with the principle of equity (*Sachlichkeitsgebot*) and efficiency (*Effizienzgebot*), which requires the examination of whether such outsourcing can be justified (*Vertretbarkeitskontrolle*).²⁸⁴ The Court did finally rule that entities outsourced from the state structure were nevertheless required to be subject to the instructions of their superiors in order to comply with the principle of accountability towards Parliament (*Weisungs- und Verantwortungszusammenhang*).²⁸⁵ According to the Constitutional Court, article 20 of the B-VG is not directly applicable to entities outsourced from the state structure, if they carry out sovereign tasks. In this case, the legislator is obliged to provide for rules, which confer upon the highest organ effective tools of direction and control. If these entities carry out non-sovereign tasks, the question, of whether article 20 B-VG is directly applicable, remains. It must, however, at least be

²⁸² See VfSlg 14.474/1996; see furthermore *H. Eberhard*, Limits of outsourcing “core functions” of the state such as the execution of criminal law, Austrian Constitutional Court Judgment from 12 December 1991, G 269/01, VfSlg 16.400, ICI journal, Vol. 4, 2/2010, p. 217 at p. 218.

²⁸³ See *e.g. B. Müller*, Das österreichische Regulierungsbehördenmodell, Wien 2011, p. 149 and p. 150.

²⁸⁴ *Ibid*; see also *B. Raschauer*, art. 20 para 1 B-VG, in: K. Korinek/ M. Holoubek, Österreichisches Bundesverfassungsrecht, Textsammlung und Kommentar, (Loseblattsammlung, Stand 2000), 2. Auflage, Wien 1999 (März 2000), para. 54.

²⁸⁵ See *B. Müller*, Das österreichische Regulierungsbehördenmodell, Wien 2011, p. 151 *et seq.*

guaranteed that, where the exercise of tasks can be qualified as “leading the administration”, respective tools of control are in place (*Ingerenz*).²⁸⁶

In Germany, the outsourcing of administrative tasks is subject to similar restrictions: only definable parts of administrative tasks may be outsourced (*abgrenzbare Teilaufgaben*); the core area of the administrative matter (*Kernbereich der Verwaltungsmaterie*) must remain within the competence of the administrative authority; and the connection to the state authority (*Anbindung an den Staat*) must be guaranteed.²⁸⁷ Moreover, the limits laid down by the Austrian Constitutional Court recall the limits that have been established by the German Constitutional Court with regards to the transfer of competences from the Federation to the European Union and article 79 para. 3 of the GG. The German Court held that an untouchable core set of own competences (*unantastbares Hausgut eigener Aufgaben*) had to remain with the Federal States in order to guarantee their sovereignty.²⁸⁸ As criteria of determination of the “untouchable core set of competences” different approaches were considered, including the *quantitative approach*, which referred to the number of competences withdrawn from the Federal States, the *qualitative approach*, which examined what specific areas of Federal States’ competences were affected and the *functional approach*, which examined whether core competences of the Federal States had been withdrawn. The German Court aimed at ensuring that the sovereignty of the Federal States (*Eigenstaatlichkeit der Länder*) was not eroded, which was triggered through a transfer of competences from the Federation to the European Union. Similarly, the Austrian Constitutional Court aimed to guarantee that state functions are not withdrawn from public state power. Hence, in both cases, the aim is to uphold the constitutional Federal order and, in particular, the hierarchical structure of administration. It is merely on a *different level within the state structure*, that the

²⁸⁶ For more details, see *B. Raschauer*, Allgemeines Verwaltungsrecht, 3. Auflage, Wien 2009, paras. 376 -378.

²⁸⁷ See *e.g. B. Pieroth*, in: Jarass/Pieroth, H.D. Jarass/ B. Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 87 GG, para. 16.

²⁸⁸ BVerfGE 34, 9 at 19 *et seq.*

decisions have been taken: one on the level of the European Union and the Member States, the other on the level of public administration. In both cases, the overall aim is to maintain the lien of responsibility that is established between entities carrying out administrative tasks and Parliament.

As a result, although established outside of the hierarchical structure of administration, Austrian constitutional law requires *the E-control GmbH* principally to comply with the instructions of its superiors.

3.2.2.2.2 Governmental control over the *E-Control GmbH*?

The Energy Regulatory Authorities Act is consistent with Austrian Constitutional law in that it subjects the *E-control GmbH* to governmental control. Pursuant to section 21 para. 2 of the Energy Regulatory Authorities Act (*Energieregulierungsbehördengesetz*, hence E-RBG), the activities of the *E-control GmbH* are subject to different forms of supervisory control of the Federal Ministry of Economics and Labour.²⁸⁹ Central provision is section 4 and section 21 para. 2 of the E-RBG. These provisions confer upon the Federal Ministry of Economics and Labour the *general right* to give instructions to the *E-control GmbH* within the exercise of its supervisory functions. The only precondition is that the instructions of the Federal Ministry of Economics and Labour are set out in writing and that they are followed by reasons. Another provision, which demonstrates well the extent to which extent the *E-control GmbH* is subject to governmental control, is section 21 para. 4 of the E-RBG. This provision entitles the Federal Ministry of Economics and Labour to revoke the appointment of the managing director of the *E-control GmbH*, if the latter fails to comply with its instructions. The right of revocation of the Federal Ministry of Economics and Labour is thereby without prejudice to the right of the General Assembly to revoke the managing director of the *E-control GmbH* by shareholder

²⁸⁹ Section 21 para. 1 E-RBG.

resolution or by court order on important grounds.²⁹⁰ Finally, the *E-control GmbH* is also subject to the instructions of the *E-control Kommission* in all those cases, in which it assumes tasks on behalf of the latter.²⁹¹

3.2.2.2.3 Governmental control over the *E-Control Kommission*?

The *E-control Kommission* is constituted as a collegial body with a judicial element in the meaning of articles 20 para. 2 of the B-VG and 133 no. 4 of the B-VG. Pursuant to article 20 para. 2 no. 3 and article 133 no. 4 B-VG in connection with section 19 of the E-RBG, the members of the *E-control Kommission* are not bound by any instructions within the exercise of their office.

As a conclusion it can be said that the German and Austrian energy laws are consistent with the German and Austrian constitutional law respectively, in that they subject their main national energy regulators, in principle, to the instructions of the Government.

3.2.3 Article 35 par. 4 sent. 2 (b) (ii) of Directive 2009/72/EC as recognised exception of German and Austrian constitutional law?

3.2.3.1 Under *German* constitutional law

Under German constitutional law administrative organs are, in principal, bound by the instructions of their superiors (“*governmental instructions*”).²⁹² The exercise of public authority through administrative organs that have been released from their

²⁹⁰ Sections 5 para. 5 and 21 paras. 1 and 4 E-RBG in connection with section 16 of the Limited Liabilities Companies Act (RGG no 58/1906): for more details, see *P. Draxler/ C. Regehr*, E-Recht: Der österreichische Weg, 1. Auflage, Wien 2007, p. 94 *et seq.*

²⁹¹ Section 15 para. 2 E-RBG.

²⁹² See *B. Pieroth*, in: H.D. Jarass/ B. Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, art. 20 GG, no. 10.

obligation to comply with governmental instructions is thus, in principal, incompatible with German constitutional law. As a result, exceptions from this constitutional principle are recognised in only few cases.²⁹³ In addition to the exceptions explicitly laid down by the German Basic Law, the German Constitutional Court has developed specific categories, in which a release of administrative organs from the obligation to comply with governmental instructions is recognised as being constitutional.

Among these categories are administrative decisions that are classified as being decisions of “minor political relevance” (*Verwaltungsentscheidungen von geringer politischer Tragweite*) (3.2.3.1.1). Regarded as constitutional are, furthermore, cases, in which the obligation of administrative organs to comply with governmental instructions is substituted through other elements of democratic legitimation (3.2.3.1.2) or which is compensated by some other form of governmental control (3.2.3.1.3)

Whether article 35 4b (ii) sent. 1 of Directive 2009/72/EC can be classified as one of the categories developed by the German Constitutional Court, will be dealt with in the following.

3.2.3.1.1 Energy regulatory decisions as decisions of “minor political relevance”?

According to German constitutional law, administrative organs may, in principal, be released from their obligation to comply with governmental instructions, if their decisions are of “*minor political relevance*” (3.2.3.1.1.1). Energy regulatory decisions, in order to fall within this category, must thus constitute decisions of “minor political relevance” (3.2.3.1.1.2).

²⁹³ For a detailed overview, see C. Fichtmüller, Zulässigkeit ministerialfreien Raums in der Bundesverwaltung, AöR 91 (1966), 297 *et seq*; see also B. Pieroth, in: Jarass/Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 65 GG, no. 1 and art. 86, no. 3; as to the privatization of the telecommunications and post sector, see e.g. T. Mayen, Verwaltung durch unabhängige Einrichtungen, DÖV 2004, p. 45 *et seq*; regarding the right of supervision on the BNetzA, see W. Kahl/ A. Glaser, Wer führt die Fachaufsicht über die Bundesnetzagentur bei Ausführung des EEG, IR (4) 2008, p. 74 at p.76.

3.2.3.1.1.1 Administrative decisions of “minor political relevance”

In the decision on the law of employee representation of Bremen²⁹⁴, the German Constitutional Court (*Bundesverfassungsgericht*) ruled that there were administrative tasks, which could, by virtue of their “*political relevance*”, not generally be withdrawn from the scope of responsibility of the Government and be conferred upon administrative organs that are independent from the Government and the Parliament.²⁹⁵ The Court based its view on the principle of separation of powers (*Gewaltenteilungsprinzip*) and the role of the Government (*Regierungsfunktion*).²⁹⁶ The Court did not define, at which point administrative decisions were to be considered as politically relevant but pointed out that, contrary to decisions of minor political relevance, decisions of *major* political impact were those, which had far-reaching economic consequences and which fell into the decision-making competences of the Government.²⁹⁷

In the decision on foreigners’ voting rights for the representatives of the districts of Hamburg²⁹⁸, the German Constitutional Court clarified that the recognition of an administrative task as one of minor relevance was, *on itself*, not sufficient to justify a release of administrative organs from their obligation to comply with governmental instructions. The Court emphasised that it was *additionally* necessary that the competences of the public official were strictly limited to the subject matter of the individual case (“*gegenständlich im einzelnen...eng begrenzt*”)²⁹⁹ as well as strictly limited within their scope of application (“*und auch ihrem Umfang nach eng*

²⁹⁴ BVerfGE 9, 268 (*Entscheidung zum Bremischen Personalvertretungsgesetz*).

²⁹⁵ BVerfGE 9, 268 at 282; see also BVerfGE 83, 130 at 150; for further details, see *B. Pieroth*, in: Jarass/Pieroth, H.D. Jarass/ B. Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 86, no. 3.

²⁹⁶ *Ibid* at 281; see also *S. Broß*, in I. v. Münch/ P. Kunig, Grundgesetz-Kommentar, Band 3: Artikel 70 – 146, 6. Auflage, München 2001, art. 86, no. 16.

²⁹⁷ BVerfGE 9, 268 at 281.

²⁹⁸ BVerfGE 83, 60. (*Entscheidung zum Ausländerwahlrecht für die Hamburgischen Bezirksvertretungen*).

²⁹⁹ BVerfGE 83, 60 at 74.

begrenzt”).³⁰⁰ Moreover, the content of the decision needed to be pre-structured to an extent, which permitted to reduce the decision to an in-detail verifiable execution of the laws (“...und die zu treffende Entscheidung inhaltlich soweit vorstrukturiert ist, dass sie sich auf etwa die messbar richtige Plan- oder Gesetzesdurchführung beschränkt”).³⁰¹

It is only upon the fulfilment of these requirements that a release of administrative organs from their obligation to comply with governmental instructions can be regarded as constitutional.

3.2.3.1.1.2 Energy regulatory decisions of “minor political relevance”?

The question of whether energy regulatory decisions constitute decisions of minor political relevance cannot generally be answered. It is rather necessary to differentiate between the different areas of energy regulation involved.

To be included in the assessment are all those decisions, which fall within the scope of application of article 35 para. 4b (ii) sent. 1 of Directive 2009/72/EC. Article 35 para. 4b (ii) sent. 1 of Directive 2009/72/EC requires national energy regulators to be independent from the Government or any other public or private entity “*when carrying out the regulatory tasks*”. “The regulatory tasks” are neither listed under the definitions of article 2 of Directive 2009/72/EC nor are they specified in article 35 of Directive 2009/72/EC itself with the consequence that it applies to *any* regulatory task. Moreover, based on its wording, the regulatory tasks are not restricted to a specific area of energy regulation. As a result, article 35 para. 4b (ii) sent. 1 of Directive 2009/72/EC requires national energy regulators to be independent in respect of *any* regulatory decision taken within *any* area of energy regulation.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid*; see also BVerfGE 83, 130 at 150, in: NJW 1991, p. 899 *et seq.*

When examining selected areas of energy regulation, it appears that energy regulatory decisions constitute partly decisions of major political relevance, partly decisions of minor political relevance.

Within the area of energy supply, for instance, energy regulatory decisions are decisions of *major* political relevance rather than of minor political relevance.

Firstly, based on the definition of the German Constitutional Court, decisions taken in this area have far-reaching economic consequences. Being generally addressed to a large part of the population, they usually entail important financial consequences. Furthermore, they have a considerable impact on the entire energy sector in that they influence the organisation and development of one of the most important economical sectors. *Secondly*, these decisions fall into the decision-making competence of the Government. Article 74 no. 11 of the GG stipulates that the concurrent legislative powers (*konkurrierende Gesetzgebung*) extend to the area of the law relating to economic matters (*Recht der Wirtschaft*), which includes, *inter alia*, the energy industry (*Energiewirtschaft*). The energy industry encompasses not only the generation of energy (*Energiegewinnung*), but includes also the distribution (*Energieverteilung*) of energy, including the safeguarding of energy supply.³⁰² Although article 72 para. 1 of the GG determines that the Federal States are principally competent for concurrent legislative matters the Federation may seize the matter by exercising its legislative powers. Indeed, the Federal States are only competent, “*as long and to the extent that the Federation does not exercise its legislative powers through Federal law*”.³⁰³ As to the area of energy industry, the Federation exercised its legislative powers through, *inter alia*, enacting the Energy Industry Act (*Energiewirtschaftsgesetz*). Furthermore, in 2008, the higher Court of Celle³⁰⁴ ruled that tasks that were assumed in the area of energy supply were to be regarded as tasks of services of general interest (*Aufgaben*

³⁰² See *B. Pieroth*, in Jarass/Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 74 GG at no. 22.

³⁰³ Art. 72 para. 1 GG; see *B. Pieroth*, in Jarass/Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 72 GG at no. 6 *et seq.*

³⁰⁴ Higher Court of Celle, 28.05.2008 – U 11/08; District Court of Hannover of 05.12.2007 – 43 O 4/07.

der Daseinsvorsorge).³⁰⁵ The Court emphasised that these tasks were principally within the responsibility of the Government because the supply with sufficient energy constituted part of the people's existential basic needs (*existentielle Grundsicherung aller Bürger*).³⁰⁶ Finally, subjecting these decisions to governmental control facilitates the detection and correction of mistakes that are possibly made by administrative organs. This results in the citizens having more confidence in their Member State in that they know that these decisions are scrutinised by several administrative authorities.

In a vital core area of services of general interests (*lebensnotwendiger Kernbereich der Daseinsvorsorge*), such as the area of energy supply, administrative organs should thus strictly be integrated into the hierarchical structure of administration by subjecting them to governmental instructions.

Within the area of connection and access to electricity networks, energy regulatory decisions are equally decisions of *major* political relevance rather than of minor political relevance.³⁰⁷ These decisions have far-reaching economic consequences in that they are usually addressed to a large part of the population. According to section 18 of the EnWG, distribution network operators are obliged to connect every ("jedermann") end consumer living in the relevant municipal area to their distribution networks and to grant them the right to use the connection for energy abstraction. This obligation is similar to the one that exists in the area of water supply (*Wasserversorgung*), sewerage disposal (*Abwasserbeseitigung*), waste disposal (*Abfallbeseitigung*), and, in some cases, district heat supply (*Fernwärmeversorgung*).³⁰⁸

³⁰⁵ Higher Court of Celle, 28.05.2008 – U 11/08; for more details, see *R. Ringwald*, OLG Celle: Energieversorgung als Aufgabe der Daseinsvorsorge und Inanspruchnahme privater Grundstücke, IR (10) 2008, p. 230 at p. 231.

³⁰⁶ *Ibid.*

³⁰⁷ Other examples of decisions of major political relevance are energy regulatory decisions involving costly investments, such as decisions on network expansion. They have undoubtedly far-reaching economic consequences and fall into the decision-making competences of the Government.

³⁰⁸ See e.g. *B. Pieroth*, in Jarass/Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 28 GG, no. 15 and 24 and art. 74 at no. 26.

These decisions fall equally within the responsibility of the Government due to the fact that they form part of the tasks of services of general interest. It is indeed due to the connection and access to electricity networks that the people are able of being supplied with energy. It is, thus, also due to the connection and access to the electricity networks that one of the people's vital core areas of services of general interest can be guaranteed.

On the contrary, within *the area of network operation*, energy regulatory decisions are most of the time decisions of *minor* political relevance. Decisions on safety standards, for instance, are purely technical decisions and form, thus, not part of the tasks of services of general interests.

It can therefore be concluded that energy regulatory decisions cannot *generally* be classified as being decisions of "minor political relevance". Quite the opposite is true. As tasks of services of general interest, they constitute most of the time decisions of *major* political relevance.

The compatibility of article 35 para. 4b (ii) with German constitutional law can, therefore, not be justified upon the grounds that energy regulatory decisions are decisions of "minor political relevance".

3.2.3.1.2 The substitution of the obligation of administrative organs to comply with governmental instructions through other elements of democratic legitimation

The obligation of administrative organs to comply with governmental instructions as a basic principle of constitutional law derives from the principle of democracy.³⁰⁹ By requiring that all state authority emanates from the People, the principle of democracy requires a certain level of democratic legitimation (*demokratisches Legitimationsniveau*) that must, at all times, be guaranteed.³¹⁰ This

³⁰⁹ Art. 20 para. 2 GG.

³¹⁰ See *B. Pieroth*, in Jarass/ Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 20 GG, no. 9.

constitutionally required level of democratic legitimation is composed of different elements of legitimation and includes, *inter alia*³¹¹, the element of *personnel* legitimation (*personelles Legitimationselement*) as well as the element of *factual* legitimation (*sachlich- inhaltliches Legitimationselement*).³¹² According to the German Constitutional Court, these elements of democratic legitimation interact with and complement each other.³¹³ As a result, a deficit of democratic legitimation that occurred within one element of legitimation can be substituted through another element of democratic legitimation, *as long as, in the end, the constitutionally required level of democratic legitimation is re-established*.³¹⁴ The Court states in this regard: “*decisive factor is not the form of legitimation of the acts carried out by public authorities but their effectiveness*”.³¹⁵ Article 20 para. 2 of the GG does thus not prescribe a specific form of democratic legitimation with regard to the exercise of public power, but requires that a certain level of democratic legitimation be guaranteed.³¹⁶ As a consequence, a deficit of democratic legitimation that occurred, for instance, within a factual element of democratic legitimation can be substituted through either a factual or a personal element of democratic legitimation and vice versa.

The obligation of administrative organs to comply with governmental instructions constitutes a factual element of legitimation in that it enables Parliament to exert an

³¹¹ Other elements of democratic legitimation are the institutional element of legitimation (*institutionelle Legitimation*) and the functional element of legitimation (*funktionelle Legitimation*).

³¹² See B. Pieroth, in Jarass/Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 20 GG, no. 9a and no. 10; *personelle Legitimation* may also be translated as “personal aspect of democratic legitimation” and *sachlich-inhaltliche Legitimation* as “factual aspect of democratic legitimation”, see e.g. F. Becker, The principle of democracy: watered down by the Federal Constitutional Court, German Law Journal, Vol. 04, No. 08, p. 759 at 760 *et seq.*, http://www.germanlawjournal.com/pdfs/Vol04No08/PDF_Vol_04_No_08_759-769_public_Becker.pdf (26.03.2011).

³¹³ See BVerfGE 83 (60) at 72.

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

indirect influence on administrative organs via the Government.³¹⁷ In establishing a lien of responsibility between Parliament and the administrative organs, it contributes to the constitutionally required level of democratic legitimation of article 20 para. 2 of the GG.

A release of administrative organs from their obligation to comply with governmental instructions has the consequence that the lien of responsibility established between Parliament and the administrative organs is interrupted.³¹⁸ As a result, the constitutionally required level of democratic legitimation is decreased. In order to re-establish the constitutionally required level of legitimation it is therefore necessary to compensate the deficit of democratic legitimation hereby occurred and to substitute the obligation to comply with governmental instructions through another element of democratic legitimation.

The First Part of this sub-section will analyse whether the obligation of administrative organs to comply with governmental instructions can be substituted through the obligation of administrative organs to strictly adhere to the laws (*strikte Gesetzesbindung der Verwaltung*) (3.2.3.1.2.1). Under the Second Part of this sub-section, it will be examined whether an increased level of personnel legitimation (*gesteigerte personelle Legitimation*) within an administrative organ is able to act as a substitute for the obligation of administrative organs to comply with governmental instructions (3.2.3.1.2.2). Whether the Government disposes of other means of control than the right to subject administrative organs to its instructions will be dealt with under the Third Part of this sub-section (3.2.3.1.2.3).

³¹⁷ See B. Pieroth, in Jarass/Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 20 GG, no. 10.

³¹⁸ BVerfGE 83, 60 at 73 states that an unbroken chain of legitimation (*ununterbrochene Legitimationskette*) must be guaranteed between the People and the administrative organ entrusted with public tasks; see also B. Pieroth, in Jarass/Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 20 GG at no. 9a.

3.2.3.1.2.1 The obligation of national energy regulators to strictly adhere to the laws as adequate substitute?

Having established that a factual element of legitimation can be substituted through another factual element of legitimation, the question is whether the obligation of administrative organs to strictly adhere to the laws, as a factual element of legitimation³¹⁹, may, *in general*, act as a substitute for the obligation of administrative organs to comply with governmental instructions (3.2.3.1.2.1.1). Whether it is applicable to the area of energy regulation, *in particular*, will be subject of the Second Part of this sub-section (3.2.3.1.2.1.2).

3.2.3.1.2.1.1 A strict adherence of *administrative organs* to the laws

The obligation of administrative organs to strictly adhere to the laws derives from the constitutional state principle (*Rechtsstaatsprinzip*)³²⁰ and therefore constitutes a central element of democratic legitimation.³²¹ In order to act as an adequate substitute for the obligation of administrative organs to comply with governmental instructions, it must be able to compensate the deficit of democratic legitimation occurred through a release of administrative organs from their obligation to comply with governmental instructions. The obligation of administrative organs to strictly adhere to the laws must be able to re-establish the constitutionally required level of democratic legitimation, This is, with a view to the underlying principle of democracy, achieved, if it establishes the same lien of responsibility that exists between Parliament and administrative organs by virtue of the obligation of administrative organs to comply with governmental instructions. The People must be able to exert an influence on

³¹⁹ See *B. Pieroth*, in Jarass/Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 20 GG at no. 10.

³²⁰ According to art. 20 para. 3 GG, the legislative authority is bound by the constitutional order, the executive authority and judiciary authority by law and justice.

³²¹ See *B. Pieroth*, in Jarass/Pieroth, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 20 GG, no. 39; see also *T. Öhlinger*, Verfassungsrecht, 8. Auflage, Wien 2008, p. 343 and p. 355 *et seq.*

administrative organs that is as effective as the one achieved by virtue of the obligation of administrative organs to comply with governmental instructions.

Again, no general answer can be given but rather a distinction needs to be drawn as to the different laws involved. Generally, laws consist of a part, which lies down the factual side of the case (*Tatbestandsseite*) and a part, which establishes the legal consequences of the case (*Rechtsfolgenseite*). Each side may contain definite and/ or indefinite terms. Where a law contains indefinite terms, whether on the factual or on the consequential side, a substitution is, in my view, not possible. Indefinite terms always allow for several possibilities of interpretation. They leave room for judgment and confer powers of discretion to the administrative organs, which may interpret the law in question in the way they judge appropriate in respect of the particular case.³²² Where, on the contrary, a law contains definite terms, the administrative organs have no other choice than to apply the law in exactly the way prescribed. In these cases, administrative organs are strictly bound by the laws and may not exercise own judgement and power of discretion. It is only in these cases that it is guaranteed that the will of the Parliament, enacting the laws, is transposed in the way prescribed.

As a result, only a strict adherence to the laws may substitute the obligation of administrative organs to comply with governmental instructions.

3.2.3.1.2.1.2 A strict adherence of *national energy regulators* to the laws

Whether national energy regulators are placed under the obligation to strictly adhere to the laws needs to be assessed on the basis of the scope of application of article 35 para. 4b (ii) sent. 1 of Directive 2009/72/EC. Only decisions, which are included in article 35 para. 4b (ii) sent. 1 of Directive 2009/72/EC, may serve as criterion of examination. By requiring national energy regulators' independence in respect of *any* regulatory decision within *any* area of energy regulation, the question is, therefore, whether national energy regulators are *generally* obliged to strictly adhere to

³²² See e.g. *H. Jarass*, in *Jarass/Pieroth*, GG, Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 10. Auflage, München 2009, art. 19 GG at no. 64.

the laws. This is not the case. Various energy laws exist, which leave room for judgment and confer power of discretion to the national energy regulators. Section 68 and section 69 of the EnWG, for instance, attribute to the *BNetzA* an overall right to conduct inquiries to establish facts and to request information from operators, without, however, prescribing the exact procedures for the inquiries.³²³ Section 31 of the EnWG empowers the *BNetzA* to investigate and remedy abusive behaviour of network operators. It enables any individual to file a complaint with the *BNetzA* where its interests are “seriously” affected by a network operator’s conduct. The determination of the seriousness of the violation is, however, left to the *BNetzA*. Furthermore, the costs incurred with regard to the taking of evidence are established through the *BNetzA* according to its equitable discretion (*billiges Ermessen*) pursuant to section 31 para. 4 of the EnWG.

It can therefore be said that national energy regulators are not generally obliged to strictly adhere to the laws but dispose of certain powers of judgement and discretion.

A release of national energy regulators from their obligation to comply with governmental instructions as required by article 35 para. 4b (ii) sent. 1 of Directive 2009/72/EC can, therefore, not be justified upon the grounds that national energy regulators are obliged to strictly adhere to the laws.

3.2.3.1.2.2 An increased level of personnel legitimation within the *BNetzA*?

The obligation of national energy regulators to comply with governmental instructions could possibly be substituted through an increased level of personnel legitimation (*gesteigerte persönliche Legitimation*) existent within the *BNetzA*. Such increased level of personnel legitimation could emanate from the particular status of the President and Vice-president of the *BNetzA* (3.2.3.1.2.2.1). It could, furthermore, be seen in the participation of a judge within an energy regulatory authority, as it is the case in Austria (3.2.3.1.2.2.2). An increased level of personnel legitimation could,

³²³ See CEER IEB TF-Regulatory Benchmark Questionnaire, Final Version, 05-07-05, Draft on Germany – Federal Network Agency, p. 12.

finally, emanate from the status of the members of the energy regulatory advisory board (3.2.3.1.2.2.3).

3.2.3.1.2.2.1 The particular status of the President and Vice-president of the BNetzA

The President and Vice-president of the *BNetzA* enjoy a particular status within the *BNetzA*. Pursuant to section 3 para. 3 of the Law establishing the Federal Network Agency for Electricity, Gas, Telecommunications, Posts and Railways (*Gesetz über die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen*, hence *BEGTPG*), they are appointed by the Federal Government upon proposal of the Federal Network Agency's Advisory Council. They are appointed as civil servants and relate to the Federal Government through an employment relationship of public-legal service and loyalty (*öffentlich-rechtliches Dienst- und Treueverhältnis*) according to section 4 para. 1 of the *BEGTPG*. Moreover, they may only be removed from their office upon the establishment of important cause (section 4 para. 5 of the *BEGTPG*). Finally, it is the President of the *BNetzA*, who has the final decision-making authority to select and recruit, as well as to remove and set penalties and incentives of the staff members of the *BNetzA*.³²⁴ One can thus undoubtedly argue that the President and Vice-president dispose of an increased level of personnel legitimation. This could, as a consequence, lead to an increased level of democratic legitimation of the *BNetzA as a whole*.³²⁵

This argument is, in my view, not convincing. Firstly, although the President and Vice-president of the *BNetzA* may dispose of an increased level of personal legitimation, this does not lead to an increased level of democratic legitimation of the *BNetzA* as a whole. According to section 59 para. 1 of the *EnWG*, the *BNetzA* decides through its ruling chambers rather than through its individual members. Although the President of

³²⁴ See CEER IEB TF-Regulatory Benchmark Questionnaire, Final Version, 05-07-05, Draft on Germany – Federal Network Agency, p. 11 and 23 *et seq.*

³²⁵ A similar argument is used with regard to the the president and vice-president of the regulatory authority for telecommunications and post, see *K. Oertel*, *Die Unabhängigkeit der Regulierungsbehörde nach §§ 66 ff TKG*, Berlin 2000. 2000, p. 322 ff.

the *BNetzA* participates at the voting process (section 59 para. 2 of the EnWG), he acts on behalf of the interests of the *BNetzA* rather than of his own. The increased level of personnel legitimation of the President and the Vice-president of the *BNetzA* does, therefore, not act as an adequate substitute for the obligation of administrative organs to comply with governmental instructions.

3.2.3.1.2.2.2 The participation of a judge within an energy regulatory authority

Contrary to German constitutional law, Austrian constitutional law allows under specific circumstances the release of administrative organs from their obligation to comply with governmental instructions. Prerequisite is, *inter alia*, that their membership includes at least one judge (*Kollegialbehörde mit richterlichem Einschlag*).³²⁶ Even if German constitutional law contained a similar legal construct, the participation of a judge within the *BNetzA* could, in my view, not justify the release of the *BNetzA* from governmental instructions.³²⁷ It is, in particular, not justifiable on the basis of article 97 para. 1 of the GG. Article 97 para. 1 of the German Basic Law determines that judges are “*independent and subject only to the law*”. One can thus argue that the judiciary independence of judges guaranteed through article 97 para. 1 of the GG, leads to an increased level of personnel legitimation. However, with a view to article 97 para. 2 of the GG and in accordance with the jurisprudence of the Constitutional Court³²⁸, article 97 para. 1 of the GG is not applicable to the *BNetzA*. It applies only to judges, which are appointed to full-time positions (*hauptamtlich*) and which are in office permanently and on regular terms (*planmäßig endgültig*). Judges enjoy judicial independence only insofar as they act in their capacity as judiciary authority. The prohibition to subject judges to governmental instructions, which is

³²⁶ See e.g. art. 20 para. 2, sent. 1 no. 3 in connection with art. 133 no. 4 B-VG; see furthermore T. Öhlinger, *Verfassungsrecht*, 8. Auflage, Wien 2008, paras. 639 – 641.

³²⁷ The release of the Federal Cartel Authority from Governmental instructions, for example, is justified on the grounds, that the proceedings before the cartel authorities as laid down in sections 54 *et seq.* of the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) is constituted similar to judiciary proceedings (“*justizähnlich*”); see J. Rodegra, *Zum Problem aufsichtsfreier Verwaltung durch das Bundeskartellamt untersucht am Beispiel des Fusionskontrollverfahrens*, 1992 (zugl. Jur. Diss FU Berlin), p. 33 *et seq.*

³²⁸ See e.g. BVerfGE 26, 186 at 201.

contained in article 97 para. 1 of the GG, applies therefore only in respect of activities protected by article 97 para. 1 GG.³²⁹ Hence, where judges carry out tasks as members of administrative organs, such as the *BNetzA*, they may not rely upon article 97 para. 1 of the GG. In these cases, judges are no judges in the sense of article 97 of the GG.³³⁰

The insertion into the German Basic Law of a provision, which is comparable to the Austrian article 20 para. 2, sent. 1 no. 3 of the B-VG and article 133 no. 4 of the B-VG, would violate article 79 para. 3 of the GG.³³¹ Article 79 para. 3 GG stipulates that amendments to the Basic Law that affect the division of the Federation into *Länder*, their participation on principles within the legislative process or the principles laid down in articles 1 and 20, are prohibited (*Ewigkeitsgarantie*). The judicial independence is protected by virtue of article 20 para. 3 of the GG, which lies down the constitutional state principle (*Rechtsstaatsprinzip*). Hence, to entrust judges with tasks other than judiciary ones, would violate the principle of separation of state powers (*Gewaltenteilungsprinzip*) and, as a consequence, article 20 para. 3 of the GG and article 79 para. 3 of the GG.

3.2.3.1.2.2.3 The Advisory Council as a body comparable to Parliament?

Pursuant to section 60 of the EnWG in connection with section 5 of the BEGTPG, the *BNetzA* is supported through an Advisory Council. The Advisory Council is composed of members, which are appointed by the Government upon proposal of the *Bundestag* and the *Bundesrat* (section 5 para. 1 of the BEGTPG). One could thus argue that the members dispose of an increased level of personal legitimation. The Advisory Council could be seen as a parliamentary controlling body (*parlamentarisches Kontrollorgan*).³³² This argument is not convincing. The

³²⁹ *Ibid.*

³³⁰ R. Herzog, in: T. Maunz/ G. Dürig, Grundgesetz Kommentar, 53. Auflage, München 2009, art. 92 at 75.

³³¹ See J. Cruz, The Legacy of the Maastricht-Urteil and the Pluralist Movement, ELJ, volume 14, July 2008, p. 389 at p. 391.

³³² According to K. Oertel, the advisory board established at the regulatory authority of telecommunications and post through section 66 TKG can be seen as a parliamentary controlling body

appointment of the Advisory Council by the Government upon proposal of the *Bundestag* and *Bundesrat* does not elevate the advisory board to a body comparable to Parliament due to the fact that it does not establish the same lien of responsibility that is established between Parliament and the Government.

3.2.3.1.2.3 The substitution through other means of governmental control

The Government disposes of other means of control on administrative organs than the right to require compliance with its instructions. Among these rights is the right of removal of a civil servant from the civil service (*Entfernung des Beamten aus dem Dienstverhältnis*). Whether the right of removal of a civil servant from the civil service applies to the members of the *BNEtzA* and whether it may act as a substitute for the obligation of administrative organs to comply with governmental instructions, will be subject of the first sub-section (3.2.3.1.2.3.1). The second part will assess, with a view to the Austrian article 52 para. 1(a) of the B-VG, whether the German Government disposes of a right towards the members of energy regulatory authorities comparable to the right of the *German Bundestag* and its committees to require the presence of the members of the Government and to interrogate them about their activities carried out within the exercise of their office (article 43 of the GG), (*Zitier- und Interpellationsrecht*) (3.2.3.1.2.3.2).

3.2.3.1.2.3.1 The right of removal of the members of the *BNetza*

Most of the staff members of the *BNetza* are appointed as civil servants.³³³ Their removal (*Entfernung*) is thus subject to the provisions of the Federal Civil Servants Act (Bundesbeamtengesetz, hence *BBG*) and the Federal Disciplinary Act

similar to Parliament, see *K. Oertel*, Die Unabhängigkeit der Regulierungsbehörde nach §§66 ff TKG, Berlin 2000. 2000, p. 331 *et seq.*

³³³ See CEER IEB TF-Regulatory Benchmark Questionnaire, Final Version, 05-07-05, Draft on Germany – Federal Network Agency, p. 23.

(Bundesdisziplinargesetz, hence *BDG*).³³⁴ Section 77 para. 1 sent. 1 of the BBG determines that where a civil servant culpably violates an obligation that has been conferred upon him within the exercise of his office, he commits malfeasance of office (*Dienstvergehen*). In this case, the Federal Disciplinary Act becomes applicable (section 77 para. 3 of the BBG), which provides, among the disciplinary measures available, the right of removal of the civil servant (section 30 no. 3 of the BGG, section 5 no. 5 of the BDG and section 10 para. 1 sent. 1 and para. 6 of the BDG). The decision on the disciplinary measure must be taken according to one's best judgement (*nach pflichtgemäßem Ermessen*) pursuant to section 13 para. 1 sent. 1 of the BDG and must be assessed in relation to the severity of the malfeasance of office committed pursuant to section 13 para. 1 sent. 2 of the BDG. Section 13 para. 1 sent. 3 of the BDG provides furthermore that the personality of the civil servant must be taken into account. It shall also be taken into account to what extent the public official has betrayed the trust of its superior or the general public.³³⁵ The disciplinary measures available against malfeasance of office are listed in section 5 of the BDG in relation to their severity. The removal of the civil servant from his office represents the disciplinary measure the most severe. The organ entitled to remove the civil servant is the respective Federal minister as the highest disciplinary superior (*oberste Disziplinarvorgesetzte*) pursuant to article 133 para. 2 of the GG.

The removal of the President and the Vice-president of the *BNetzA* is laid down in the Law establishing the Federal Network Agency for Electricity, Gas, Telecommunications, Posts and Railways as *lex specialis* to the Federal Civil Servants Act and the Federal Disciplinary Act. According to section 4 para. 5 of the BEGTPG, the President³³⁶ and the Vice-president³³⁷ may be removed, either at their own request, or at the request of the Federal Ministry of Economics and Technology

³³⁴ For more details, see e.g. N. Achterberg/ G. Püttner, T. Würtenberger, *Besonderes Verwaltungsrecht*, Band II, Kommunal-, Haushalts-, Abgaben-, Ordnungs-, Sozial-, Dienstrecht, 2. Auflage, Heidelberg 2000, §31, para. 110.

³³⁵ Section 13 para. 1 sent. 4 BDG.

³³⁶ Section 4 para. 5 sent. 2 BEGTPG.

³³⁷ Section 4 para. 8 in connection with section 4 para. 5 sent. 2 BEGTPG.

(*Bundesministerium für Wirtschaft und Technologie*), and after consultation of the Advisory Council, by the Federal Government, *provided an important cause is shown*. Prior to the request of the Federal Ministry of Economics and Technology, the President and the Vice-president of the *BNetzA* have the right to be heard (section 4 para. 5 sent. 3 of the BEGTPG). The revocation of the appointment of the President or Vice-president becomes principally valid upon the execution of the resolution of the Government (section 4 para. 5 sent. 6 of the BEGTPG).

The right of the Government to remove the members of the *BNetzA*, including the President and Vice-president, constitutes, in my view, an adequate substitute for the obligation of the *BNetzA* to comply with governmental instructions. This is true, although sections 4 para. 5 sent. 2 of the BEGTPG and 13 para. 1 sent. 1 of the BDG do not establish a compulsory right for the Government, but rather a right that *may* be exercised.³³⁸ The mere possibility, however, that the Government *may* exercise its right and that the members of the *BNetzA* *may* be removed from their office where they act contrary to the constitutional principles puts, in my view, enough pressure on them to act in accordance with the requirements of the Government. This is especially valid with a view to the legal consequences involved. Indeed, according to section 10 para. 1 sent. 2 of the BDG, the civil servant loses its right to require his official emoluments and pensions. According to section 20 para. 6 of the BDG, he also forfeits his right of being appointed to the civil service ever again.

3.2.3.1.2.3.2 The right to require the presence of the President and Vice-president of the *BNetzA*

Contrary to the Austrian article 52 para. 1(a) of the B-VG, the German Government has no right to require the presence of the members of an administrative organ released from governmental instructions and to interrogate them on their activities. It is the *Bundestag* and its committees, which are entitled to require the presence of the Chancellor and its members and to interrogate them about their

³³⁸ See wording of section 4 para. 5 sent. 2 BEGTPG and section 13 para. 1 sent. 1 BDG, according to which the appointment of the members of the *BNetzA* *may* be revoked.

activities.³³⁹ A comparable right can, in my view, not be seen in the right of the Energy Advisory Committee (section 5 of the BEGTPG in connection with section 6 para. 7 sent. 3 of the BEGTPG) to require the presence of the President and the Vice-president of the *BNetzA* or of its representative. Although it consists of 16 members of the *Bundestag*, the Energy Advisory Committee is not elevated to a body comparable to Parliament.

As a conclusion it can be said that the right of the Government to remove the members of the *BNetzA* constitutes the only means, which is able to substitute the obligation of administrative organs to comply with governmental instructions.

On the basis of the Government's right of removal of the members of the *BNetzA*, article 35 par. 4 sent. 2 (b) (ii) of Directive 2009/72/EC can thus be regarded as compatible with German constitutional law.

3.2.3.2 Under Austrian constitutional law

Pursuant to article 20 para. 1 sent. 2 of the B-VG, administrative organs are responsible to their superiors³⁴⁰ for the acts carried out within the exercise of their office and are, *in principle*, bound by their instructions.

Upon article 20 para. 1 sent. 2 B-VG ("*save as otherwise provided for by laws pursuant to para. 2*") in connection with article 20 para. 2 of the B-VG, they may, however, be released from their obligation to comply with governmental instructions where provided for "*by law*". The release through ordinary laws³⁴¹, through Federal or

³³⁹ Art. 43 GG.

³⁴⁰ The superiors are, according to art. 20 para. 1 *sent. 1* B-VG, the highest administrative organs. These are the Federal ministers, the Federal Government, Federal States' Government and the members of the Federal States' Governments; art. 19 B-VG is not complete; furthermore, the state secretaries therein mentioned are no highest administrative organs; see *W. Berka*, *Verfassungsrecht, Grundzüge des österreichischen Verfassungsrechts für das juristische Studium*, 3. Auflage, Wien 2010, para. 650; see also *B. Raschauer*, art. 20 para 1 B-VG, in: K. Korinek/ M. Holoubek, *Österreichisches Bundesverfassungsrecht, Textsammlung und Kommentar*, (Loseblattsammlung, Stand 2000), 2. Auflage, Wien 1999 (März 2000), para. 28 *et seq.*

³⁴¹ Ordinary laws in the sense, that they are subordinate to constitutional law.

Federal state laws is thereby only allowed upon fulfilment of one of the eight categories listed in article 20 para. 2 sent. 1 of the B-VG and under the conditions of article 20 para. 2 sent. 3 of the B-VG.³⁴²

The first sub-section will examine the release of the Austrian energy regulators from their obligation to comply with governmental instructions in the light of revised article 20 para. 2 of the B-VG (3.2.3.2.1). The second sub-section will assess the rights of supervision that have been introduced through the constitutional reform in 2008 (3.2.3.2.2).

3.2.3.2.1 The release of the Austrian energy regulators from governmental instructions upon article 20 para. 2 of the B-VG

The *E-control GmbH* is principally subject to governmental instructions (section 21 of the E-RB). It may however be released from its obligation to comply with governmental instructions upon *no. 5* and *no. 8* of article 20 para. 2 sent. 1 of the B-VG (3.2.3.2.1.1). The *E-control Kommission* was, already under former article 20 para. 2 of the B-VG, explicitly released from governmental instructions. It may now be released governmental instructions upon *no. 3* of article 20 para. 2 of the B-VG (3.2.3.2.1.2)

3.2.3.2.1.1 The release of the *E-control GmbH* upon article 20 para. 2 sent. 1 no. 5 and no. 8 of the B-VG

As to the *general requirement* of article 20 para. 2 of the B-VG, only “*organs*” may be released from their obligation to comply with governmental instructions. The

³⁴² Upon art. 44 para. 1 B-VG, the Federal constitutional legislator is entitled to provide for further categories outside art. 20 para. 2 B-VG by virtue of constitutional provisions contained in ordinary laws.

E-control GmbH, although established as an entity of private law, constitutes an “organ” in the sense of article 20 para. 2 of the B-VG.³⁴³

This follows, *first of all*, from the wording of revised article 20 para. 2 of the B-VG, which clearly refers to “organs” rather than to “administrative organs”. The term “organs” has intentionally been used, since at the time of the revision of article 20 of the B-VG the problem of applicability of former article 20 of the B-VG to private entities that have been outsourced from the hierarchical structure of the state (*ausgegliederter Rechtsträger*), was well known.

It follows, *secondly*, from the fact that article 20 of the B-VG applied, already prior to its revision, to entities outsourced from the hierarchical structure of the state, even though it applied only in an *indirect way*.³⁴⁴ As a consequence, if already former article 20 of the B-VG was applicable to these entities, it is *a fortiori* the case as to revised article 20 of the B-VG (*Argumentum a fortiori*). Indeed, the Austrian Constitutional Court (*Österreichische Verfassungsgerichtshof*) ruled that article 20 para. 1 of the B-VG obliged the ordinary legislator to provide for appropriate regulation, which guaranteed that these entities are subject to the instructions of their superiors.³⁴⁵ The rationale behind the Court’s reasoning is that the release of administrative organs from the instructions of their superiors was only allowed where provided for by *constitutional laws*. The only constitutional provision, which provided, however, for such release, was article 20 para. 2 of the B-VG in connection with article 133 no. 4 of the B-VG. As a consequence, administrative organs could, upon *ordinary Federal and Federal state law*, only be released from their obligation to comply with the

³⁴³ The question of applicability of art. 20, para. 2 of the B-VG to the *E-control GmbH* is different from the question of whether the establishment of the *E-control GmbH* as an entity of private law with sovereign powers can be regarded as constitutional. See *D. Damjanovic*, Weisungsfreie Behörden: der Vorschlag für eine Neufassung des Art 20 Abs. 2 B.VG, JRP 2007, p. 222 at p. 223 and p. 225 *et seq*; see also *T. Öhlinger*, Weisungsfreie Verwaltungsbehörden nach der B-VG Novelle, BGBl I 2008/2, JRP 2008, p. 85 at p. 89 *et seq*.

³⁴⁴ In such an indirect way art. 20 B-VG applies furthermore to entities that are entrusted with specific, administrative tasks (*Beliehene*) without being outsourced from the hierarchical structure of administration; see *e.g.* B. Müller, Das österreichische Regulierungsmodell, Wien 2011, p. 182, p. 151.

³⁴⁵ VfSlg 14.473/1996, 16.400/2001, 17.421/2004, in *T. Öhlinger*, Weisungsfreie Verwaltungsbehörden nach der B-VG Novelle, BGBl, I 2008/2, JRP 2008, p. 85 at p. 89.

instructions of their superiors if they were constituted as a “collegial organ having within their membership at least one judge” (*Kollegialbehörde mit richterlichem Einschlag*).³⁴⁶ Since the revision of article 20 para. 2 of B-VG, administrative organs may, upon ordinary Federal and Federal state law, also be released from their obligation to comply with the instructions of their superiors, if they fall within one of the categories listed in article 20 para. 2 of the B-VG. There is no reason why a release of these entities *upon one of the categories listed in article 20 para. 2 B-VG* should, suddenly, be prohibited.³⁴⁷

As to *no. 5* of article 20 para. 2 sent. 1 B-VG, the *E-control GmbH* may be released from its obligation to comply with governmental instructions upon this paragraph. It provides that administrative organs may be released from their obligation to comply with governmental instructions for the “safeguarding of competition and the exercise of economic supervisory powers” (*Sicherung des Wettbewerbs und zur Durchführung der Wirtschaftsaufsicht*). The “safeguarding of competition and the exercise of economic supervisory powers is necessary in sectors that are, in principal, market based and open to competition. Due to their specific economical structure as well as their importance for the overall economy, these sectors are economically sensible and require, therefore, regulatory control.”³⁴⁸ As to the electricity sector, the authorities, which are entrusted with the safeguarding of competition and the exercise of economic supervisory powers, are the national energy regulators. This becomes obvious upon various provisions of *European law*. Article 36 of Directive 2009/72/EC, for instance, provides that national energy regulators shall safeguard competition by taking “all reasonable measures”, such as “promoting (...) a *competitive* (...) internal market in electricity within the Community” (a), “developing *competitive* and properly functioning regional markets within the Community (...)” (b), “eliminating restrictions on trade in electricity between Member States (...)” (c) or “ensuring (...) the efficient

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

³⁴⁸ See e.g. *D. Damjanovic*, Weisungsfreie Behörden: der Vorschlag für eine Neufassung des Art 20 Abs. 2 B.VG, JRP 2007, p. 222 at p. 229.

functioning of national market, *promoting effective competition* and (...) consumer protection” (g). In addition, article 37 of Directive 2009/72/EC entrusts national energy regulators with further economic supervisory duties and powers. It becomes also apparent upon certain provisions of *national law*. Sections 9 and 10 of the E-RGB, for instance, entrust the *E-control GmbH* with regulatory functions in order to safeguard competition as well as they confer upon them certain economic supervisor powers. In addition, section 10 para. 1 no. 1 of the E-RBG obliges the *E-control GmbH* to monitor compliance with *competition rules*, including the obligation to issue opinions and recommendations on *competitive* market activities (section 7 para. 2 sent.1 of the E-RBG).

As to no. 8 of article 20 para. 2 sent. 1 of the B-VG, the *E-control GmbH* may also be released from its obligation to comply with governmental instructions upon this paragraph. According to this paragraph, administrative organs may be released from their obligation to comply with the instructions of their superiors “to the extent required by European law” (*soweit dies nach Maßgabe des Rechts der Europäischen Union geboten ist*) Since article 35 para. 4b (ii) sent. 1 of Directive 2009/72/EC requires such a release, the *E-control GmbH* may thus, *in principle*, be released from its obligation to comply with governmental instructions.

3.2.3.2.1.2 The release of the *E-control Kommission* upon article 20 para. 2 sent. 1 no. 3 in connection with article 133 no. 4 of the B-VG

The *E-control Kommission*, constituted as a collegial organ under the participation of a judge, is released from its obligation to comply with governmental instructions on the basis of article 20 para. 2 sent. 1 no. 3 in connection with article 133 no. 4 of the B-VG³⁴⁹ and section 19 of the E-RBG.³⁵⁰

³⁴⁹ Art. 133 no. 4 B-VG stipulates, that “the remaining members too are not bound by any instructions within the exercise of this office”. Due to the wording “too”, the conclusion is drawn, that the legislator presumed, that the judiciary member is not subject to Governmental instructions.

³⁵⁰ The *E-control Kommission* constitutes a collegial body in the sense of art. 20 para. 2 sent. 1 no. 3 and art. 133 no. 4 B-VG. It is appointed through the Federal Government and one of its three members

Both, the *E-control Kommission* and the *E-control GmbH* may thus be released from its obligation to comply with governmental instructions. As a consequence, article 35 para. 4b (ii) sent. 1 of Directive 2009/72/EC can, *in principle*, be regarded as compatible with Austrian constitutional law.

3.2.3.2.2 The requirements of article 20 para. 2 sent. 3 of the B-VG

Since the constitutional reform in 2008, administrative organs that have been released from their obligation to comply with governmental instructions need to be subject to some other form of governmental control. In this regard, article 20 para. 2 sent. 3 of the B-VG stipulates that the Federal or Federal State legislator shall provide the highest administrative organs “*with a right of supervision that is adequate in relation to the task of the administrative organ being released from governmental instructions*” (*ein der Aufgabe des weisungsfreien Organs angemessenes Aufsichtsrecht der obersten Organe*).

3.2.3.2.2.1 The minimum set of supervisory rights

The adequate rights of supervision must, according to article 20 para. 2 sent. 3 of the B-VG, contain “*at least the right to be informed about all activities of the administrative organs released from governmental instructions as well as - except in the cases of no. 2, 3 and 8 - the right to revoke the appointment of the administrative organs released from governmental instructions on important grounds*”. Article 20 para. 2 sent. 3 of the B-VG therefore contains *a minimum set of supervisory rights*, consisting of *a right of information* and *a right of revocation on important grounds*. These rights must principally be attributed in a *cumulative way* (“*and*”). Exempted are only those administrative organs, which have been released from their obligation to comply with governmental instructions upon article 20 para. 2 no. 2, 3 and 8 of the B-VG. In this case, the right of revocation on important grounds does not apply. Due to the exception being inserted within the second part of the sentence (“... *and – except in*

is a judge (section 17 para. 1 sent. 1 and 2 E-RBG). Its decision are final and not subject to repeal or alteration by administrative ruling (section 20 para. 2 E-RBG).

the cases stipulated in no. 2, 3 and 8”), the right of information remains, in any way, applicable. Principally, these supervisory rights are, in my view, able to act as an adequate substitute. The mere possibility of the highest organ to require information at any time about any issue related to the exercise of office of the administrative organ in question has the effect that the administrative organs feels continuously under the responsibility to document its activities in a correct and transparent manner. The same is valid for the right of revocation on important grounds. The mere possibility to be revoked urges the administrative organ in question to carry out its activities in compliance with the laws.

3.2.3.2.2 Further “adequate” rights of supervision

Requiring adequate rights of supervision in relation to the task of the administrative organ being released from governmental instructions, the scope and meaning of article 20 para. 2 sent. 3 of the B-VG is vague. First of all, article 20 para. 2 sent. 3 of the B-VG does not stipulate in which cases further rights of supervision than the minimum set of supervisory rights need to be established. Secondly, it does not define what is meant through the term “adequate” rights of supervision. It does finally not determine in what kind of relation the right of supervision and the administrative task in question needs to be put.

As to the question in which cases further rights of supervision become necessary, I believe that no general answer can be given but that it rather depends on the specific circumstances of the case. Decisive factor is, in my view, which *specific area of administration* is concerned. Reason is that, since *the intensity of state power varies in dependence of the specific administrative area concerned*, also the *constitutionally required level of democratic legitimation varies*. Where, for instance, *areas of services of general interests* are concerned, the constitutionally required level of democratic legitimation is higher than in economic competitive areas where the state assumes the role of a mere market participant (*Teilnahme des Staates am*

wirtschaftlichen Wettbewerb).³⁵¹ This is, in my view, expressed through the term “adequate” right of supervision of article 20 para. 2 sent. 3 of the B-VG, which requires a determination in relation to the task of the administrative organ released from governmental instructions. The term “adequate” leaves room for own judgment and power of discretion to the ordinary legislator in that it allows a gradation (*Abstufung*) in relation to the intensity of state power involved, which again relates to the specific administrative task in question.

As a result, where services of general interests are involved, the right of supervision needs to be exercised in a stricter way than in open market areas where competition exists. Where services of general interests are concerned, the term “adequate” needs to be determined as narrow as possible in order to secure a lien of responsibility between the people and public administration that is as strong as possible. Where, however, *economical competitive areas* are involved, the minimum set of supervisory rights of article 20 para. 2 sent. 3 of the B-VG is, in my view, sufficient.

3.2.3.2.2.3 The application of article 20 para. 2 sent. 3 of the B-VG in the area of energy regulation

In the area of energy regulation, several inconsistencies exist with regard to the application of article 20 para. 2 sent. 3 of the B-VG, in particular with regard to the *E-control GmbH*.³⁵²

3.2.3.2.2.3.1 The inapplicability of the right of revocation on important grounds

As to the relationship between *Austrian constitutional law* and *European law*, an inconsistency becomes apparent between no. 5 and no. 8 of article 20 para. 2 sent. 1. of the B-VG. Indeed, where the *E-control GmbH* is released from its obligation to

³⁵¹ See e.g. G. Kühne, in: M. Bartsch/ A. Röhling/ P. Salje/ U. Scholz, *Stromwirtschaft: Ein Praxishandbuch*, 2. Auflage, Köln 2008, p. 248.

³⁵² As to the *E-control Kommission*, art. 20, para. 2 no. 3, sent. 2 and 3 B-VG clearly states that the right of revocation does not apply.

comply with governmental instructions by virtue of *no. 5* of article 20 para. 2 sent. 1 of the B-VG, the legislator must provide for at least the right of information *and* the right of revocation on important grounds (article 20 para. 2 sent. 3 of the B-VG). Where, however, the *E-control GmbH* is released from its obligation to comply with governmental instructions by virtue of *no. 8* of article 20 para. 2, sent. 1 of the B-VG, *i.e.* because of European requirements, the right of revocation on important grounds does not apply.³⁵³ Hence, what is the situation if *the E-control GmbH* is released from its obligation to comply with governmental instructions by virtue of *both no. 5 and no. 8* of article 20 para. 2 sent. 1 of the B-VG? Does the right of revocation on important grounds remain applicable?

Another inconsistency exists between *Austrian constitutional law* and *Austrian energy laws*. Section 21 of the E-RBG entitles the Federal Minister of Economics and Labour to revoke the appointment of the Managing Director of the *E-control GmbH*, if the Managing Director fails to comply with its instructions or fails to furnish the required information. The right of revocation contained in section 21 of the E-RBG is, thus, incompatible with article 20 para. 2, sent. 1 no. 8 B-VG, which stipulates that, where required by European law, the right of revocation on important grounds does not apply.

In my view, due to the *supremacy of European Law*, article 20 para. 2 sent. 3 B-VG should in any case be interpreted in the sense that, wherever European law requires administrative organs to be released from governmental instructions, *the right of revocation on important grounds does not apply*.

Regarding article 35 par. 4 sent. 2 (b) (ii) of Directive 2009/72/EC this has the consequence that the right of revocation on important grounds does not apply (article 20 para. 2 sent. 1 no. 8 in connection with article 20 para. 2 sent. 3 B-VG). Hence, where *the E-control GmbH* is released from its obligation to comply with governmental instructions, either by virtue of *no. 5* or *no. 8* of article 20 para. 2 sent. 1

³⁵³ According to *T. Öhlinger*, the scope of application of art. 20, para. 2, sent. 3 B-VG should be limited to cases, which require a release merely from governmental instructions, see *T. Öhlinger*, Weisungsfreie Verwaltungsbehörden nach der B-VG Novelle, BGBl I 2008/2, JRP 2008, p. 85 at p. 88.

B-VG, its members may not be revoked by the Government on the basis of important grounds.

3.2.3.2.3.2 The right of information as an adequate right of supervision

Upon article 20 para. 2 sent. 3 of the B-VG, the Federal Ministry of Economics and Labour as the supervising authority (section 21 of the E-RBG) has merely the right to be informed about all activities of the *E-control GmbH*. Section 21 para. 3 of the E-RBG entitles the Federal Ministry of Economics and Labour in addition to require any documents in order to discharge his functions. I believe that, *on its own*, the right of information as the sole remaining compulsory right of supervision is not able to act as an adequate substitute for the obligation of administrative organs to comply with governmental instructions. Although the right of information establishes a certain lien of responsibility between the *E-control GmbH* and the Federal Ministry of Economics and Labour, the latter has no possibility of enforcement in case of its violation. The Federal Ministry of Economics and Labour is thus unable to exert a sufficient influence and control on the *E-control GmbH*, lacking in particular, the power of threat of removal from office in case of violation.

3.2.3.2.3.4 Section 20 of the GmbHG as an adequate right of supervision

Whereas *paragraph 1* of section 20 of the GmbHG lays down the *internal* restrictions that the managing director (*Geschäftsführer*) has to comply with when representing the company, *paragraph 2* of the same section establishes the restrictions of his power of representation towards *third parties*. Section 20 para. 1 of the GmbHG stipulates, in particular, that the managing director is obliged to comply with any restrictions that have been laid down in the articles of association, in a resolution of the shareholders or “*an instruction of the supervisory board that is binding upon the managing director as to his scope of representation of the company*” (*verbindliche Anordnung des Aufsichtsrates gegenüber dem Geschäftsführer für den Umfang seiner Befugnis*). Section 21 para. 2 of the E-RBG requires additionally that the instructions are set out in writing and are followed by reasons.

The question, which arises is whether the right of the supervisory board to issue binding instructions upon the managing director constitutes an adequate right of supervision in the sense of article 20 para. 2 sent. 3 of the B-VG. Here, the question of whether the right of section 20 para. 1 of the GmbHG represents an *adequate right of supervision* and the question of whether the right of section 20 para. 1 of the GmbHG (*privat-rechtliches Weisungsrecht*) constitutes an *adequate substitute* for the right of article 20 para. 1 sent. 2 of the B-VG (*öffentlich-rechtliches Weisungsrecht*) needs to be distinguished.

The question whether the right of section 20 para. 1 of the GmbHG constitutes an *adequate substitute* for the right of article 20 para. 1 sent. 2 of the B-VG relates to the debate of whether *the outsourcing of administrative tasks to entities established outside of the hierarchical structure of administration can be regarded as legitimate, if the outsourced entity is merely subject to section 20 para. 1 of the GmbHG*. In other words, the question in this regard is whether the right to issue governmental instructions is a *mandatory prerequisite of the legitimacy to outsource administrative tasks*. It is considered that only in case of *equality of these rights (Gleichwertigkeit von Weisungen)*, the right of section 20 para. 1 of the GmbHG provides a sufficient compensation (*Ingerenz*) and the right laid down in article 20 para. 1 sent. 2 of the B-VG becomes dispensable (*entbehrlich*). The prevailing view in Austria denies the equality of these rights with the argument that *the right to refuse compliance with an instruction is more far-reaching* in the case of section 20 para. 1 of the GmbHG than in the case of article 20 para. 1 sent. 2 of the B-VG. It is argued that, whereas article 20 para. 1 sent. 3 of the B-VG allows administrative organs to refuse compliance with an instruction *only*, if the instruction has been given through an authority, which was not competent in the matter or if compliance with the instruction would infringe provisions of the criminal code, section 20 para. 1 of the GmbHG permits such a refuse *already*, if the managing director, upon compliance with the instruction of the supervisory board, would render himself liable in terms of civil or criminal public law.³⁵⁴

³⁵⁴ See B. Müller, Das österreichische Regulierungsmodell, Wien 2011, p. 182 *et seq.*

The question whether the right of section 20 para. 1 of the GmbHG constitutes an *adequate right of supervision* must rather *not* be answered through a comparison of article 20 para. 1 sent. 2 of the B-VG with section 20 para. 1 of the GmbHG. *On the contrary*, the right of supervision may under no circumstances be determined in a way that it reverts back into a governmental control that is equivalent to the one established through the subjection of administrative organs to governmental instructions. Otherwise, article 20 para. 2 of the B-VG would be deprived of its purpose.³⁵⁵ The difference between these rights is, in my view, merely their *different level of liability*. However, the argument of the prevailing Austrian view that the administrative organs, by reason of their different level of liability, are bound in a *more direct and comprehensive way* to the instructions of their superiors than the managing directors of a limited liability company, does not necessarily prove that section 20 para. 1 of the GmbHG is no *adequate right of supervision*.³⁵⁶

As to the content of the instructions that may be given by the supervisory board to the managing director, they can take the form of specific orders (*einzelfallbezogene Anordnungen*) or general instructions, such as rules of procedure (*Geschäftsordnungen*) and may relate to any lawful matter.³⁵⁷

The power of the supervisory board to issue binding instructions upon the managing director undoubtedly constitutes an adequate instrument of supervision.

3.2.3.2.2.5 The supervisory instruments available under civil and company law

Even if the right of section 20 para. 1 of the GmbHG was *on itself* considered as an inadequate right of supervision over the managing director of the *E-control GmbH*, the supervisory instruments available under civil and company law *in their*

³⁵⁵ In this sense T. Öhlinger, Weisungsfreie Verwaltungsbehörden nach der B-VG Novelle, BGBl I 2008/2, JRP 2008, p. 85 at p. 88.

³⁵⁶ See K. Korinek, ÖZW 2000, p. 52 in: B. Müller, Das österreichische Regulierungsmodell, Wien 2011, p. 183.

³⁵⁷ See e.g. H.-G. Koppensteiner/ F. Rüffler, GmbHG Kommentar, 3. Auflage, Wien 2007, § 16, p. 274 – p. 275.

totality constitute undoubtedly adequate rights of supervision.³⁵⁸ The *lien of control* between the managing director of the *E-control GmbH* and the Federal Ministry of Economics and Labour as the highest organ of the *E-control GmbH*³⁵⁹ is thereby established via the attribution of various supervisory instruments to the organs of the *E-control GmbH*, which are composed of representatives of the highest organ being and which are again subject to the instructions of the Federal Ministry of Economics and Labour.

Supervisory rights of the organs of the *E-control GmbH* include the right of *revocation of the managing director of the E-control GmbH* by way of shareholders' resolution (section 16 para. 1 of the GmbHG).³⁶⁰

As to the applicability of section 16 para. 1 of the GmbHG, section 16 para. 4 of the GmbHG states that section 16 para. 1 GmbHG does not apply to managing directors, which have been appointed by means of shareholder resolution through the Federation, a Federal State or another institution of public law. Hence, since section 1 of the E-RBG as a constitutional provision provides that the *issue, repeal and execution of the provisions contained in the E-RBG lie with the Federation* and that *the matters regulated in the E-RBG may directly be discharged by the authorities provided for in the E-RBG*, section 16 para. 1 of the GmbHG would normally not be applicable. However, section 21 para. 4 sent. 2 of the E-RBG explicitly allows the application of section 16 para. 1 of the GmbHG to the *E-control GmbH*, stating that the regulation of section 21 of the E-RBG shall be “*without prejudice to the provisions of section 16 of the Law on Limited Liability Companies*”. As to the scope of section 16 para. 1 of the GmbHG, the revocation of the managing director can be exercised *at any time* (“*jederzeit*”), which means that establishment of the existence of an important ground is not prerequisite. In contrast, section 21 para. 4 sent. 1 of the E-RBG allows the

³⁵⁸ See B. Müller, Das österreichische Regulierungsmodell, Wien 2011, p. 183 *et seq.*

³⁵⁹ See Website of the *E-control GmbH*, Company, Institutional Framework, http://www.e-control.at/en/econtrol_en/company/institutional-framework (03.02.11).

³⁶⁰ See e.g. C. Fritz, Gesellschafts- und Unternehmensformen in Österreich, 3. Auflage, Wien 2007, para. 2871 *et seq.*

revocation of the managing director only, if the managing director fails to comply with the instructions of the Ministry of Economics and Labour or if he does not furnish the required information.³⁶¹ Which provision is thus applicable? Does the provision of section 21 para. 4 sent. 1 of the GmbHG needs to be considered as “redundant”³⁶² or does section 21 para. 4 sent. 1 of the E-RBG constitute a provision that is *lex specialis*? Or does section 21 para. 4 sent. 2 of the E-RBG, which refers to section 16 of the GmbHG, in general, only apply to the paragraphs other than paragraph 1? I believe that section 21 para. 4 sent. 1 of the GmbHG should be considered as *lex specialis* due to the fact that the *E-control GmbH*, although established as a company of private law, does not representative a typical company of private law, but rather an entity, which has been outsourced from the hierarchical structure of administration and which carries out administrative tasks. The consideration of section 21 para. 4 sent. 1 of the GmbHG as *lex specialis* with the consequence that the managing director may only be revoked upon failure to comply with governmental instructions or failure to furnish the required information, is similar to the regulation contained in section 20 para. 1 no. 3 in connection with section 92 para. 1 no. 4 of the Austrian Public Services Law on Civil Servants (*österreichisches Beamten-Dienstrechtsgesetz*, hence *BDG*³⁶³), which stipulates that a civil servant may only be revoked, if he *culpably violates one of his official duties (schuldhafte Verletzung seiner Dienstpflicht)* (section 91 of the BDG). Since the disciplinary measure to be taken depends upon the *severity of violation* (section 93 para. 1 of the BDG), the revocation of a civil servant as the most severe measure among those stipulated in section 20 para. 1 of the BDG, may only be taken in case the existence of an important ground can be established. These provisions correspond to those laid down in the German BBG and BDG³⁶⁴, which equally require the establishment of an important ground in order to revoke a civil servant. However,

³⁶¹ For more details, see section 3.2.2.2.2 (Governmental control over the *E-control GmbH*).

³⁶² In this sense, B. Müller, *Das österreichische Regulierungsmodell*, Wien 2011, p. 184.

³⁶³ See *österreichisches Beamten-Dienstrechtsgesetz*, <http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008470/BDG%201979%2c%20Fassung%20vom%2002.03.2011.pdf> (02.03.2011).

³⁶⁴ See section 3.2.3.1.2.3.1 (The right of removal of the members of the *BNetzA*).

whereas the decision of whether an important ground can be established to revoke the President of the *BNetzA* is taken according to one's best judgement (*nach pflichtgemäßem Ermessen*), the decision to revoke the managing director of the *E-control GmbH* is restricted to the failure to comply with governmental instructions and the failure to furnish the required information.

As to the grounds for revocation, article 16 para. 1 of the GmbHG stipulates that principally the managing director may be revoked by shareholder's resolution at "*any time*".³⁶⁵ It is, however, possible upon article 16 para. 3 of the GmbHG to restrict the revocation of the managing director to the establishment of important grounds provided that the managing director has been appointed in the *articles of association*.³⁶⁶

Another supervisory right includes the obligation of the managing director to inform the company about any activities of the company and its assets for a period of five years after his term of office (section 24a of the GmbHG). In accordance herewith section 21 para. 3 of the E-RBG enables the Ministry of Economics and Labour to ask the managing director for any information and documents in order to discharge his functions. Generally the supervisory board, consisting of three members (section 30 of the GmbHG),³⁶⁷ supervises the activities of the managing director (section 30 j para.1 of the GmbHG), which includes the right to require, at any time, the preparation of a report on the activities of the company (section 30 j para. 2 of the GmbHG). The supervisory board may, in particular, require the managing director to provide a *yearly report* on questions of principle on of the future business policy and financial development of the company (*Jahresbericht*), a *quarterly report* on the ordinary business and the actual status of the company (*Quartalsbericht*) as well as a report if

³⁶⁵ For more details, see *M. Umfahrer*, *Die Gesellschaft mit beschränkter Haftung*, 6. Auflage, Wien 2008, p. 95 – 100.

³⁶⁶ Another exception is laid down in art. 50 para. 4 GmbHG, see *e.g. C. Fritz*, *Gesellschafts- und Unternehmensformen in Österreich*, 3. Auflage, Wien, 2007, paras. 2390, 2873; see also *M. Umfahrer*, *Die Gesellschaft mit beschränkter Haftung*, 6. Auflage, Wien 2008, p. 96; see furthermore *H.-G. Koppensteiner/ F. Rüffler*, *GmbHG Kommentar*, 3. Auflage, Wien, 2007, § 16, p. 224 *et seq.*

³⁶⁷ See website of the *E-control GmbH*, <http://www.e-control.at> (03.02.2011).

there is an important cause (*wichtiger Anlass*) or if circumstances of significant reason (*Umstände von erheblicher Bedeutung*) so require (*Sonderbericht*) (section 28a para. 1 of the GmbHG). The supervisory board may furthermore look at and examine the accounts of the company (section 30 j para. 3 of the GmbHG).

Section 21 para. 1 of the E-RBG provides that the supervisory powers of the Ministry of Economics and Labour are without prejudice to the rights of the General Assembly pursuant to the Law on the Limited Liability Companies. Shareholders' resolutions are principally taken in the general assembly (*Generalversammlung*) pursuant to section 34 para. 1 of the GmbHG, which decides, *inter alia*, on the measures of examination and supervision of the managing director (section 35 para. 1 no. 5 of the E-RBG).

As a result, the managing director is strictly supervised by the Federal Ministry of Economics and Labour, either directly through the Federal minister or indirectly through the organs of the *E-control GmbH*.

3.2.3.2.3 Article 52 para. 1a of the B-VG

In addition to the requirement of article 20 para. 2 sent. 3 of the B-VG, article 52 para. 1a of the B-VG, which has also been introduced in the course of the revision of the B-VG, entitles the competent committees of the National and Federal Council to require the presence of the director of an organ released from the instructions of its superior according to article 20 para. 2 of the B-VG in the sessions of the committees and to interrogate him on all activities related to the exercise of his office. Such a *direct right of parliamentary control* has so far only been accorded to the National Council and Federal Council towards the Government and its members. By virtue of article 52 para. 1a of the B-VG, such direct right of parliamentary control has been extended to organs that are released from governmental instructions by virtue of article 20 para. 2 of the B-VG. The conferral of such a direct right of parliamentary control shows the importance that is increasingly attached to the principle of democracy through Austrian constitutional law. It constitutes the most powerful tool for Parliament to exert an influence on public administration and may, thus, undoubtedly act as an adequate substitute for the obligation of administrative organs to comply with governmental instructions.

3.3 Analysis

Contrary to German constitutional law, Austrian constitutional law codifies *in writing* the principle, according to which administrative organs are subject to the instructions of their superiors. Equally contrary to German constitutional law, Austrian constitutional law lays down the exceptions allowed thereof in a very detailed way. On one side, the solution taken by Austrian constitutional law entails the risk that specific cases not foreseen by law fall outside of the scope of application. On the other side, the solution of German constitutional law, which does not even mention the principle, leads to legal uncertainty. Although the German Constitutional Court has developed specific categories, there is still wide room of interpretation. With a view to the principle of democracy as an *ever changing principle of constitutional law*, a principle that depends to such extent upon the actual political and social circumstances, the release of administrative organs from their obligation to comply with governmental instructions should, in my view, however be codified as flexible as possible.

3.4 Conclusion

Compared to former regime of Directive 2003/54/EC, national energy regulators' independence has further been strengthened in granting them independence in also political terms. The strengthening of national energy regulators' independence leads to the result that Member States lose considerable power and control over their own national energy regulators. This effect is particularly triggered through article 35 par. 4 sent. 2 (b) (ii) of Directive 2009/72/EC, which prohibits Member States from giving instructions to their national energy regulators. The release of national energy regulators from governmental instructions stands thereby in strong contrast to the hierarchical model of administration as prevalent in Austria and Germany. Indeed, based upon the principle of democracy, both constitutional systems subject the administrative organs principally to the instructions of their superiors and allow for their release in only exceptional, limited cases. The examination of whether article 35 par. 4 sent. 2 (b) (ii) of Directive 2009/72/EC can be regarded as such an exception recognised by Austrian and German constitutional law *leads to a different result*, which is due to the fact that the *supervision of the energy sector in Austria and*

Germany is organised in an entirely different way. The *BNetzA*, established as an autonomous higher Federal authority, remains under the tight control of the Government and its release would not be justifiable upon the cases developed by German law doctrine and administrative practice. The release of the *E-control GmbH*, established as an entity of private law outside of the hierarchical structure of administration, and the *E-control Commission*, on the contrary, is compatible with Austrian constitutional law. Whereas in Austria, the constitutional laws have been adjusted to European legislation through the constitutional reform in 2008, in Germany the contradiction between national and European legislation subsists. As a consequence, whereas article 35 par. 4 sent. 2 (b) (ii) of Directive 2009/72/EC can be regarded as compatible with Austrian constitutional laws, it is incompatible with the German Basic Law.

4 The gain of power of the European Commission over the national energy regulators of the Member States

Whereas Member States, triggered through article 35 para. 4 sent. 2 b (ii) of Directive 2009/72/EC lose power over their own national energy regulators, the European Commission gains power over them. Under the regime of Directive 2009/72/EC, the European Commission may exercise its power either in a *direct* way, in particular through the issuance of binding guidelines (4.1) or in an *indirect* way via newly established institutions, such as the European Network of Transmission System Operators or the Agency for the Cooperation of Energy Regulators (4.2).

4.1 The *direct* powers of control of the European Commission over the national energy regulators

The European Commission disposes of *direct* powers of control over Member States' national energy regulators. These powers are exercised either in form of binding guidelines within areas that are of the responsibility of the national energy regulators (4.1.1) or in form of an *ex post* veto right against individual decisions taken by national energy regulators (4.1.2).

4.1.1 The power to issue binding guidelines in areas of responsibility of the national energy regulators

Directive 2009/72/EC empowers the European Commission to issue binding guidelines in various areas that fall within the responsibility of the national energy regulators. Upon examining the provisions of Directive 2009/72/EC, the European Commission's power is, at first sight, not obvious. Indeed, compared to the European Commission's Proposal, which empowered the European Commission *explicitly* to "*adopt guidelines on the implementation by the regulatory authorities of the powers described in this Article*" (article 22c para. 14 of the European Commission's Proposal), no such provision can be found in Directive 2009/72/EC. This does, however, not signify that the European Commission has abandoned its aim of controlling the national energy regulators via the issuance of binding guidelines. Its

power is just more difficult to detect. Indeed, whereas in the European Commission's Proposal the European Commission's power to issue binding guidelines was directly listed under the section "*duties and powers of the regulatory authority*", it is now spread all over Directive 2009/72/EC. It is inserted within provisions, where one would not expect it to be. It is, for instance, contained in provisions, which determine the areas of responsibility of the *national energy regulators*, rather than of the European Commission; and it is, most of the time, hidden somewhere in one of the last paragraphs of the relevant provisions.

As to the legal effect of the European Commission's guidelines, they constitute "binding implementing measures".³⁶⁸ Their character as legally binding measures can be deduced either from the explicit wording of the respective provisions ("*binding guidelines*") or from the procedure to be followed for their adoption, *i.e.* the regulatory procedure with scrutiny ("*Regelungsverfahren mit Kontrolle*") pursuant to article 5a of Decision 1999/468/EC.³⁶⁹ Decisions taken by national energy regulators must comply with the European Commission's guidelines referred to in Directive 2009/72/EC and in Regulation (EC) No 714/2009 (article 39 para. 1 of Directive 2009/72/EC). The European Commission may decide to require national energy regulators to withdraw their decisions on the basis that the guidelines have not been complied with (article 39 para. 6 (b) of Directive 2009/72/EC). In this case, national energy regulators have the duty of "*complying with, and implementing*" the decision of the European Commission (article 37 para. 1 (d) of Directive 2009/72/EC). As a consequence, the guidelines issued by the European Commission in areas that fall within the responsibility of the national energy regulators *prevail* over the decisions taken by the latter.

The European Commission's power to issue binding guidelines reaches deep into the area of national networks (4.1.1.1) and extends far to areas involving cross-border issues (4.1.1.2).

³⁶⁸ See Recital (63) sent. 2 of Directive 2009/72/EC.

³⁶⁹ Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the European Commission, OJ L 184, 17.7.1999, p.23; see also Recital (64) and (65) as well as art. 46 para. 2 of Directive 2009/72/EC.

4.1.1.1 In the areas of national electricity networks

In the areas of national electricity networks Directive 2009/72/EC³⁷⁰ provides in Recital (65) sent. 1 that “*the European Commission should be empowered to adopt the Guidelines necessary for providing the minimum degree of harmonisation required to achieve the aim of this Directive*”. For this purpose, the European Commission may, for instance, issue binding guidelines as to the procedures to be followed for certification requests of transmission system owners or operators controlled by third countries (article 11 para. 10 of Directive 2009/72/EC).³⁷¹ The European Commission may furthermore issue guidelines to ensure that the transmission system owners’ independence is guaranteed (article 14 para. 3 of Directive 2009/72/EC) or to define the methods and arrangements of record keeping and the form and the content of the data relating to activities of supply undertakings (article 40 para. 4 and 5 of Directive 2009/72/EC).³⁷² The European Commission is finally empowered to issue binding guidelines as to the procedure to be followed to require energy regulators to adhere to the provisions of the Regulation, the Directive and the guidelines (article 39 para. 9 of Directive 2009/72/EC).³⁷³

4.1.1.2 In areas involving cross-border issues

In areas involving cross-border issues, it is mainly Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions

³⁷⁰ See the European Commission’s Proposal, 2007/195 (COD) at Recital (27).

³⁷¹ Art. 11 para. 10 of Directive 2009/72/EC is based upon art. 8b para. 13 of the European Commission’s Proposal, 2007/ 0195 (COD).

³⁷² Not retained in Directive 2009/72/EC has been the European Commission’s power to issue binding guidelines on Member States and national energy regulators in order to implement public service obligations, to protect customers (art. 3 para. 10 of the European Commission’s Proposal), to ensure compliance of transmission and distribution systems (art. 10a para. 3 and art. 15 para. 4 of the European Commission’s Proposal) and to ensure confidentiality issues (art. 12 para. 4 of the European Commission’s Proposal).

³⁷³ See e.g. H. Lecheler, Ungereimtheiten bei den Handlungsformen des Gemeinschaftsrechts - dargestellt anhand der Einordnung von “Leitlinien”, DVBl 2008, p. 873 at p. 879.

for access to the network for cross-border exchanges in electricity³⁷⁴ (“*Regulation (EC) No 714/ 2009*”) and Directive 2009/72/EC, which empowers the European Commission to issue binding guidelines.³⁷⁵ Central provision in this regard constitutes article 18 of Regulation (EC) No 714/2009. The European Commission has, upon paragraph 3 in connection with paragraph 5 sent. 1 of the same article, *the general power* to adopt those guidelines that are necessary for providing the minimum degree of harmonisation required to achieve the aims of Regulation (EC) No 714/2009.³⁷⁶ Areas that shall be covered in these guidelines are listed in paragraph 3 of article 18 of Regulation (EC) No 714/2009. These areas constitute thereby the *minimum* of what the European Commission shall determine. This becomes apparent upon examining the wording of article 18 of Regulation (EC) No 714/2009, which refers to “*also*”, rather than to “*in particular*”.³⁷⁷ It is thus within the discretion of the European Commission to determine the necessary degree of harmonisation. Areas, in which the European Commission may issue binding guidelines concern, for instance, inter-transmission system operator compensation mechanisms (article 18 para. 1 of Directive 2009/72/EC), network charges (article 18 para. 2 of Directive 2009/72/EC) or the management and allocation of transmission capacities between interconnectors (article 18 para. 4 of Directive 2009/72/EC). The European Commission may furthermore adopt guidelines with regard to the cooperation of national energy regulators with each other and with the Agency for the Cooperation of Energy Regulators (article 38 para. 5 of Directive 2009/72/EC). In addition, the European Commission may adopt guidelines

³⁷⁴ OJEU L 211/55, p. 15.

³⁷⁵ As to the European Commission’s plans of restructuring cross-border trade in energy, including regulatory competences, see *e.g.* G. Hermeier, Die Zuständigkeitsverteilung bei der Regulierung des grenzüberschreitenden Stromhandels – Mehr Binnenmarkt durch mehr Zentralisierung?, RdE 9/ 2007, p. 249 *et seq.* Regarding the problem of congestion management (“*Engpassmanagement*”) encountered with regards to cross- border trade in electricity, see *e.g.* K. Pritzsche/ M. Stephan/ S. Pooschke, Engpassmanagement durch marktorientiertes Redispatching, RdE 2/ 2007, p. 36 *et seq.*; see also J. Kühling, Die neuen Engpass-Leitlinien der Kommission im grenzüberschreitenden Stromhandel – Freie Fahrt für das Open Market Coupling in Deutschland?, RdE 7/ 2006, p. 173 *et seq.*

³⁷⁶ See also Recital (63) of Directive 2009/72/EC and Recital (29) of Regulation (EC) No 714/2009.

³⁷⁷ See H. Lecheler, Ungereimtheiten bei den Handlungsformen des Gemeinschaftsrechts dargestellt anhand der Einordnung von “Leitlinien”, DVBl 2008, p. 873 at p. 879; see also H. Lecheler, Die Verschärfung des Regulierungsregimes durch die drei neuen Verordnungs-Entwürfe im Paket vom 19.09.2007, RdE 6/2008, p. 167 at p. 171.

relating to “tarification and capacity allocation” (Recital (24) of Regulation (EC) No 714/2009), to the procedure to be followed for certification requests of transmission system operators (art. 3 para. 5 of Regulation (EC) No 714/2009) or to the establishment of network codes (art. 6 para. 12 in connection with article 18 of Regulation (EC) No 714/2009). The European Commission may also adopt binding guidelines with regard to compensation mechanisms of inter-transmission system operators (article 13 para. 3 Regulation (EC) No 714/2009 in connection with article 18 of Regulation (EC) No 714/2009) or to the application of the conditions and the procedure to be followed for the exemption of new interconnectors (article 17 para. 9 of Regulation (EC) No 714/2009).³⁷⁸

4.1.2 The power of veto against individual decisions of the national energy regulators

Article 39 of Directive 2009/72/EC confers upon the European Commission the power of veto against individual decisions taken by Member States’ national energy regulators. The proceedings may be initiated in three different ways (article 39 para. 5 of Directive 2009/72/EC).³⁷⁹

The *first way* is codified in article 39 para. 5 in connection with *para. 4* of Directive 2009/72/EC (*Anrufungsverfahren*). It stipulates that “any regulatory authority may inform the European 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.”

The *second way* is contained in article 39 para. 5 in connection with *para. 3* of Directive 2009/72/EC (*Agenturverfahren*). It codifies the duty of the Agency for the

³⁷⁸ *Ibid.*

³⁷⁹ See *J. Kühling*, Die Vorschläge zur institutionellen Neuorganisation des grenzüberschreitenden Stromhandels im 3. Energiebinnenmarkt-Paket - Defizite und Verbesserungsoptionen, IR 5/ 2008, p. 98 at p. 99.

Cooperation of Energy Regulators ”to inform the European Commission” if it considers that 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 *third way* is codified in article 39 para. 5 of Directive 2009/72/EC (*Autoinitiativverfahren*). It gives the European Commission the power to start the proceedings “*on its own initiative*”, where it “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 [...]”

Where, following the initiation of proceedings, the European Commission takes the decision to examine the case further, it is empowered, upon article 39 para. 6 of Directive 2009/72/EC, to take a *final decision*. In this case, the European Commission may require the regulatory authority concerned “to withdraw its decision on the basis that the Guidelines have not been complied with” (article 39 para. 6 (b) of Directive 2009/72/EC). National energy regulators must thereby respect a period of two months (article 39 para. 8 of Directive 2009/72/EC). Hence, as a result, the national energy regulators have no other means than to comply with and implement the decision of the European Commission (article 37 para. 1(d) of Directive 2009/72/EC).

4.1.3 Analysis

The European Commission’s power to issue binding guidelines penetrates almost every area of the electricity market of the Member States.³⁸⁰ The European Commission’s guidelines are not only far-reaching in terms of *their scope of application*, extending to areas of national networks as well as to areas involving cross-border issues; they are also far-reaching in terms of *their legal consequences*, prevailing over the decisions taken by the national energy regulators. The European Commission may “*adopt*” and “*amend*” guidelines whenever it judges “*appropriate*”, having only to respect that they “*do not go beyond what is necessary*” to achieve their

³⁸⁰ *Ibid* at p. 100.

aim (article 39 para. 5 of Regulation (EC) No 714/2009). The European Commission is thus, *de facto*, elevated to a decision-making body.³⁸¹

4.2 The *indirect* powers of control of the European Commission over the national energy regulators via European intermediaries

In addition to the European Commission's direct powers of control over Member States' national energy regulators, the European Commission disposes also of *indirect* powers of control. These powers are indirect, because they are not exercised directly through the European Commission itself, but rather through its institutions, such as the European Network of Transmission System Operators (4.2.1) or the Agency for the Cooperation of Energy Regulators (4.2.2). In order to retain its influence on national energy regulators, the European Commission secures, at the same time, control over these institutions.

4.2.1 The European Network of transmission system operators

Article 5 of Regulation (EC) 714/2009 establishes the European Network of Transmission System Operators for Electricity ("*ENTSO for Electricity*") to "ensure the optimal management of the electricity transmission network and to allow trading and supplying electricity across borders in the Community".³⁸² Its establishment has, according to the European Commission's Proposal for a Regulation amending Regulation (EC) No 1228/2003³⁸³, become necessary because the voluntary

³⁸¹ See in this sense *H. Lecheler*, Ungereimtheiten bei den Handlungsformen des Gemeinschaftsrechts dargestellt anhand der Einordnung von "Leitlinien", DVBl 2008, p. 873 at p. 879 and p. 880.

³⁸² See Recital (7) and art. 4 of Regulation (EC) 1228/2003; see also *W. Koster/ C. Filippitsch*, Die neue Europäische Kommission und Kernelemente ihrer Energiepolitik, e/m/w, 1/10, p. 10.

³⁸³ See Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity, presented by the European Commission on 19.09.2007, COM (2007) 531 final, 2007/0198 (COD).

cooperation that existed between transmission system operators via the European Transmission System Operators (“ETSO”)³⁸⁴ “*has shown its limits*”.³⁸⁵

4.2.1.1 The conferral of extensive tasks on the European Network of transmission system operators

The *ENTSO for Electricity*, in order to “strengthen the cooperation between transmission system operators”³⁸⁶, has been vested with extensive tasks through Regulation (EC) 714/2009. Its main task constitutes the development of detailed market and technical codes, which shall cover various key areas of cooperation (article 8 para. 1 and 2 in connection with para. 6 of Regulation (EC) 714/2009). As to the control of these network codes, the European Commission stressed that “*strong regulatory oversight on the content and on monitoring of compliance and enforcement of these rules by national regulators authorities, the Agency and/ or the European Commission (...)*” must be guaranteed.³⁸⁷ Upon examination of Regulation (EC) 714/2009, it becomes apparent that, whereas it is, indeed, *the European Commission*, which controls the “*content*” and “*enforcement*” of these rules, the *national energy regulators* merely “*monitor*” compliance with these rules. Just as under former article 9 of Regulation (EC) 1228/2003, the national energy regulators have merely the power to

³⁸⁴ As to the *ETSO*, see e.g. *ETSO* former website, What is *ETSO*, [www.etso-net.org/association/about us/](http://www.etso-net.org/association/about_us/) (23.06.2008); see also Cross-border Tariffs for the Internal Market of Electricity in Europe (IEM), see also *ETSO*, ITC Agreement 2008 – 2009, Explanatory draft, 3 October 2007, http://ec.europa.eu/energy/gas_electricity/consultations/doc/2009_02_28_tso_explanatory_note.pdf (02.07.2009); *ETSO*, press release, Inter-TSO Compensation Mechanism for 2007, 22 December 2006, https://www.entsoe.eu/fileadmin/user_upload/library/ntc/archive/Press%20Release%20in%20ITC%2020075-final.pdf (02.07.2009).

³⁸⁵ See Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity, presented by the European Commission on 19.09.2007, COM (2007) 531 final at 4.1.

³⁸⁶ *Ibid* at 4.1; see also *F. J. Säcker*, Netzausbau- und Kooperationsverpflichtungen der Übertragungsnetzbetreiber nach Inkrafttreten des EnLAF und der Dritten StromRL 2009/72 EG vom 13.7.2009, RdE 10-11/ 2009, 305 *et seq.*

³⁸⁷ *Ibid* at 4.1.

“ensure compliance with this Regulation and the Guidelines” of the European Commission (article 19 of Regulation /EC) 714/2009).

4.2.1.2 The control of the European Commission over the European Network of transmission system operators

The European Commission secures control over the ENTSO for Electricity in two ways. It may, *firstly*, request the *ENTSO for Electricity* to draw up technical and market codes in those areas that are listed in article 8 para. 1 of Regulation (EC) No 714/2009 (article 6 para. 6 of Regulation (EC) No 714/2009). These network codes must thereby comply with the “framework guideline” adopted by the Agency upon request of the European Commission (article 6 para. 2 and 4 of Regulation (EC) No 714/2009). The framework guideline may also be elaborated by the European Commission itself, if it “considers that the framework guideline does not contribute to non-discrimination, effective competition and the efficient functioning of the market” (article 6 para. 4 and 5 of Regulation (EC) No 714/2009). Where the *ENTSO for Electricity* fails to develop the network codes within the period set by the European Commission, the network codes are prepared by the Agency under control of the European Commission (article 6 para. 10 of Regulation (EC) No 714/2009).³⁸⁸ The European Commission may also, “upon its own initiative”, decide to adopt the network codes itself, if it considers that the *ENTSO for Electricity* or the Agency have failed to develop appropriate network codes (article 6 para. 11 of Regulation (EC) No 714/2009). The European Commission may, *secondly*, adopt binding guidelines for the development of network codes, either upon its own initiative or upon recommendation of the Agency (article 6 para. 12 of Regulation (EC) No 714/2009).

Hence, whereas the European Commission disposes of real decision-making powers with regard to the activities of *the ENTSO for Electricity*, the national energy regulators

³⁸⁸ Art. 6 para. 10 of Regulation (EC) No 714/2009 is in line with the European Parliament’s demand to give to the Agency “the final say over the approval and adoption of the grid access and market rules laid out by the ENTSO’s”; see *e.g.* art. “MEPs: Strong EU regulators key to energy market puzzle”, 29.05.2008, <http://www.euractiv.com/en/energy/meps-strong-eu-regulator-key-energy-market-puzzle/art.-172804> (14.08.2010).

play merely a supervisory role. The European Commission does not only control the *procedure* for the development of network codes, it also determines the *contents* of these codes.³⁸⁹

Here, a similar tactic as the one used with regard to national energy regulators' powers is employed by the European Commission: it strengthens, *in a first step*, the powers of the *ENTSO for Electricity* and secures, *in a second step*, its power over the electricity market through a control over the *ENTSO for Electricity*.

4.2.2. The Agency for the Cooperation of Energy Regulators as intermediary controlling body

Article 1 of Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators ("*Regulation (EC) No 713/2009*") establishes the Agency for the Cooperation of Energy Regulators ("*the Agency*")³⁹⁰ (4.2.2.1). The legal basis upon

³⁸⁹ See *H. Lecheler*, Die Verschärfung des Regulierungsregimes durch die drei neuen Verordnungs-Entwürfe im Paket vom 19.09.2007, RdE 6/2008, p. 167 at p. 170; critical also *J. Kühling*, Die Vorschläge zur institutionellen Neuorganisation des grenzüberschreitenden Stromhandels im 3. Energiebinnenmarkt-Paket - Defizite und Verbesserungsoptionen, IR 5/ 2008, p. 98 at p. 101.

³⁹⁰ Initially the European Commission put forward in its Proposal three options for establishing an EU regulatory function: gradually evolving the current approach by reinforcing collaboration between national regulators; ERGEG taking on greater independent decision-making and coordinating powers (ERGEG +); and the creation of an independent single European regulator; for further details, see ERGEG; ERGEG's response to the European Commission's Communication "An Energy Policy for Europe", Ref. C06-BM-09-05, 6 February 2007 at p. 25 *et seq*; see also 2007 Annual Report of the European Energy Regulators, website European Energy Regulators CEER & ERGEG, publications & press, annual reports, p. 7 *et seq*, http://www.energyregulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/ANNUAL%20REPORTS/2007/4732CDA067DEE73DE040A8C03C2F2F45 (25.09.2010).

On the establishment of European Agencies *in general*, see *e.g.* Deutscher Bundestag, Wissenschaftliche Dienste, Europäische Agenturen, http://www.bundestag.de/dokumente/analysen/2007/Europaeische_Agenturen.pdf (19.09.2010); on the establishment of the Agency for the Cooperation of Energy Regulators *in particular*, including the procedural steps, news and events, see European Energy Forum, Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, <http://www.europeanenergyforum.eu/archives/european-union/eu-general-topic-file/eu-competition-and-economic-matters/third-legislative-package-on-eu-electricity-gas-markets/establishment-of-an-agency-for-the-cooperation-of-energy-regulators> (19.09.2010).

which it has been established (4.2.2.2), the way it is composed (4.2.2.3), the tasks that have been conferred upon it (4.2.2.4), in particular with regard to the exercise of executive powers (4.2.2.5), prove that the European Commission aims, first and foremost, at giving the Agency control over Member States' national energy regulators (4.2.2.6).³⁹¹ The European Commission itself secures its influence over the national energy regulators through various means, including its influence on the composition of the Agency or the enactment of legally binding guidelines (4.2.2.7).

4.2.2.1 Introduction: *EREGplus* or a European agency?

The creation of a single European energy market requires the national energy regulatory authorities of the Member States to carry out their regulatory tasks *according to uniform principles*. The coordination of the implementation of these principles, which are determined in current energy laws, such as in Directive 2009/72/EC, has been conferred upon the European Regulators Group for Electricity and Gas (hence *EREG*), an institution established by European Commission Decision of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas (hence *EREG* European Commission Decision).³⁹² Generally, the *EREG*, which is composed of the heads of the national regulatory authorities or their representatives (article 2 para. 1 of *EREG* European Commission Decision), is entrusted with advising and assisting the European Commission in consolidating the internal energy market, in particular, with respect to the preparation of draft implementing measures on matters related to the internal energy market, and thereby

³⁹¹ For details as to the European Union's competence to establish European agencies, see *W. Kilb*, Europäische Agenturen und ihr Personal – die großen Unbekannten?, *EuZW* 9/2006, p. 268 *et seq.* According to the jurisprudence of the European Court of Justice on “*Meroni*”, the establishment of the Agency, including of its extensive powers, is legitimate as long as a sufficient judiciary protection and sufficient participation rights of the European Parliament is guaranteed; for details, see *J. Kühling*, Vorschläge zur institutionellen Neuorganisation des grenzüberschreitenden Stromhandels im 3. Energiebinnenmarkt – Paket- Defizite und Verbesserungsoptionen, *IR* 5/ 2008, p. 98 at p. 101; see also *J. Kühling*, Die Zukunft des Europäischen Agentur(un)wesens – oder: Wer hat Angst vor Meroni?, *EuZW* 5/2008, p. 129 *et seq.*; see furthermore *S. Neveling*, Europäisierung der Energieaufsicht? – Vorschläge von Kommission und EREG zur Neuordnung (Teil 1), *IR* 8/2007, p. 173 at p. 175.

³⁹² See European Commission Decision of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas (2003/96/EC), *OJEU* L 296, 14.11.2003, p. 34 – p. 35.

ensuring its creation and smooth functioning (article 1 para. 2 of *EREG* European Commission Decision).³⁹³ Its tasks include the facilitating and promoting of consultation, coordination and cooperation between the national energy regulatory authorities in the Member States, and between these bodies and the European Commission, and contributing to a consistent application in all Member States of Directives 2003/54/EC and 2003/55/EC and Regulation (EC) No 1228/2003 (article 1 para. 2 of *EREG* European Commission Decision). It furthermore acts as a link between the national energy regulators, the European Commission and market participants, consumers and end-users, with which it shall consult extensively and at an early stage in an open and transparent manner (article 1 para. 2 of *EREG* European Commission Decision).³⁹⁴ The activities of the *EREG* resulted in the development of different *non-binding codes*, such as the Guidelines of Good Practice (hence, *GGPs*), aimed at giving directions to the national energy regulators within the exercise of their office.³⁹⁵ Although these codes and common approaches lead to a “*gradual convergence*” of the activities of the national energy regulators, as the European Commission claims, they were unable to lead to real decisions on the difficult issues that need to be taken in the area of energy regulation.³⁹⁶ It was proposed by the *EREG* itself that the voluntary cooperation between the national energy regulators should now take place within a Community structure with clear

³⁹³ For more details, see *EREG*, CEER, 2009 Annual Report of the European Energy Regulators, p. 2 – 4, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/ANNUAL%20REPORTS/Tab/erreg_%20ceer%20annual%20report%2009.pdf (06.01.2011).

³⁹⁴ See CEER & *EREG*, Annual Report of the European Energy Regulators, 2009, p. 4, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/ANNUAL%20REPORTS/Tab/erreg_%20ceer%20annual%20report%2009.pdf (06.01.2011).

³⁹⁵ The *EREG*’s Guidelines of Good Practice are voluntary guidelines that are legally not enforceable, see homepage of the European Energy Regulators, CEER & *EREG*, Papers, Guidelines of Good Practice, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_EREG_PAPERS/Guidelines%20of%20Good%20Practice/Electricity (06.01.2011).

³⁹⁶ See e.g. Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, presented by the European Commission on 19.09.2007, COM (2007) 530 final at 3.1.

competences and with the power to adopt individual regulatory decisions in a number of specific cases.³⁹⁷

In its Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators (*European Commission's Proposal on establishing an Agency*)³⁹⁸ the European Commission stated that, although the activities of the *ERGEG* “*made a very positive contribution to the completion to the internal energy markets*”, they had not “*resulted in the real push towards the development of common standards and approaches necessary to make cross-border trade and (...) a European energy market a reality*”.³⁹⁹ This was, in the European Commission’s view, particularly true as to the *technical rules and standards* for electricity operators, which “*differ enormously between Member States and often even within a single Member State*”, making cross-border trade difficult and often impossible.

As a consequence, the European Commission, after having examined, if it was be able to pursue the required tasks itself, opted for the establishment of a “*separate entity, independent and outside the European Commission*” and evaluated three different options.⁴⁰⁰

The *first option* that the European Commission examined was to promote the creation of a *more powerful network of national energy regulators*, by intensifying the cooperation between them and introducing specific notification obligations towards

³⁹⁷ See *e.g.* Recital (3) of Directive 2009/72/EC.

³⁹⁸ Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, presented by the European Commission on 19.09.2007, COM (2007) 530 final, 2007/0197 (COD).

³⁹⁹ *Ibid* at 3.1; see also Recital (3) of Directive 2009/72/EC.

⁴⁰⁰ Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, presented by the European Commission on 19.09.2007, COM (2007) 530 final at 3.1.

the European Commission.⁴⁰¹ However, the creation of such a “self-organisation of the national regulatory authorities” would, in the European Commission’s view, not prove effective, because it would only be able to adopt national administrative regulations (*Verwaltungsvorschriften*), which had no legally binding effects vis-à-vis third parties (*unmittelbare Außenwirkung*). In addition, this would necessitate the creation of autonomous powers for the European Commission in the energy sector.⁴⁰² Moreover, as purely *national* entities, they would not be able to carry out the necessary *European* supervision on energy related issues. Finally, the European progress would continue to be based upon *voluntary agreements* between the national energy regulators, which often pursue different and purely national interests.⁴⁰³

The *second option* considered was to elevate and strengthen the *ERGEG*, by *conferring upon it greater independent decision-making and coordinating powers (ERGEGplus)* for regulators and relevant market players on certain precisely defined technical issues and mechanisms relating to cross border issues.⁴⁰⁴ In the European Commission’s view, this option would, however, equally not be effective, given that the *ERGEG* represents a purely advisory body and does not dispose of its own administrative structure.⁴⁰⁵

⁴⁰¹ See e.g. B. Holznagel/ P. Schumacher, *ERGEGplus – Wieder der Versuch der Einführung eines Europäischen Regulierers durch die Hintertür*, RdE 8/2007, p. 225 at p. 229.

⁴⁰² See S. Neveling, *Europäisierung der Energieaufsicht? – Vorschläge von Kommission und ERGEG zur Neuordnung* (Teil 2), IR, Heft 9/2007, p. 194 at p. 195.

⁴⁰³ See e.g. B. Holznagel/ P. Schumacher, *ERGEGplus – Wieder der Versuch der Einführung eines Europäischen Regulierers durch die Hintertür*, RdE 8/2007 at p. 225; see also Communication from the European Commission to the European Council and the European Parliament, *An Energy Policy for Europe*, COM (2007) 1 final, p. 8.

⁴⁰⁴ For a detailed overview on the tasks of the ERGEG+ developed through the European Commission and the ERGEG, *ibid* at p. 226 *et seq.*

⁴⁰⁵ See e.g. S. Neveling, *Europäisierung der Energieaufsicht? – Vorschläge von Kommission und ERGEG zur Neuordnung* (Teil 1), IR, Heft 8/2007, p. 173 at p. 174.

The *third option* evaluated through the European Commission related to the *creation of an independent single European energy regulator*.⁴⁰⁶ The European Commission considered that an independent central entity offered a number of long-term advantages over the other options.⁴⁰⁷ It concluded that if an independent body should be established to make proposals to the European Commission regarding decisions, which involve *substantive decisions* and to take *individual regulatory decisions, which are binding on market participants* with regard to technical issues, the only solution was the creation of an independent energy regulator.⁴⁰⁸

Hence, based upon the European Commission's Proposal on establishing an Agency, article 1 para. 1 of Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators ("*Regulation (EC) No 713/2009*") set up the Agency for the Cooperation of Energy Regulators ("*the Agency*").

4.2.2.2 The legitimacy of the European Union to establish the Agency as a European regulatory agency

Generally, European agencies emerged completely outside of European primary law, bearing no reference within the framework of the treaties of the European Union.⁴⁰⁹

⁴⁰⁶ For further details, see e.g. the Communications of the European Commission to the Council and the European Parliament, *Prospects for the internal gas and electricity market*, COM (2006) 841 final at p. 15 *et seq.*, *ERGEG's response to the European Commission's Communication, An Energy Policy for Europe*, Ref. C06-BM-09-05, 6 February 2007 at p. 25 *et seq.*

⁴⁰⁷ See Recital (5) of Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJEU, L 211/1.

⁴⁰⁸ Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, presented by the European Commission on 19.09.2007, COM (2007) 530 final at 3.1.

⁴⁰⁹ See e.g. J. Saurer, The accountability of supranational administration: the case of European Union agencies, Am. U. Int'l L. Rev., p. 431; see also W. Kilb, Europäische Agenturen und ihr Personal – die großen Unbekannten?, EuZW, Heft 9/2006, p. 268 at p. 269.

Within *European primary law*, article 13 para. 1 TEU determines *seven institutions* as organs that share between them the constitutional powers necessary to carry out the legislative, executive and judicial functions of the European Union. These are the European Commission⁴¹⁰ as the “guardian of the Treaties”, the European Parliament⁴¹¹ and the Council (of the European Union)⁴¹² as legislative and budgetary organs, the European Council as organ defining the general political direction and priorities of the European Union⁴¹³, the Court of Justice⁴¹⁴ as judicial control organ, the European Central Bank⁴¹⁵ and the Court of Auditors⁴¹⁶ as examining organ of the budget. Equally established through European primary law are “*other bodies*”, such as the Economic and Social Committee⁴¹⁷, the Committee of the Regions⁴¹⁸ as well as further “*miscellaneous bodies*”, such as the Economic and Financial Committee⁴¹⁹ or the Committee of Permanent Representatives.⁴²⁰

⁴¹⁰ See art. 244 to 250 TFEU, ex-art. 7 para. 1 and art. 211 to 219 TEC.

⁴¹¹ See art. 223 to 234 TFEU, ex-art. 7 para. 1 and art. 189 to 201 TEC.

⁴¹² See art. 237 to 243 TFEU, ex-art. 7 para. 1 and art. 202 to 210 TEC.

⁴¹³ See art. 235 to 236 TFEU, ex-art. 7 para. 1 and art. 204 to 205 TEC; see furthermore website of the European Council, the institution, <http://www.european-council.europa.eu/the-institution.aspx?lang=en> (10.03.2011).

⁴¹⁴ See art. 251 to 281 TFEU, ex-art. 7 para. 1 and art.s 220 to 245 TEC.

⁴¹⁵ See art.s 282 to 284 TFEU, ex-art. 7 para. 1 and art.s 112 to 113 TEC; The ECB’s main task is to maintain the euro’s purchasing power and thus price stability in the euro area. For more details, see website of the ECB, the European Central Bank, <http://www.ecb.int/ecb/html/index.en.html> (10.03.2011).

⁴¹⁶ See art. 285 to 287 TFEU, ex-art. 7 para. 1 and art. 246 to 248 TEC.

⁴¹⁷ See art. 301 to 304 TFEU, ex-art. 7 para. 2 and art. 257 to 262 TEC.

⁴¹⁸ See art. 305 to 307 TFEU, ex-art. 7 para. 2 and art. 263 to 265 TEC.

⁴¹⁹ See art. 134 TFEU, ex-art. 114 para. 2 TEC.

⁴²⁰ See art. 240 TFEU. Primary tasks of the Economic and Social Committee and of the Committee of the Regions is to assist the European Parliament, the Council and the European Commission in advisory capacity (art. 300 and art. 304 TFEU); the European Central Bank and the European Investment Bank have mainly advisory and regulatory functions (art. 127 para. 2 and art. 309 para. 1 TFEU).

Over the years the European Commission, responsible for overseeing the implementation of an ever-expanding European Union policy, created further bodies, such as *European agencies*, through *European secondary legislation*. This was considered necessary due to the concentration of time-consuming tasks and extensive functions in the European Commission, thereby putting pressure on its resources.⁴²¹

These agencies were established with the aim of supporting the European Commission with the implementation of specific technical and scientific aspects of policy, where specialist skills were required. Examples of European agencies are the European Aviation Safety Agency, European Centre for Disease Prevention and Control, the European Chemicals Agency, the European Environment Agency, the European Food Safety Authority or the European Maritime Safety Agency.

4.2.2.2.1 The legal basis of the Agency

Principally, since European agencies are an instrument for implementing a particular European Union policy, the legal instrument creating them must be based upon the provisions of the TFEU, which constitutes the specific legal basis for the policy in question. In exceptional cases European agencies may, however, also be established by means of European secondary legislation on the basis of article 352 TFEU (ex-article 308 TEC) and article 114 TFEU (ex-article 95 TEC).⁴²² Whereas in the 1970s and 1980s European agencies were mostly established under article 308 TEC⁴²³, in recent years they have particularly been based upon article 95 TEC.⁴²⁴ The

⁴²¹ See *D. Chalmers/ C. Hadjiemmanuil/ G. Monti/ A. Tomkins*, *European Union Law, Text and Materials*, Cambridge 2006, p 99.

⁴²² See Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, 25.02.2005, COM (2005) 59 final at p. 3; see also *R. Bieber/ A. Epiney/ M. Haag*, *Die Europäische Union, Europarecht und Politik*, 8. Auflage, Baden-Baden 2009, p. 148 – p. 149.

⁴²³ See *R. Streinz*, § 308 EGV, paras. 34, 43, in: *R. Streinz*, *EUV/EGV, Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaften, Kommentar*, 1. Auflage, München 2003.

⁴²⁴ See e.g. *J. Saurer*, The accountability of supranational administration: the case of European Union agencies, *Am. U. Int'l L. Rev.*, p. 442 *et seq.*; see also *R. Bieber/ A. Epiney/ M. Haag*, *Die Europäische Union, Europarecht und Politik*, 8. Auflage, Baden-Baden 2009, p. 148; see furthermore *E. Lenski*, in:

use of article 95 TEC as a legal basis for the establishment of European agencies was confirmed in the *ENISA case*, where the European Court of Justice held that, *if these agencies contributed to the smooth functioning of the single European market*, as it was the case with the European Network and Information Security Agency (*ENISA*), they could be built upon article 95 TEC.⁴²⁵

In line with the jurisprudence of the *ENISA case*, the Agency has been established upon Article 1 (1) of Regulation (EC) 713/2009, which was adopted on the basis of Article 95 TEC. However, although article 95 TEC was confirmed in the *ENISA case* as the appropriate legal basis for the establishment of the *ENISA*, the arguments brought forward in this case *can, in my view, not directly be applied to the Agency*. Main reason is that the *ENISA* and the Agency assume different functions: whereas the *ENISA* is entrusted with mere coordination and advisory functions, the Agency has been vested with real decision-making powers.⁴²⁶ It needs therefore to be examined whether article 95 TEC provides indeed the appropriate legal basis for the adoption of that regulation.

Generally, article 95 TEC was introduced to enable the European Union to adopt the legislation necessary to complete the internal market by using qualified majority voting in the Council, rather than unanimity as required by article 94 TEC. Article 95

C. O. Lenz/ K.-D. Borchardt, EU-Verträge, Kommentar nach dem Vertrag von Lissabon, 5. Auflage, Köln 2010, art. 13, para. 21 *et seq.*

⁴²⁵ ECJ, OJEU, C-217/04, 02.05.2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0217:EN:PDF> (08.01.11) : in the *ENISA case*, the United Kingdom had challenged the legality of *ENISA*, which was established in Regulation (EC) No. 460/2004 on the basis of art. 95 EC Treaty. The United Kingdom argued that there was no connection between the establishment and the functioning of the internal market as required by art. 95 EC Treaty. The European Court of Justice dismissed the action and held that Regulation (EC) No. 460/2004 was lawfully based upon art. 95 EC Treaty; see also Report *N. Ahner*, ERGEG Workshop on Unbundling and Corporate Governance in the Third Package, Florence School of Regulation, 25.10.2009, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_WORKSHOP/CEER-ERGEG%20EVENTS/CROSS-SECTORAL/Corporate_Governance_Workshop/WD/C09-URB-24-03_CorporateGovernance_AX-Programme.pdf (13.01.2010).

⁴²⁶ See *ENISA* Website, our activities, <http://www.enisa.europa.eu/act> (08.01.2011).

para. 1 sent. 2 TEC (article 114 TFEU) stipulates that the Council shall, acting in accordance with procedure referred to in Article 251 and, after consulting the Economic and Social Committee, “*adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*” The scope of powers conferred upon the European Union through article 95 TEC has controversially been discussed.

In the case *Germany v Parliament and Council* regarding the Tobacco Advertising Directive 98/94⁴²⁷, the Court held that article 95 TEC could *not* be construed as conferring upon the Community legislator *a general power to regulate the internal market*. It ruled that the measures adopted under this article had to have the specific object of improving the conditions for the establishment and functioning of the internal market and had to be designed to remove genuine obstacles to free movement or distortions of competition and not merely abstract risks.⁴²⁸ However, in the case *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health*, the Court considered that the European Union was authorised to intervene by adopting “*appropriate measures*” in compliance with article 95 para. 3 TEC and with the legal principles mentioned in the Treaty or identified in the case-law, in particular the principle of proportionality in order to deal with actual or potential obstacles to trade.⁴²⁹

Against the application of article 95 TEC to the Agency’s establishment as appropriate legal basis speaks that the power conferred upon the Community legislature by article 95 TEC is the power to harmonise national laws and not one that is aimed at setting up the Agency and conferring tasks upon it. On the contrary, it has

⁴²⁷ OJEU L213/9.

⁴²⁸ ECJ, case C-376/98 *Germany v Parliament and Council* (2000) E.C.R. I-8419; see also Case C-74/99 *Imperial Tobacco* (2000) E.C.R. I-8599.

⁴²⁹ ECJ, case C-210/03, *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health*, (2004) E.C.R. I- 11893, paras. 33, 39 and 42.

always been emphasised by the European Commission in its Proposal and found its way in Regulation (EC) 713/2009 that the Agency would only *complement* at European level the regulatory tasks performed at national level by the regulatory authorities in *assisting* them and, where necessary *coordinate* their actions.⁴³⁰ Apart from their individual decision making powers on certain technical issues, the Agency is therefore even *expressly precluded from interfering with the competences of the national energy regulators*. In addition, one could argue that even if the Agency's establishment was beneficial to the functioning of the internal market due to the fact that it supports the European Commission, this does not mean that it constitutes a harmonisation measure within the meaning of article 95 TEC.

In favour of the application of article 95 TEC as legitimate basis for the Agency's establishment speaks that its competences reach further than those of the ENISA, which is only allowed to give non-binding advice and that, as a result of it, the powers conferred upon the Agency could in their entirety amount to an "approximation of the provisions laid down by law, regulation or administrative action in the Member States" within the meaning of article 95 TEC. Moreover, one could argue that article 95 TEC does not define the degree to which the European measure must approximate the legal orders of the Member States with the consequence that it would not be necessary for the measure to approximate substantive rules of national legislation. One could say that, given the technical complexity of the energy sector and its rapidly evolving character, Regulation (EC) 713/2009 had the objective to prevent further obstacles to the energy sector as well as to eliminate the loss of efficiency arising from an uncoordinated adoption by the Member States of technical codes, from the heterogeneous development of national energy laws and of the differing practices of the Member States. One could therefore argue that the Agency, by assisting the European Commission by means of non-binding advice and individual decision-making powers, provides a decisive contribution to the harmonisation of national laws in the area of energy regulation.

⁴³⁰ See European Commission's Proposal at 3.2; see art. 1 of Regulation (EC) 713/2009

Article 95 TEC constitutes, in my view, the appropriate legal basis for the adoption of Regulation (EC) 713/2009 establishing the Agency.

First of all, regarding the expression “measures for the approximation” within the meaning of article 95 TEC, the Court ruled that it is aimed at conferring upon the institutions of the European Union “*a discretion, depending on the general context and the specific circumstances of the matter to be harmonised*” and that, as a result of it, the institutions of European Union could chose “*the method of approximation the most appropriate for achieving the desired result.*”⁴³¹ It held that nothing in the wording of article 95 TEC implied that addressees of the measures adopted by the Community legislature could only be the individual Member States.⁴³² As a consequence, it was legitimate to provide for the establishment of the Agency as a European body, which is responsible for contributing to the implementation of a process of harmonisation for the regulation of the energy market.

In addition, the objectives and tasks laid down for the Agency in Regulation (EC) No 713/2009 must thereby *closely be linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the Member States.*⁴³³ Regulation (EC) No 713/2009 must be seen in connection with the entire framework adopted in the area of energy regulation, in particular in connection with Directive 2009/72/EC. This becomes apparent upon article 1 para. 2 of Regulation (EC) No 713/2009, which links the purpose of the Agency to article 35 of Directive 2009/72/EC. Hence, the *objectives* of the Agency as laid down in article 1 of Regulation (EC) No 713/2009 and the *tasks* of the Agency as laid down in articles 5 *et seq.* of Regulation (EC) No 713/2009 must be closely linked to the objectives pursued by Directive 2009/72/EC, which is to “the establishment of common rules for the generation, transmission, distribution and supply of electricity, together with

⁴³¹ *Ibid* at para. 45; see also *ENISA* case, para. 43 (n. 427).

⁴³² See *ENISA* case, para. 44 (n. 427).

⁴³³ See *ENISA* case, paras. 45 and 47 (n. 427).

consumer protection provisions, with a view to improving and integrating competitive electricity markets in the Community” (article 1 of Directive 2009/72/EC). The objectives of the Agency is to assist the regulatory authorities referred to in article 35 of Directive 2009/72/EC in exercising, at Community level, the regulatory tasks performed in the Member States and, where necessary, to coordinate their action (article 1 of Regulation (EC) No 713/2009). This shall enhance the cooperation of the national energy regulators at Community level and the participation, on a mutual basis, in the exercise of Community related functions (Recital 5 and Recital 29 of Regulation (EC) 713/2009). In order to achieve this, the Agency has been vested with extensive advisory, coordinative and decision-making powers. As a result, by enhancing the participation and cooperation of national energy regulators at European level, the objectives and tasks of the Agency are closely linked to the establishment of *common* rules in the energy sector and thereby help to unify the competitive European electricity markets. In providing assistance to the national energy regulators and operators, which affect the homogenous implementation of harmonising instruments in the energy sector and which are likely to affect their application, the Agency’s tasks are closely linked to the subject-matter of Regulation (EC) 713/2009 and Directive 2009/72/EC.

Finally, article 95 TEC can only be used as a legal basis where it is actually and objectively apparent from the legal act that its purpose is to “*improve the conditions for the establishment and functioning of the internal market*”.⁴³⁴ Regulation (EC) 713/2009 and herewith the establishment of the Agency must therefore improve the conditions for the establishment and functioning of the energy market. In the *ENISA* case the Court held that *ENISA* was an appropriate means of “*preventing the emergence of disparities likely to create obstacles to the smooth functioning of the internal market in the area*”.⁴³⁵ Hence, if such was assumed with regard to the *ENISA*,

⁴³⁴ See e.g. Case C-66/04, *United Kingdom v Parliament and Council* (6.12.2005) E.C.R. I-10553, para. 44, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0066:EN:HTML> (11.03.2011); see also the *ENISA* case, para. 42 (n. 427).

⁴³⁵ In this sense also the argument of the Court used in the *ENISA* case, see para. 62 (n. 427).

which has only the power of giving non-binding advice, such must *a fortiori* (*Erstrecht-Schluss*) be the case with regard to the Agency, which has even the power to adopt individual decisions in technical areas of the energy sector.

However, it is rather questionable whether the establishment of the Agency is justified upon the principle of subsidiarity, which requires the European Union to act “*only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States on national level, but can rather be better achieved at European level*” (article 5 para. 3 Treaty of Lisbon).⁴³⁶ Contrary to former article 5 para. 2 TEC, which differentiated only between two levels of competences, *i.e.* the European Union and the Member States, article 5 para. 3 TFEU includes the sub-Federal levels of the Member States, *i.e.* regions and municipalities as well.⁴³⁷ On the one hand, the principle of subsidiarity prohibits the European Union to intervene whenever an issue can effectively be regulated through the Member States at central, regional or local level. On the other hand, the European Union is permitted to exercise its powers, when Member States are unable to achieve the objectives of the Treaties in a satisfactory manner. Hence, in accordance with article 5 para. 3 TFEU, the energy sector must *not* be an area that falls within the *exclusive competence* of the European Union. This is the case, since, pursuant to article 4 para. 2 (i) TFEU, the energy sector is part of the shared competences of the European Union and the Member States. It is furthermore necessary that the objectives of Regulation (EC) 713/2009, namely the participation and cooperation of the national energy regulators at European level, “*cannot be sufficiently achieved by the Member States*”. Although there might be disparities between the different Member States as to regulation of the energy sector,

⁴³⁶ See *e.g.* N. Ahner, ERGEG Workshop on Unbundling and Corporate Governance in the Third Package, Florence School of Regulation, 25.10.2009, p. 10, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_WORKSHOP/CEER-ERGEG%20EVENTS/CROSS-SECTORAL/Corporate_Governance_Workshop/WD/C09-URB-24-03_CorporateGovernance_AX-Programme.pdf (13.01.2010); on the principle of subsidiarity in general, see D. Wyatt/ A. Dashwood, European Union Law, in: A. Arnulf, A. Dashwood, M. Dougan, M. Ross, E. Spaventa and D. Wyatt, Fifth Edition, London 2006, p. 97 – p.110.

⁴³⁷ See *e.g.* W. Frenz, Handbuch Europarecht, Wirkungen und Rechtsschutz, Band 5, Neuauflage, Berlin 2010, p. 215 – p. 217; see also D. Chalmers/ C. Hadjiemmanuil/ G. Monti/ A. Tomkins, European Union Law, Text and Materials, Cambridge 2006, p. 219 *et seq.*

there is no prove that the Member States were not able to establish another form of interaction between their national energy regulators than the establishment of a single European energy regulator. This requirement relates to the final condition of article 5 para. 3 TFEU, which is equally not proven, requiring that the participation and cooperation of the national energy regulators at European level can, “*by reason of its scale of effects, be implemented more successfully by the European Union*”. Regulation (EC) 713/2009 states, in this regard, merely that its objectives “*cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level*” (Recital 29 of Regulation (EC) 713/2009).⁴³⁸

4.2.2.2.2 The Agency as a European regulatory agency

Within European law no single model for European agencies exists. They can generally be classified into two types of agency, the “*regulatory agencies*” and the “*executive agencies*”.⁴³⁹ These agencies have in common that they were created in order to perform tasks that are clearly set out in their constitutional act, that they dispose of legal personality and enjoy a certain degree of organisational and financial autonomy.⁴⁴⁰ Being created at different points in the past in order to meet specific requirements at the time, they have, however, many differences as regards their internal structure, their relations with the institutions, responsibilities and powers.⁴⁴¹ Indeed, whereas executive agencies carry out tasks of a purely administrative nature, relating to the management of Community programs, regulatory agencies are actively involved in executive functions by enacting instruments, which help to regulate a

⁴³⁸ For a detailed overview of the definition and the requirements of the principle of subsidiarity, see G. Langguth, in: C. O. Lenz/ K.-D. Borchardt, EU-Verträge, Kommentar nach dem Vertrag von Lissabon, 5. Auflage, Köln 2010, art. 5, paras. 16 *et seq.*

⁴³⁹ For more details, see *e.g.* E. Lenski, in: C. O. Lenz/ K.-D. Borchardt, Eu-Verträge, Kommentar nach dem Vertrag von Lissabon, 5. Auflage, Köln 2010, art. 13, paras. 17 *et seq.*

⁴⁴⁰ See Communication from the European Commission, The Operating Framework for the European Regulatory Agencies, 11.12.2002, COM (2002) 718 final at p. 3.

⁴⁴¹ See Communication from the European Commission to the European Parliament and the Council, European agencies – The way forward, COM (2008) 135 final, p. 2 *et seq.*; see also W. Kilb, Europäische Agenturen und ihr Personal – die großen Unbekannten?, EuZW, Heft 9/2006, p. 268 at p. 270 *et seq.*

specific sector. Regulatory agencies are thus decision-making bodies, which are empowered to enact instruments that are binding on third parties, whereas executive agencies, when performing their tasks to assist the European Commission in the discharge of its responsibilities, have no real decision-making powers.⁴⁴² Moreover, whereas executive agencies are governed by Council Regulation (EC) No 58/2003 of 19 December 2002, laying down their statute and tasks in the management of Community programmes, regulatory agencies are not specifically regulated.⁴⁴³ In addition, executive agencies are, contrary to regulatory agencies, usually set up for a limited period of time. Moreover, whereas regulatory agencies are spread all over Europe, executive agencies are always located close to European Commission headquarters.⁴⁴⁴ Regarding the organisational structure of executive agencies, they are legally assigned to the European Commission, which creates them, closely supervises their activities and appoints the key staff. Member States do not dispose of any participation rights via an administrative council.⁴⁴⁵

The Agency has been established as a classical *European regulatory agency*, aimed at helping to regulate the energy sector at European level and implement European energy policy. By performing its tasks, the Agency shall improve the way in which the rules are implemented and applied throughout the European Union. It plays thus an active role in exercising executive powers at Community level.⁴⁴⁶

⁴⁴² See e.g. T. Groß, Die Kooperation zwischen europäischen Agenturen und nationalen Behörden, EuR, Heft 1/2005, p. 54 at p. 56 *et seq*; see also Communication 2002, 718 final, p. 4; see also Communication from the European Commission, The Operating Framework for the European Regulatory Agencies, 11.12.2002, COM (2002) 718 final at p. 3 and p. 4.

⁴⁴³ O.J. L 11, p. 1.

⁴⁴⁴ See Communication from the European Commission, The Operating Framework for the European Regulatory Agencies, 11.12.2002, COM (2002) 718 final at p. 7.

⁴⁴⁵ For further details, see T. Groß, Die Kooperation zwischen europäischen Agenturen und nationalen Behörden, EuR, Heft 1/2005, p. 54 at p. 56 *et seq*.

⁴⁴⁶ See Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, 25.02.2005, COM (2005) 59 final at p. 5; see also Communication from the European Commission to the European Parliament and the Council, *European agencies – The way forward*, COM (2008) 135 final at p. 4 *et seq*.

4.2.2.3 The composition of the Agency and the question of independence of its organs vis-à-vis the European Commission

The Agency constitutes a “*Community body with legal personality*” (article 2 para. 1 of Regulation (EC) No 713/2009), which disposes of its own administrative structure with a staff of around 50 people and its own budget⁴⁴⁷. The Agency will initially be located in Brussels, Belgium. Since 3 March 2011, the Agency is fully operational in its permanent office in Ljubljana, Slovenia.⁴⁴⁸

4.2.2.3.1 The organs of the Agency

The Agency has four operating bodies as its management: the Director (4.2.2.3.1.1), the Administrative Board (4.2.2.3.1.2), the Board of Regulators (4.2.2.3.1.3) and the Board of Appeal (4.2.2.3.1.4). Regarding the independence of the Agency’s organs vis-à-vis the European institutions, in particular vis-à-vis the European Commission, they have *formally* been granted a significant degree of autonomy through Regulation (EC) No 713/2009. *De facto*, they are, however, all but independent vis-à-vis the European Commission.

4.2.2.3.1.1 The Director

4.2.2.3.1.1.1 Appointment

The Director is appointed by the Administrative Board after consultation and approval of the Board of Regulators (article 13 para. 1 of Regulation (EC) No

⁴⁴⁷ The budget of the Agency will be in the order of EUR 5 million per year, see website of the European Commission, http://ec.europa.eu/energy/gas_electricity/Agency/Agency_en.htm (08.01.11).

⁴⁴⁸ See Press release of the Agency, New Impetus for Internal Market: Agency for the Cooperation of Energy Regulators takes up operations in Slovenia of 3 March 2011, see website of the Agency, News, http://www.energy-regulator.eu/portal/page/portal/AGENCY_HOME/Communication/News/Press%20release%20EN%20FINAL.doc (10.03.2011).

713/2009). He represents the Agency (article 2 para. 3 in connection with article 17 para. 1 of Regulation (EC) No 713/2009) and is responsible of its management (article 16 para. 1 and 17 para. 1 of Regulation (EC) No 713/2009).

4.2.2.3.1.1.2 Tasks of the Director

The Director assumes mainly administrative tasks in order to ensure the smooth functioning of the Agency (17 para. 5 of Regulation (EC) No 713/2009). He prepares and participates in the work of the Administrative Board without, however, having a right to vote (17 para. 2 of Regulation (EC) No 713/2009). He prepares and implements the annual work programme (17 para. 4 and 6 of Regulation (EC) No 713/2009) and the budget of the Agency, for which he draws up the final accounts of the Agency, thereby “*acting on his own responsibility*” (article 3 (c) in connection with article 17 para. 7 and article 24 para. 4 of Regulation (EC) No 713/2009). In order to be able to exercise his functions efficiently, the Director may adopt internal administrative instructions (*interne Verwaltungsanweisungen*) and issue publish notices (*Mitteilungen*) pursuant to article 17 para. 5 of Regulation (EC) No 713/2009. The Director is furthermore responsible to “*adopt and publish*” the opinions, recommendations and decisions referred to in article 5, 6, 7, 8 and 9 of Regulation (EC) No 713/2009 (17 para. 3 of Regulation (EC) No 713/2009). However, Regulation (EC) No 713/2009 does not specify which *particular organ* shall carry out these tasks, but merely entrusts “*the Agency*”. The Director, when considering the tasks conferred upon him through article 17 of Regulation (EC) No 713/2009, is not responsible for them. The Administrative Board, which is supposed to meet only twice a year in ordinary session (article 12 para. 3 of Regulation (EC) No 713/2009), can equally not be regarded as responsible to carry out such such ordinary, daily tasks. The same applies to the Board of Regulators, which assumes merely advisory

functions. As a consequence, Regulation (EC) No 713/2009 lacks provisions, which specifically determine the internal organisational structure of the Agency.⁴⁴⁹

4.2.2.3.1.1.3 The question of independence towards the European Commission

Article 16 para. 1 sent. 2 of Regulation (EC) No 713/2009 stipulates that “*without prejudice to the respective roles of the Administrative Board and the Board of Regulators, the Director shall neither seek nor follow any instruction from any Government, from the European Commission, or from any other public or private entity*”. This provision aims to guarantee that the Director is able to exercise its functions free from influence and control of *any* of the European institutions, of the national Governments, including the national energy regulators.

It is, in particular, the Director’s independence towards the *European Commission*, which is questionable. The wording of article 16 para. 1 sent. 2 of Regulation (EC) No 713/2009 is clear. Indeed, contrary to article 13 para. 1 sent 2 of the European Commission’s Proposal on establishing an Agency, the requirement of the Director’s independence is clearly stated. In article 13 para. 1 sent 2 of the Proposal on establishing an Agency, the European Commission proposed to guarantee the Director’s independence “*without prejudice to the respective powers of the European Commission*”. One could thus follow that the European Commission wanted to remain in the position of enforcing the powers conferred upon it towards the Director. This would have had the consequence that the independence of the Director would, at least to a certain extent, have been restricted.⁴⁵⁰ The wording of article 13 para. 1 sent 2 of the European Commission’s Proposal has, however, not been retained through Regulation (EC) No 713/2009, but has been replaced by the term “*without prejudice to the respective roles of the Administrative Board and the Board of Regulators*” (article 16 para. 1 sent. 2 of Regulation (EC) No 713/2009). In addition, article 16

⁴⁴⁹ In this sense, see U. Ehricke, Die geplante EU-Agentur für die Zusammenarbeit der Energieregulierungsbehörden, (Teil 1), IR, Heft 6/2008, p. 122 at p. 125 and p. 126.

⁴⁵⁰ *Ibid* at p. 123.

para. 1 sent. 2 of Regulation (EC) No 713/2009 now explicitly states that the Director shall not seek or follow any instruction “*from the European Commission*”.

However, the European Commission retains *indirect* influence and control over the Director. First of all, the European Commission participates in the *Director’s appointment*. Indeed, pursuant to article 16 para. 2 sent. 2 of Regulation (EC) No 713/2009, the Director is appointed from a list *proposed by the European Commission*. The European Commission is therefore in the position of choosing the director of the Agency and thus of appointing a person that matches its expectations of a leadership of the Agency. In addition, the European Commission is also involved in the *Director’s removal from office*. Article 16 para. 7 of Regulation (EC) No 713/2009 regulates that the Director may be removed from office only upon a decision of the Administrative Board on the basis of a three-quarters majority and only after having obtained a favourable opinion of the Board of Regulators. Regulation (EC) No 713/2009 does, however, not specify, under *which circumstances* the Director of the Agency may be removed from his office. Regulation (EC) No 713/2009 does, however, prescribe that his appointment shall be effectuated by the Administrative Board following a favourable opinion of the Board of Regulators on the basis of merit as well as *skills and experience relevant to the energy sector* (article 13 para. 1 in connection with article 15 para. 2 and article 16 para. 2 of Regulation (EC) No 713/2009). By *argumentum e contrario* it can thus be concluded that the Director may be removed from office only upon a *gross violation of the qualifications appointing him* and only after consultation of the Board of Regulators *and the European Commission*. Moreover, the European Commission retains influence as to the *extension of the term of the Director’s office*. The Director, which is basically appointed for a five-year term (article 16 para. 3 of Regulation (EC) No 713/2009), can be reappointed for another period of three years, *if the European Commission so proposes* (article 16 para. 4 of Regulation (EC) No 713/2009). The European Commission is, finally, involved in the *future setup of the Director’s duties*. Indeed, according to article 16 para. 3 of Regulation (EC) No 713/2009 the European Commission undertakes, within the course of the nine months preceding the end of that period, an assessment of the performance of the Director and the Agency’s duties and requirements for the coming years. In being empowered to judge the Director’s

past performance and determining the Agency's *future* duties and requirements, it indirectly defines the duties of the *future Director* too.

As a result, although the Director's independence from the European Commission is *formally* stated in article 16 para. 1 sent. 2 of Regulation (EC) No 713/2009, it is *in fact* not guaranteed.

4.2.2.3.1.2 The Administrative Board

4.2.2.3.1.2.1 Appointment

Pursuant to article 12 para. 1 of Regulation (EC) No 713/2009, the Administrative Board comprises nine members and nine alternate members. Members and alternates have four-year terms, except for the first mandate, where half of the member of the Administrative Board will be granted six-year terms in order to guarantee a continual and smooth operation of the Agency. The European Parliament and the European Commission each nominate two members and their alternates. The European Council nominates the five other members and their alternates. The Administrative Board shall meet at least twice a year in ordinary session (article 12 para. 3 of Regulation (EC) No 713/2009) for the adoption of decisions, which require a two-thirds majority (article 12 para. 4 of Regulation (EC) No 713/2009).

4.2.2.3.1.2.2 Tasks of the Administrative Board

The Administrative Board assumes administrative, executive as well as supervisory functions. It formally appoints the Director (article 13 para. 1 of Regulation (EC) No 713/2009), the Board of Regulators (article 13 para. 2 of Regulation (EC) No 713/2009) and the members of the Board of Appeal (article 13 para. 3 of Regulation (EC) No 713/2009) and adopts the work programme and multi-annual programme of the Agency (article 13 para. 5 and 6 of Regulation (EC) No 713/2009). In addition, it exercises the disciplinary authority over the Director (article 13 para. 9 of Regulation (EC) No 713/2009) and adopts the implementing rules of staff regulations and conditions of employment applicable to the staff of the Agency, including the Director (article 13 para. 10 of Regulation (EC) No 713/2009).

in connection with article 28 para. 2 of Regulation (EC) No 713/2009). Moreover, it ensures that the Agency carries out its mission and performs the tasks assigned to it (article 13 para. 4 of Regulation (EC) No 713/2009. The Administrative Board is finally responsible for the establishment of the budget of the Agency (article 13 para. 9 in connection with article 23 of Regulation (EC) No 713/2009) and is involved in its implementation (article 24 para. 4 and 5 of Regulation (EC) No 713/2009). It makes an estimate of revenue and expenditure of the Agency for each financial year on the basis of the preliminary draft budget drawn up by the Director and transmits it to the European Commission. It finally delivers an opinion on the final accounts of the Agency transmitted to it by the Director for the final implementation of the accounts of the Agency (article 24 para. 4 and 5 of Regulation (EC) No 713/2009).

4.2.2.3.1.2.3 The question of independence towards the European Commission

Article 12 para. 7 sent. 1 of Regulation (EC) No 713/2009 requires the Administrative Board to “*act independently and objectively in the public interest, without seeking or following any political instructions*”. The term, which prescribes the independence of the Administrative Board is different from the one used with regards to the independence of the Director. *On one side*, it is more *general* in that it does not specifically name the entity towards which such independence shall apply and in that it generally requires a “*political*” independence. *On the other side*, it is more *precise* in that it lays down in detail how the independence of the Administrative Board has to be ensured. Indeed, article 12 para. 7 sent. 2 of Regulation (EC) No 713/2009 requires the members of the Administrative Board to make a “*written declaration of commitments and a written declaration of interests*”. In these written declarations, which must be published annually, the members must indicate whether they see an *interest that could be considered prejudicial to their independence*. The European Commission does, however, also with regards to the Administrative Board retain an *indirect influence* on the composition of the Administrative Board, in that it is entitled to appoint two members and two alternate members out of nine members. However, due to the small number of members being appointed by the European Commission, its influence is *less significant* than it is in the case of the Director.

4.2.2.3.1.3 The Board of Regulators

4.2.2.3.1.3.1 Appointment

The Board of Regulators is composed of a representative of each Member State's national regulatory authority as well as of *one non-voting representative of the European Commission* (article 14 para. 1 of Regulation (EC) No 713/2009). The Board of Regulators may adopt decisions by a two-thirds majority of its members present (article 14 para. 1 of Regulation (EC) No 713/2009). Contrary to the *ERGEG*, each member and alternate has one vote, independently of the population or the size of the Member State (article 14 para. 3 sent. 1 of Regulation (EC) No 713/2009).

4.2.2.3.1.3.2 Tasks of the Board of Regulators

The Board of Regulators assumes mainly advisory functions. It is, for example, entrusted to provide opinions on opinions, recommendations and decisions referred to in article 5, 6, 7, 8 and 9 of Regulation (EC) No 713/2009, has, however, no power to draft opinions and recommendations itself. It provides furthermore guidance to the Director in the execution of his tasks (article 15 para. 1 of Regulation (EC) No 713/2009). The Administrative Board also advises on the candidate to be appointed as Director (article 15 para. 2 of Regulation (EC) No 713/2009). It finally approves the work programme of the Agency (article 15 para. 3 of Regulation (EC) No 713/2009) and the independent section on regulatory activities of the annual report (article 15 para. 4 of Regulation (EC) No 713/2009).

4.2.2.3.1.3.3 The question of independence towards the European Commission

Article 14 para. 5 of Regulation (EC) No 713/2009 stipulates that the Board of Regulators shall “*act independently and shall not seek or follow instructions from any Government of a Member State, from the European Commission, or from another public or private entity*”. The guarantee of independence of the Board of Regulators towards the European Commission is *stronger* than in the case of the Director and the Administrative Board due to the fact that the European Commission is merely entitled to place *a non-voting member*. The independence of the Board of Regulators towards

national Governments of the Member States is explicitly required through article 14 para. 5 of Regulation (EC) No 713/2009. It is, however, questionable whether it is desirable, given that the Board of Regulators is the only means by which Member States are able to exert a certain influence on the Agency.

4.2.2.3.1.4 The Board of Appeal

4.2.2.3.1.4.1 Appointment

The Board of Appeal comprises six members and six alternate members (article 18 para. 1 of Regulation (EC) No 713/2009). Its members are selected from among current or former senior staff of the national regulatory authorities, competition authorities or other national or Community institutions with relevant experience in the energy sector. The members are nominated by the Administrative Board *upon proposal of the European Commission* and after consultation of the Board of Regulators (article 18 para. 2 of Regulation (EC) No 713/2009). The experience of its members shall ensure that the Board of Appeal disposes of significant know-how in energy related issues. They are appointed for a five-year term, whereby the term is renewable. The removal of a member of the Board of Appeal is only legitimate, if it has been found guilty of misconduct and only upon decision of the Administrative Board after consultation of the Board of Regulators.

4.2.2.3.1.4.2 Tasks of the Board of Appeal

The Board of Appeal is responsible for handling appeals against decisions referred to in articles 7, 8 or 9 of Regulation (EC) No 713/2009, which are either *directly addressed* to the natural or legal person concerned or which, although in the form of a decision addressed to another person, are of *direct and individual concern* to that person (articles 19 para 1 of Regulation (EC) No 713/2009). Article 19 of Regulation (EC) No 713/2009 allows thus to appeal against decisions, which directly affect the person in question (*unmittelbare Entscheidungen*) as well as against decisions, which produce third party effect (*Entscheidungen mit Drittbetroffenheit*). Appeals need to be filed in writing within two months of the day of notification of the decision to the person concerned, upon which the Board of Appeal decides equally

within two months of the lodging of the appeal (articles 19 para 2 of Regulation (EC) No 713/2009). The appeal has no suspensory effect (*aufschiebende Wirkung*). However, the Board of Appeal may suspend the application of the contested decision, if it considers that circumstances so require (articles 19 para 3 of Regulation (EC) No 713/2009). The Board of Appeal examines whether the appeal is admissible (*Zulässigkeit der Beschwerde*) and well founded (*Begründetheit der Beschwerde*). The parties may be invited by the Board of Appeal to file observations or to make oral presentations. The Board of Appeal may either *exercise any of the powers conferred upon the Agency* or to *remit the case to the competent body of the Agency*, which is bound to the decision taken by the Board of Appeal (articles 19 para 5 of Regulation (EC) No 713/2009). Here again, Regulation (EC) No 713/2009 does not specify, which body shall be the “*competent body*” of the Agency.⁴⁵¹

4.2.2.3.1.4.3 The question of independence towards the European Commission

Pursuant to article 18 para. 3 of Regulation (EC) No 713/2009, the members of the Board of Appeal “*shall be independent in making their decisions*”, “*shall not be bound by any instructions*” and “*shall not perform any other duties in the Agency, in its Administrative Board or in its Board of Regulators*”. In addition, they shall “*act independently and in the public interest*”. As in the case of the Administrative Board, its members are required to make *written declarations of commitments and of interests*, which are published annually (article 18 para. 7 of Regulation (EC) No 713/2009). The independence of the Board of Appeal is the most comprehensive. It requires independence with regard to “*any*” instruction and is thus addressed to *any* public or private entity. However, although article 18 of Regulation (EC) No 713/2009 guarantees an overall independence towards the national regulatory authorities, it does not guarantee independence towards the European Commission, which retains a *right of proposal of the members of the Board of Appeal*.

⁴⁵¹ See furthermore U. Ehricke, Die geplante EU-Agentur für die Zusammenarbeit der Energieregulierungsbehörden, (Teil 1), IR, Heft 6/2008, p. 122 at p. 126.

4.2.2.3.2 In-depth analysis: legal protection against decisions of the Board of Appeal and the Agency: article 263 TFEU (ex article 230 TEC)

The legal protection against decisions of the Board of Appeal is laid down in article 20 of Regulation (EC) No 713/2009, which foresees two ways of actions.

4.2.2.3.2.1 Article 20 para. 1 of Regulation (EC) No 713/2009 in connection with article 263 TFEU (ex-article 230 TEC)

Article 20 *para. 1* of Regulation (EC) No 713/2009 in connection with article 263 TFEU (ex-article 230 TEC) allows an action to be brought before the General Court (former Court of First Instance) or the Court of Justice, contesting a decision taken by the Board of Appeal or, in cases where no right lies before the Board of Appeal, by the Agency (*Nichtigkeitsklage*). Article 20 of Regulation (EC) No 713/2009 thereby requires that the conditions of article 263 TFEU (ex-article 230 TEC) are fulfilled (“*in accordance with Article 230 of the Treaty*”). In particular with regard to actions brought against *acts of European agencies*, article 263 TFEU contains *the additional paragraph 5*, which provides that *specific conditions and arrangements* can be laid down in the founding statutes of the European agencies. The possibility of specifying further conditions and arrangements does, however, not mean that the scope of protection of article 263 TFEU may be altered; it merely allows the concretisation of conditions that are specific to agencies.

4.2.2.3.2.1.1 The jurisdiction of the General Court

Article 263 para. 1 TFEU generally declares “*the Court of Justice of the European Union*” as the competent court. The Court of Justice of the European Union includes, according to article 19 TEU, *the Court of Justice, the General Court* and the *specialised courts* (together hereinafter referred to as the *European Courts*). The Court of First Instance, although established as a separate decision-making body, did not result in the creation of new heads of jurisdiction, but simply in a redistribution of responsibility for dealing at first instance with regard to certain cases brought under

the existing heads.⁴⁵² The establishment of the Court of First Instance According to article 256 no. 1 para. 1 TFEU (ex-article 225 TEC), the decisions taken by the Board of Appeal or the Agency are *principally* reviewed through the *General Court*, which has jurisdiction to “*hear and determine at first instance actions or proceedings referred to in Articles 263,...*”. The Court of Justice is only competent where explicitly provided for (“*with the exception of those... reserved in the Statute for the Court of Justice*”), (article 256 para. 1 TFEU). The decisions of the General Court are subject to a right of appeal to the *Court of Justice on points of law only* (article 256 no. 1 para. 2 TFEU).

4.2.2.3.2.1.2 The subject matter of the action (*Klagegegenstand*)

Article 263 TFEU, in comparison to former article 230 para. 1 of the TEC, brought major changes with regard to the possibility of reviewing acts taken by European agencies.

4.2.2.3.2.1.2.1 Reviewable acts of agencies prior to the Lisbon Treaty

Prior to the Lisbon Treaty, former article 230 para. 1 of the TEC stipulated that the Court of Justice shall review the legality of “acts adopted jointly by the European Parliament and the Council, of acts of the *Council*, of the *European Commission* and of the *ECB*, other than recommendations and opinions, and of acts of the *European Parliament* intended to produce legal effects vis-à-vis third parties.” Other European bodies, including *European agencies*, were *not* mentioned in article 230 para. 1 TEC. The question arose, therefore, whether acts of European agencies could nevertheless be reviewed under article 230 para. 1 TEC although they did

⁴⁵² For more details on the allocation of competences within the Court of Justice, see *e.g.* W. Frenz, Handbuch Europarecht, Wirkungen und Rechtsschutz, Band 5, Neuaufgabe, Berlin 2010, p. 672 – p. 683; see furthermore D. Wyatt/ A. Dashwood, in: A. Arnulf/ A. Dashwood/ M. Dougan/ M. Ross/ E. Spaventa/ D. Wyatt, European Union Law, Fifth Edition, London 2006, p. 397.

principally not take the form of any of the binding acts referred to in article 249 TEC (article 288 TFEU).⁴⁵³

The Court of Justice, in several cases, considered former article 230 TEC as applicable.

In the case *Parti Ecologiste “Les Verts” v European Parliament*, the applicant, a French political group sought, upon article 173 para. 2 EEC Treaty (former 230 TEC, now article 263 TFEU), the annulment of a decision of the Bureau of the European Parliament concerning the allocation and the use of appropriations for reimbursement of expenditure.⁴⁵⁴ At the material time, the European Parliament was not mentioned in article 230 para. 1 TEC. The Court of Justice held that *an act of the European Parliament could be subject to judicial review and that neither the Member States nor the European institutions could avoid judicial review of measures that were adopted by them*. It ruled that it would be inconsistent with the spirit of the Treaty to exclude measures adopted by the European Parliament, which were intended to have legal effects vis-à-vis third parties, *even though Article 173 TEC referred only to acts of the Council and the European Commission*. The Court concluded that an interpretation of that article, which excluded measures adopted by the European Parliament from those which could be contested, would lead to a result that was *contrary both to the spirit of the Treaty as expressed in Article 164 of the ECC Treaty (former article 220 TEC, replaced in substance by article 19 TEU) and to its system*.⁴⁵⁵

⁴⁵³ See e.g. T. Groß, Die Kooperation zwischen europäischen Agenturen und nationalen Behörden, EuR, Heft 1/2005, p. 54 at p. 65 *et seq*; see also D. Wyatt/ A. Dashwood, in: A. Arnulf/ A. Dashwood/ M. Dougan/ M. Ross/ E. Spaventa/ D. Wyatt, European Union Law, Fifth Edition, London 2006, p. 444.

⁴⁵⁴ ECJ, case 294/83, *Parti Ecologiste “Les Verts” v European Parliament* (23.04.1986) E.C.R., p. 01339, grounds, para. 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61983J0294:EN:HTML> (11.03.2011).

⁴⁵⁵ *Ibid* at paras. 21, 23 – 25.

In the case *Sogelma - Società generale lavori manutenzioni appalti Srl v European Agency for Reconstruction (EAR)*, the applicant sought the annulment of a decision of the *EAR* that cancelled a tender procedure.⁴⁵⁶ The *EAR* claimed that this decision was not an act the legality of which could be reviewed by the Court under Article 230 TEC. It argued that the review of the Court of Justice was limited to acts adopted jointly by the European Parliament and the Council, acts of the Council, of the European Commission and of the European Central Bank, other than recommendations and opinions, and to acts of the European Parliament intended to produce legal effects vis-à-vis third parties.⁴⁵⁷ The Court of First Instance ruled that the European Community was a community based on the rule of law and that the Treaty had established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.⁴⁵⁸ It held that the general scheme of the Treaty was to make a direct action available against “any act of a Community body intended to produce legal effects vis-à-vis third parties had to be open to judicial review”.⁴⁵⁹ Hence, although article 230 para. 1 TEC referred only to Community institutions and the *EAR* established on the basis of secondary legislation was not among the institutions listed in article 7 TEC, its acts had to be subject to review as long as such body was “endowed with the power to take measures intended to produce legal effects vis-à-vis third parties”.⁴⁶⁰ It concluded that accordingly it could *not be acceptable* that measures intended to produce legal effects vis-à-vis third parties, which were adopted

⁴⁵⁶ ECJ, case T-411/06, *Sogelma - Società generale lavori manutenzioni appalti Srl v European Agency for Reconstruction (AER)*, 8.10.2008 E.C.R., p. II-02771 (*Sogelma case*), paras 22 – 26, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006A0411:EN:HTML> (12.03.2011).

⁴⁵⁷ *Ibid* at paras. 28 – 32.

⁴⁵⁸ *Ibid* at paras.36, 37.

⁴⁵⁹ *Ibid* at paras. 33 and 37.

⁴⁶⁰ For a detailed overview of the institutions of the European Union, see e.g. *D. Wyatt/ A.Dashwood*, in: *A. Arnulf/ A. Dashwood/ M. Dougan/ M. Ross/ E. Spaventa/ D. Wyatt*, *European Union Law*, Fifth Edition, London 2006, p. 27 – p. 54.

by bodies established on the basis of secondary legislation such as the EAR *escape judicial review*.⁴⁶¹

In the case *Nancy Fern Olivieri v European Commission of the European Communities and European Agency for the Evaluation of Medicinal Products*, the applicants argued that article 230 TEC did not contain an exhaustive list of the institutions whose acts were amenable for review and that the *EMEA* was an auxiliary body vested with specific administrative powers whose acts had to be capable of being the subject of an action for annulment.⁴⁶² The European Commission, based on wording of article 230 TEC, argued that this article did not include the *EMEA* in the list of bodies whose acts were subject to review.⁴⁶³ The Court of First Instance, not considering whether the *EMEA* was listed under article 230 TEC, rejected the application for annulment of the revised opinion as *inadmissible* on the grounds that the negative opinion issued by the European Medicines Agency (*EMEA*) and the Committee for Proprietary Medicinal Products (*CPMP*) upon article 10 para. 1 of Regulation No 2309/93, constituted an “intermediate measure whose purpose was to prepare for the final decision”. As such it did not definitely lay down the European Commission’s position with the consequence that it was not a challengeable act under article 230 TEC.⁴⁶⁴

Within literature some considered to apply former article 230 TEC *in analogy* to the acts of European agencies upon general principles of legal protection (*allgemeine Rechtsschutzgründe*).⁴⁶⁵ Others raised the issue if and to what extent the European

⁴⁶¹ *Sogelma case*, para. 37 (n. 458).

⁴⁶² *Ibid* at para. 28.

⁴⁶³ *Ibid* at para. 50.

⁴⁶⁴ *Ibid* at paras. 51, 53.

⁴⁶⁵ See *U. Ehrlicke*, in: R. Streinz, EUV/EGV, Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaften, Kommentar, 1. Auflage, München 2003, § 230, para. 13 – 17; see also *W. Cremer*, in: C. Calliess/ M. Ruffert, Kommentar des Vertrages über die Europäische Union und des Vertrages zur Gründung der Europäischen Gemeinschaft - EUV/ EGV, 2. Auflage, Neuwied u. Kriftel 2002, art. 230 TEC, paras. 9 – 11; see furthermore J. Schwarze, EU-Kommentar, 2. Auflage, Baden-Baden 2009, art. 230 TEC, para. 13 – 16.

Commission could be held accountable for decisions taken by agencies. They opted to *legally attributing these acts to the European Commission* with the consequence of bringing an action *directly against the European Commission*.⁴⁶⁶ If the European Commission were held to be accountable for acts taken by European agencies, it would, *on the one hand*, need to be ensured that *its degree of accountability does not exceed its degree of influence on these agencies' activities*. The European Commission would, *on the other hand*, need to be put in the position to exert a *sufficient influence on these agencies* in order to be able to carry out the actions requested through the Court of Justice. Regarding the Agency, it is doubtful whether its acts could legally be attributed to the European Commission. Indeed, although the European Commission is involved in the Agency's work by proposing a list of names for the Director of the agency, being consulted on work programmes and conducting evaluations, its involvement is not substantial and could thus not been judged as having a sufficient influence on the Agency.⁴⁶⁷ Moreover, such approach would be contradictory to article 18 para. 3 and 7 of Regulation (EC) No 713/2009, which requires the Board of Appeal to act independently and without any instructions also from the European Commission.⁴⁶⁸

4.2.2.3.2.1.2.2 Reviewable acts of agencies since the Lisbon Treaty

Since the Lisbon Treaty, the issue of whether acts of European agencies are reviewable (*Klagegegenstand*) under article 263 TFEU has been resolved. Agencies still have not been granted a position that is comparable to the Council, the European Commission or the European Parliament. Indeed, they are not included in the catalogue of the Union's institutions of article 1 para. 14 TEU. They are, however, now indirectly constitutionalised in that they are referred to in various provisions of

⁴⁶⁶ See U. Ehricke, Die geplante EU-Agentur für die Zusammenarbeit der Energieregulierungsbehörden, (Teil 2), IR, Heft 7/2008 at p. 146.

⁴⁶⁷ Communication from the European Commission to the European Parliament and the Council, *European agencies – The way forward*, COM (2008) 135 final, p. 5 et seq.

⁴⁶⁸ In this sense, see U. Ehricke, Die geplante EU-Agentur für die Zusammenarbeit der Energieregulierungsbehörden, (Teil 2), IR, Heft 7/2008, p 146 at p. 147.

the European treaties. As to the judicial review of their actions, article 263 para. 1 sent. 2 TFEU provides that the Court of Justice shall “review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties”.

4.2.2.3.2.1.2.3 Definition of “acts of ... agencies of the Union”

The definition of “acts” of agencies referred to under article 263 para. 1 sent. 2 TFEU is difficult to establish since the European treaties refer to *various forms of acts*. Article 288 TFEC (ex-article 249 TEC), for example, defines the *legal acts* of the European Union. It thereby establishes a hierarchy of legal instruments, by distinguishing between “*legislative acts*”, *i.e.* European laws and European framework laws (article 289 TFEU), “*non-legislative acts*”, *i.e.* European regulations and European decisions (article 290 TFEU) and “*non-binding acts*”, *i.e.* recommendations and opinions. In addition, article 290 TFEU refers to “*delegated acts*”. Moreover, article 291 TFEU determines “*implementing acts*”. Finally, article 263 paragraph 4 TFEU allows to institute proceedings against an “*act addressed to that person or which is of direct and individual concern to him or her*” as well as against a “*regulatory act which is of direct concern to them and does not entail implementing measures*”.

4.2.2.3.2.1.2.4 Definition of “intended to produce legal effects vis-à-vis third parties”

Article 263 TFEU provides that open for review by the Court of Justice are only those acts, which are “*intended to produce legal effects vis-à-vis third parties*”. Acts producing binding legal effects vis-à-vis third parties are, according to article 288 TFEC (ex-article 249 TEC), *regulations, which are binding in their entirety and directly applicable in all Member States* (article 288 para. 2 TFEU), *directives, which are binding as to the result to be achieved* (article 288 para. 3 TFEU) as well as *decisions, which are binding in their entirety* (article 288 para. 4 TFEU). Of no binding legal effects are recommendations and opinions (article 288 para. 5 TFEU). This becomes, for example, also apparent by virtue of article 263 para. 1 sent 1 TFEU (ex article 230 para. 1 TEC), which *explicitly excludes these acts* (“*other than*

recommendations and opinions”). In addition to these acts included within the scope of protection of article 263 para. 1 TFEU, consistent case-law of the European Courts allow an action can also be brought against measures, which, irrespective of their chosen form, are “*capable of affecting the interests of the applicant by bringing about a distinct change in his legal position*”.⁴⁶⁹

Regarding European agencies, a distinction needs to be made between regulatory activities and the adoption of legal acts, *i.e.* the adoption of non-legislative acts in form of binding rules or binding legal norms. The power to carry out “*regulatory activities*” does not necessarily include the power to enact legal acts. They may also involve measures of a more incentive nature, such as co-regulation, self-regulation, opinions, recommendations, evaluating the application and implementation of rules or networking and good practices.⁴⁷⁰

As to the Agency, article 20 *para. 1* of Regulation (EC) No 713/2009 specifies, in accordance with article 263 *para. 5* TFEU, that reviewable acts are “*decisions taken by the Board of Appeal or, in cases where no right lies before the Board of Appeal, by the Agency*”. It specifies furthermore that reviewable decisions are only those, which are referred to in articles 7, 8 and 9 of Regulation (EC) No 713/2009 (article 20 *para. 1* of Regulation (EC) No 713/2009). Pursuant to article 263 *paras. 1 and 5* TFEU, these decisions must be intended to produce legal effects vis-à-vis third parties.

4.2.2.3.2.1.3 Capacity to bring an action and period for bringing the action

As to the capacity to bring an action (*Klageberechtigung*), article 263 TFEU requires the applicant to show that he satisfies the conditions regarding standing or

⁴⁶⁹ See *e.g.* ECJ, case- 60/81 *International Business Machines Corporation v European Commission of the European Communities* (1981) E.C.R. 2639, para. 9.

⁴⁷⁰ See Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, 25.02.2005, COM (2005) 59 final at p. 4 *et seq.*

locus standi laid down in the Treaty.⁴⁷¹ Article 263 TFEU distinguishes between three categories of applicant: the privileged applicants (*privilegierte Klagebefugte*, the semi-privileged applicants (*teilprivilegierte Klagebefugte* and the non-privileged applicants (*nicht-privilegierte Klagebefugte*).⁴⁷² The *privileged applicants* have automatically standing to bring an action without having to establish a particular interest, since their interest is assumed. They include the Member States, the European Parliament, the Council and the European Commission (article 263 para. 2 TFEU). The *semi-privileged applicants* comprise the Court of Auditors, the European Central Bank and the Committee of the Regions (article 263 para. 3 TFEU). The standing of natural or legal persons to institute proceedings is limited and that is the reason why they are referred to as *non-privileged applicants* (article 263 para. 4 TFEU). *Non-privileged persons* are those who are directly and individually concerned by that act or who are directly concerned by a regulatory act, which does not entail implementing measures. Regarding the requirements of *direct and individual concern*, they must be established in a *cumulative way*.⁴⁷³ The definition of individual concern has been laid down by the Court of Justice in the *Plaumann case*, where it held that persons other than those to whom a decision is addressed may only claim to be *individually* concerned, if that decision affects them by reason of certain *attributes which are peculiar to them* or by reason of circumstances in which they are *differentiated from all other persons* and by virtue of these *factors distinguishes them individually* just as in the case of the person addressed.⁴⁷⁴ Article 19 of Regulation

⁴⁷¹ See e.g. P. Kent, European Union Law, fourth Edition, London 2006, p. 53 *et seq.* (*locus standi*: the right to challenge).

⁴⁷² See e.g. W. Frenz, Handbuch Europarecht, Wirkungen und Rechtsschutz, Band 5, Neuauflage, Berlin 2010, p. 812 – p. 813; see also K.-D. Borchardt, in: C. O. Lenz/ K.-D. Borchardt, Eu-Verträge, Kommentar nach dem Vertrag von Lissabon, 5. Auflage, Köln 2010, art. 263 AEUV, paras. 23 *et seq.*

⁴⁷³ See e.g. ECJ, case C-50/00P, *Unión de Pequeños Agricultores v Council of the European Union* (25.07.2002) E.C.R. I-06677, where the Court of Justice held that “a natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually”, paras. 44 – 45; see also D. Chalmers/ C. Hadjiemmanuil/ G. Monti/ A. Tomkins, European Union Law, Text and Materials, Cambridge 2006, p. 429 - 433 *et seq.*

⁴⁷⁴ ECJ, case 25/62, *Plaumann & Co v European Commission of the European Economic Community*, (15 July 1963) E.C.R., p. 00126. In this case, *Plaumann and Co*, a German corporation, sought the annulment of a decision of the European Commission in which the latter refused to authorise the Federal Republic of Germany to suspend customs duties applicable to fresh mandarins and clementines imported from third countries. In order to determine whether *Plaumann* had standing, the ECJ had to

(EC) No 713/2009 refers to the first two options of article 263 para. 4 TFEU and grants thus standing to direct addressees of acts of the Agency as well as those directly and individually concerned. The action must be instituted within two months of the publication of the measure or its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the plaintiff (*Klagefrist*) pursuant to article 263 para. 6 TFEU.

4.2.2.3.2.1.4 Grounds for review

The grounds for review (*Klagegrund*) include lack of competence, infringement of essential procedural requirements, infringement of the Treaties or any rule of law relating to their application or misuse of powers (article 263 para. 2 TFEU). As to the acts of the Agency, the grounds for their review must relate to the decisions referred to in articles 7, 8 and 9 of Regulation (EC) No 713/2009.

4.2.2.3.2.1.5 Legal effects of annulment

Where the Court finds an action well founded, it “shall declare the act concerned to be void”. Principally, the declaration of the Court that an act is void takes effect *ex tunc and erga omnes*, which means with regard to the whole world and with retrospective effect. However, if the Court considers this necessary, it may state which of the effects of the act declared to be void shall be considered as definitive pursuant to article 264 TFEU. This enables the Court to minimise any disruption, which might be caused by the gap left by the disappearance of the act that has been quashed.⁴⁷⁵ The Court has no power to order the institution concerned to take any

decide whether the company was individually concerned by the European Commission’s decision (*so-called Plaumann test*), see p. 96 at p. 107; for more details, see *D. Chalmers/ C. Hadjiemmanuil/ G. Monti/ A. Tomkins*, *European Union Law, Text and Materials*, Cambridge 2006, p. 420 *et seq.*

⁴⁷⁵ See *D. Wyatt/ A. Dashwood*, in: *A. Arnall/ A. Dashwood/ M. Dougan/ M. Ross/ E. Spaventa/ D. Wyatt*, *European Union Law, Fifth Edition*, London 2006, p. 453 and p. 454.

particular steps.⁴⁷⁶ The institution is, however, required upon article 266 para. 1 TFEU to take the measures necessary to comply with the Court's judgement. Article 20 no. 3 of Regulation (EC) No 713/2009, by referring to article 266 para. 1 TFEU, requires the Agency to take the necessary measures in order to comply with the judgment taken by the Court of Justice. This may take the form of the Board of Appeal exercising any of the powers that lie within the competence of the Agency or remitting the case to the competent body of the Agency (Article 219 para. 5 of Regulation (EC) No 713/2009).⁴⁷⁷

4.2.2.3.2.2 Article 20 para. 2 of Regulation (EC) No 713/2009 in connection with article 265 TFEU (ex-article 232 TEC)

The second possibility of action is contained in article 20 para. 2 of Regulation (EC) No 713/2009. It provides for the event that the Agency failed to take a decision (*Untätigkeitsklage*). In this case, the conditions of article 265 TEU (ex-article 232 TEC) must be fulfilled. Contrary to former article 232 TEC, article 265 *para. 1* TFEU now explicitly stipulates that it is applicable “*under the same conditions, to bodies, offices and agencies of the Union, which fail to act*”. Regarding legal standing (article 265 *para. 1 and 3* TFEU) and the period of bringing the action (article 265 *para. 2* TFEU) the same conditions apply as those with regard to article 263 TFEU. Article 265 *para. 2* TFEU clearly states that the action is only admissible, if the institution, body, office or agency concerned has first been called upon to act.

4.2.2.4 Tasks devolved on the Agency

The tasks devolved on European agencies in general are various, including the adoption of individual decisions that are legally binding on third parties, the providing

⁴⁷⁶ See e.g. ECJ, C-15/85, *Consorzio Cooperative d'Abbruzzo v European Commission* (1987) E.C.R. 1005, para. 18; ECJ, C-5/93 P *DSM v European Commission* (1999) E.C.R. I-4695, para. 36, in *D. Wyatt/ A. Dashwood*, European Union Law, in: A. Arnulf/ A. Dashwood/ M. Dougan/ M. Ross/ E. Spaventa/ D. Wyatt, European Union Law, Fifth Edition, London 2006, p. 452.

⁴⁷⁷ See also *U. Ehricke*, Die geplante EU-Agentur für die Zusammenarbeit der Energieregulierungsbehörden, (Teil 2), IR, Heft 7/2008, p. 146 at p. 147.

of assistance to the European Commission and the Member States in form of technical or scientific advice or the creating a network of national competent authorities and cooperation between them with a view to gathering, comparing and exchanging information and good practices.⁴⁷⁸

4.2.2.4.1 Types of acts of the Agency

Article 4 of Regulation (EC) No 713/2009 empowers the Agency to adopt four different types of acts. These are *opinions*, *recommendations*, *individual decisions* and *non-binding framework guidelines*.

Opinions and recommendations may be addressed by the Agency to transmission system operators (article 4 (a) of Regulation (EC) No 713/2009), to the national regulatory authorities (article 4 (b) of Regulation (EC) No 713/2009) and to the European Parliament, the Council or the European Commission (article 4 (c) of Regulation (EC) No 713/2009).

Individual decision-making powers may be exercised by the Agency on specific cross-border issues (article 4 (d) of Regulation (EC) No 713/2009 in connection with articles 7, 8 and 9 of Regulation (EC) No 713/2009), such as on *the terms and conditions for access to and operational security of electricity and gas cross-border infrastructure* (article 7 para. 7 in connection with article 8 of Regulation (EC) No 713/2009). The Agency takes decisions on *exemption requests* concerning new interconnectors for electricity (article 9 para. 1 of Regulation (EC) No 713/2009 in connection with article 17 para. 5 of Regulation (EC) No 713/2009) and new cross-border gas infrastructures (article 9 para. 1 of Regulation (EC) No 713/2009 in connection with article 36 para. 4 of Directive 2009/73/EC). The Agency takes thus an active part in exercising *executive powers* at Community level in that it is given the

⁴⁷⁸ See Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, 25.02.2005, COM (2005) 59 final at p. 4 *et seq*; see also *e.g.* Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, presented by the European Commission on 19.09.2007, COM (2007) 530 final at 3.1.

power to implement European laws. It is, however, limited to applying the rules of *secondary legislation to specific cases*, in accordance with the institutional system and the case law of the European Court of Justice.⁴⁷⁹

Non-binding framework guidelines may be issued by the Agency with regards to the establishment of network codes of the *ENTSO* for Electricity (article 4 (e) of Regulation (EC) No 713/2009 in connection with article 6 para. 2 of Regulation (EC) No 714/2009).

4.2.2.4.2 General tasks

The Agency assumes *general advisory functions* vis-à-vis the *European Parliament, the Council or the European Commission*. For this purpose, it issues, upon request of the European Parliament, the Council or the European Commission or on its own initiative, *opinions* and *recommendations* on any market regulation issues (article 5 of Regulation (EC) No 713/2009 in connection with article 4 (c) of Regulation (EC) No 713/2009).

As to the *Agency's advisory role vis-à-vis the European Commission*, it provides *opinions and recommendations* on matters relating to *tasks of the cooperation of transmission system operators and the national regulatory authorities*. It issues, for example, opinions on the draft statutes, list of members and draft rules of procedures of the European Network of Transmission System Operators for Electricity (*ENTSO for Electricity*), (article 6 para. 1 of Regulation (EC) No 713/2009) and on the implementation of the *ENTSO* for Electricity on network codes (article 6 para. 5 of Regulation (EC) No 713/2009). It furthermore reviews and (re-) submits within a maximum period of six months *non-binding framework guidelines* setting out clear and objective principles on issues relating to the network access for cross-border

⁴⁷⁹ See Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, 25.02.2005, COM (2005) 59 final at p. 4 *et seq.*

exchanges in electricity (article 6 para. 2 of Regulation (EC) No 714/2009⁴⁸⁰) and gas (article 6 para. 2 of Regulation (EC) No 715/2009⁴⁸¹). Additionally, the Agency makes *recommendations* to publicise good practices among national energy regulators and other market players (article 7 para. 2 of Regulation (EC) No 713/2009). Moreover, it provides opinions on compliance of regulatory authorities with the Guidelines referred to in provisions of Directive 2009/72/EC and Directive 2009/73/EC and Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 (article 7 para. 4 of Regulation (EC) No 713/2009). The Agency finally issues opinions on decisions of national regulatory authorities on certification of transmission system operators for cross-border exchanges in electricity (second sub-paragraph of article 3 para. 2 of Regulation (EC) No 714/2009⁴⁸²) and gas (second sub-paragraph of article 3 para. 2 of Regulation (EC) No 715/2009⁴⁸³).

These tasks are all carried out *upon request of the European Commission*. Since the European Commission is not obliged to follow the Agency's opinions and recommendations, the Agency' assumes a real advisory role. It keeps the European Commission informed about any market regulatory issues, the appropriate steps vis-à-vis third market participants are, however, taken through the European Commission itself.⁴⁸⁴

⁴⁸⁰Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, (*Regulation (EC) No 714/2009*), p. 19, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0015:0035:EN:PDF> (25.01.2011).

⁴⁸¹Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (*Regulation (EC) No 715/2009*), p. 41, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0036:0054:EN:PDF> (25.01.2011).

⁴⁸²Regulation (EC) No 714/2009, p. 18.

⁴⁸³Regulation (EC) No 715/2009, p. 41.

⁴⁸⁴ See in this sense *U. Ehricke*, Die geplante EU-Agentur für die Zusammenarbeit der Energieregulierungsbehörden, (Teil 1), IR, Heft 6/2008, p. 122 at p. 125.

4.2.2.4.3 Tasks as regards the cooperation of transmission system operators

The Agency is responsible for *advising, monitoring, analyzing and reviewing* the activities of the *ENTSO* for Electricity (article 6 para. 2 of Regulation (EC) No 713/2009 and article 9 of Regulation (EC) No 714/2009). It is in particular involved in the *drafting and monitoring* of implementation of the *Community wide network development plan* (article 6 paras. 3 (b), 4 and 8 of Regulation (EC) No 713/2009), in the *development and implementation of network codes* (article 6 paras. 3 (a), 4, 5 and 6 of Regulation (EC) No 713/2009) and the *monitoring of the regional cooperation of transmission system operators* established within the *ENTSO* for Electricity (article 6 paras. 9 of Regulation (EC) No 713/2009).⁴⁸⁵

4.2.2.4.4 Tasks as regards the national regulatory authorities

The Agency assumes advisory functions in providing *opinions and recommendations* on market regulation issues (article 7 para. 2 of Regulation (EC) No 713/2009), on the cooperation between national regulatory authorities (article 7 para. 3 of Regulation (EC) No 713/2009) and on compliance with and application of the guidelines of the European Commission (article 7 para. 4 of Regulation (EC) No 713/2009).

It has furthermore *real decision-making powers* on specific technical issues (article 7 para. 1 of Regulation (EC) No 713/2009), on the regulatory regime applicable to infrastructures within the territory of at least two Member States (article 7 para. 7 of Regulation (EC) No 713/2009 in connection with article 8 of Regulation (EC) No 713/2009) as well as on exemption requests from internal market rules for new electricity interconnectors and new infrastructures located in more than one Member State (article 8 para. 1 of Regulation (EC) No 713/2009). It finally provides a

⁴⁸⁵ See e.g. Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, presented by the European Commission on 19.09.2007, COM (2007) 530 final at 3.1.

framework for national regulators to cooperate in order to improve the handling of cross-border situations (article 7 para. 3 of Regulation (EC) No 713/2009).

4.2.2.4.5 Other tasks

In addition to the Agency's power to decide on exemption requests of new interconnectors and infrastructure (article 9 para. 1 of Regulation (EC) No 713/2009), to advise national energy regulators on certification of transmission system operators (article 9 para. 2 of Regulation (EC) No 713/2009), it may be charged through the European Commission with any "*additional tasks which do not involve decision-making powers*" under the condition, however, that the circumstances are clearly defined in the European Commission's Guidelines (article 9 para. 2 of Regulation (EC) No 713/2009).

4.2.2.5 In-depth analysis: the legitimacy of delegation of executive powers to the Agency

The delegation of executive powers to the Agency as a body, which is not foreseen through European primary law, gives rise to two issues: *firstly*, the issue of maintaining the regulative balance between executives, legislatives and judiciaries powers established between the European Union and, *secondly*, the issue of accountability of the Agency, exercising its powers distant from the control by the European citizens.

4.2.2.5.1 The possibility of a delegation of powers

The *principle of conferral* provides that the European Union is empowered to act only where the power to do so has been conferred upon it by the Member States. Since they have not conferred power on the European Union to delegate powers to institutional bodies other than those provided for by the Treaty, the question arises as to whether a delegation of executive powers on the Agency by virtue of Regulation (EC) No 713/2009 complies with European law.

On one side, one could argue that a delegation of powers has the inherent risk that the European Union gives more power to institutional bodies than it has itself, thereby extending its field of activity further than conferred on it by the Member States. In addition, the European Union is required to ensure that the objectives set out in the European treaties are attained in accordance with the provisions thereof (see *e.g.* article 5 TEU), which does not include any powers to delegate. Moreover, the balance of powers assigned to the European institutions is an essential characteristic of the structure of the European Union and a fundamental guarantee attributed to the Member States. One could therefore conclude that, if the European institutions intend to delegate certain of their powers that have been conferred upon them by the European treaties to bodies, which dispose of their own legal personality, such a delegation of powers should clearly be provided for by the Treaties.

On the other side, however, one could assume that with a view to the ever increasing tasks, which have to be handled through the European institutions, particularly the European Commission as the primary executive organ, it is principally necessary to delegate specific powers to European agencies. In addition, the Treaty, although it does not provide for it, does not exclude it either.

The Court of Justice, in the absence of provisions contained in the Treaty, has been called upon to define the conditions under which the European Union may legitimately delegate powers to European agencies established through secondary European legislation. The Court of Justice acknowledged that it was principally possible to delegate (executive) powers to subordinate agencies, set, however, strict limits for such delegation.⁴⁸⁶ The distinctions of the Court of Justice were, in particular, established in the cases of *Meroni*⁴⁸⁷, *Köster*⁴⁸⁸ and *Romano*⁴⁸⁹.

⁴⁸⁶ For details, see *e.g.* E. Lenski, in: C. O. Lenz/ K.-D. Borchardt, Eu-Verträge, Kommentar nach dem Vertrag von Lissabon, 5. Auflage, Köln 2010, art. 13, para. 23 *et seq.*

⁴⁸⁷ ECJ, C-9/56, *Meroni & Co, Industrie Metallurgiche SpA v. High. Authority of the Coal and Steel Community* (1958) E.C.R. 133 (*Meroni case*), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61956J0009:EN:PDF> (16.01.2011).

4.2.2.5.1.1 The *Meroni* case of 1958 and the subsequent cases of *Romano* and *Köster* (*the Meroni doctrine*)

In the *Meroni* case, the High Authority of the European Coal and Steel Community (ECSC) had created a special obligatory system for the regulation of the ferrous scrap market. This system was administered under Brussels based agencies under the responsibility of the High Authority. The High Authority issued a demand of payment to the Italian Steel Company *Meroni* payable to the Imported Ferrous Scrap Equalisation Fund, which the company *Meroni* refused to pay. *Meroni* filed an action to the Court of Justice for annulment of the High Authority's demand for payment. *Meroni* considered that a delegation of powers from the High Authority to the Brussels agencies was illegitimate.⁴⁹⁰ The Court of Justice ruled that, although article 8 of the Treaty required the High Authority to ensure that the objectives set out in this Treaty are attained in accordance with the provisions thereof and did not provide any power to delegate, the possibility of delegating powers to “*bodies established under private law, having a distinct legal personality and possessing powers of their own (...) cannot be excluded*”.⁴⁹¹

In a number of subsequent judgements, such as *the Romano case* and *the Köster case*, the Court of Justice upheld the distinctions outlined in the *Meroni* doctrine.

In *the Romano case*, the Administrative European Commission for the Social Security of Migrant Workers, an auxiliary body of the European Commission, was charged with the establishment of certain criteria that the national authorities would have to

⁴⁸⁸ ECJ, C-25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster and Berodt & Co* (17.12.1970) 01161 (*Köster case*), <http://eur-lex.europa.eu/Notice.do?val=19627:cs&lang=en&list=19627:cs.&pos=1&page=1&nbl=1&pgs=10&hwords=&checktexte=checkbox&visu=#texte> (18.01.2011).

⁴⁸⁹ ECJ, C- 98/80, *Guisepe Romano v Institut national d'assurance maladie-invalidité* (1981) E.C.R. 1241 (*Romano case*), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61980J0098:EN:PDF> (18.01.2011).

⁴⁹⁰ *Meroni case*, p. 133 at p.138 (n. 489).

⁴⁹¹ *Ibid*, p. 133 at p.151 (n. 489).

take into account. For this purpose, the Administrative European Commission was vested with *comprehensive law-making powers*, including, *inter alia*, the power to deal with questions of interpretation arising from a European Regulation. The Court of Justice held that “...it follows both from article 155 of the Treaty and by the judicial system created by the Treaty, and in particular by Articles 173 and 177 thereof, that a body such as the Administrative European Commission may not be empowered by the Council to adopt acts having the force of law”.⁴⁹²

In the *Köster* case, the Court of Justice, by order of 21 April 1970, was asked by the *Hessischer Verwaltungsgsgerichtshof* by virtue of article 177 of the EEC Treaty on the validity of Regulation No 102/64/EEC of the European Commission of 28 July 1964 on import and Export Licenses for Cereals and Processed Cereal Products, Rice, Broken Rice and Processed Rice Products⁴⁹³ and, in particular, on the role of the Management Committee that had been established by the Council to assist the European Commission in the implementation of the common organization of the market in cereals. It was alleged that the Management Committee Procedure *interfered in the European Commission’s right of decision to such an extent as to put its independence in question* and that *the interposition of the Management Committee between the Council and the European Commission distorted the relationships between these institutions*.⁴⁹⁴ The Council and the European Commission were of the opinion that the rules of procedure of the Management Committee did not have the effect of putting the European Commission’s powers in question. They considered that the European Commission remained *master of its own decision in that it was never obliged to follow the opinion of the Management Committee*. The Court of Justice decided that the Management Committee had not “*the power to take a decision in place of the European Commission or the Council*” and that “*consequently, without distorting the Community structure and the institutional balance*”, the Council was able to “*delegate to the European Commission an*

⁴⁹² *Romano case*, para. 20 (n. 491).

⁴⁹³ OJEU 1964, p.2125.

⁴⁹⁴ *Köster case* para. 8 (n. 490).

*implementing power of appreciable scope, subject to its power to take the decision itself if necessary”.*⁴⁹⁵

*In an Opinion given pursuant to article 228 (1) of the EEC Treaty on 26 April 1977, the Court of Justice confirmed the possibility of delegating powers, stating that the powers expressly given to the European Union imply the exercise of those powers, which are needed to give proper effect to the Treaty “including, if necessary, a certain delegation of powers”.*⁴⁹⁶

The Court made, however, also clear that “*the power of delegation (...) is not unlimited*” and referred thereby explicitly to the *Meroni* and the *Köster* case.⁴⁹⁷ According to the Court, the “*institutional balance*” or “*balance of powers, which is a characteristic of the institutional structure of the Community*”, constitutes a “*fundamental guarantee granted by the Treaty*” which must not be rendered ineffective.⁴⁹⁸ As a result, “*a body which is not provided for by the Treaty*”, must not “*have the effect of distorting the relationships between the institutions*” established by the Treaty.⁴⁹⁹

As a conclusion it can be said that the *Meroni doctrine* and its subsequent judgements aim at safeguarding the basic legitimacy of the European Union, in requiring it to be founded upon a *clear allocation of powers between the institutions* and to exercise its tasks in a manner that they can be *traced back to an accountable institution*.

⁴⁹⁵ *Ibid* at para. 9 (n. 490).

⁴⁹⁶ ECJ, Opinion 1/ 76, OF 26.4.1977, p. 744, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976V0001:EN:PDF> (18.01.2011).

⁴⁹⁷ See Opinion 1/ 76, OF 26.4.1977, p. 743 at p. 752.

⁴⁹⁸ See *Meroni case*, p. 133 at p. 152 (n. 489).

⁴⁹⁹ See *Köster case* at paras. 4, 8 and 9 (n. 490).

4.2.2.5.1.2 The *Meroni doctrine* still prevalent today?

The principles of the *Meroni doctrine*, despite the extensive use of delegation of powers to the European Commission as well as other European institutions and agencies, are still prevalent today.

This has been confirmed by the Court of Justice in 2005. In the case *Queen v. Secretary of Health and National Assembly for Wales* of 12 July 2005⁵⁰⁰, the Court of Justice considered that a delegation of powers from the Council to the European Commission to amend a legislative act had to ensure that “*the power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria*”.⁵⁰¹ Moreover, in the case *Carmine Salvatore Tralli v European Central Bank* of 26 May 2005, the Court of Justice explicitly referred to the *Meroni* case, considering a delegation of powers to one of the organs of the European Central Bank as legitimate.⁵⁰² It recalled that the powers conferred on an institution included “*the right to delegate ... a certain number of powers which fall under those powers, subject to conditions to be determined by the institution*”.⁵⁰³ It pointed furthermore out that, regarding the delegation of powers to bodies established under private law, having a distinct legal personality, “*a Community institution or body must be entitled to lay down a body of measures of an organisational nature, delegating powers to its own internal decision making bodies, in particular as regards the management of its own staff*.”⁵⁰⁴

⁵⁰⁰ ECJ, joined cases C-154/04 and C-155/04, *The Queen, on the application of Alliance for Natural Health and Others v. SE.C.R.etary of State for Health and National Assembly for Wales* (12 July 2005) E.C.R. I-6451, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0154:EN:HTML> (11.02.2011).

⁵⁰¹ *Ibid* at para. 90.

⁵⁰² ECJ, case C-301/02 P, *Carmine Salvatore Tralli v European Central Bank*, E.C.R. (2005) I-4071 (*Carmine Salvatore Tralli case*), paras. 41 - 44, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0301:EN:HTM> (11.02.2011).

⁵⁰³ *Ibid* at para. 41.

⁵⁰⁴ *Ibid* at para. 42.

The principles of the *Meroni doctrine* have also been confirmed through the *European Commission* in its Communication to the European Parliament and the Council on “European agencies – The way forward” in 2008. The European Commission emphasised that „*there are clear and strict limits to the autonomous power of regulatory agencies in the current Community legal order. Agencies cannot be given the power to adopt general regulatory measures. They are limited to taking individual decisions in specific areas where a defined technical expertise is required, under clearly and precisely defined conditions and without genuine discretionary power.*“⁵⁰⁵

4.2.2.5.2 The conditions to be complied with in the context of a delegation of powers

The conditions that must be complied with in the context of a delegation of powers were particularly established through the Court of Justice in the decisions of *Meroni* and *Romano*.

A delegation of powers can, *first of all*, not “confer upon the authority receiving the delegation powers different from those which the delegating authority itself received under the Treaty”.⁵⁰⁶ The exercise of powers conferred upon the body to which the powers are delegated must thereby be subject to the “*same conditions to which it would have been subject if the (High Authority) delegating authority had exercised them directly*”.⁵⁰⁷ *Second*, a delegation of power must be based upon an *express decision* taken by the delegating authority transferring the powers.⁵⁰⁸ *Third*, a delegation of powers can only relate to “*clearly defined executive powers*”.⁵⁰⁹ *Forth*,

⁵⁰⁵ See Communication from the European Commission to the European Parliament and the Council, European agencies – The way forward, COM (2008) 135 final, p. 5.

⁵⁰⁶ See *Meroni case*, p. 133 at p. 150 (n. 489).

⁵⁰⁷ *Ibid*; see also case *Carmine Salvatore Tralli case*, para. 43 (n. 504).

⁵⁰⁸ *Ibid*.

⁵⁰⁹ *Meroni case*, p. 133, at p.150, 152 (n. 489); see also *Carmine Salvatore Tralli case*, para. 43 (n. 504).

a delegation of powers must “*be entirely subject to the supervision*” of the delegating institution⁵¹⁰, which means that the “*organ to which the powers are transferred must remain under the control and the supervision of the authority in which the original power was vested*.”⁵¹¹ Fifth, a delegation of powers “*may not concern discretionary powers leaving room of political judgement*”, because a delegation of powers that implied a wide margin of discretion would “*make possible the execution of actual economic policy*”.⁵¹² The Court of Justice held that such a delegation would considerably alter the consequences involved in the exercise of powers in that it “*replaces the choices of the delegator by the choices of the delegate*” and therefore “*brings about an actual transfer of responsibility*”.⁵¹³ The Court concluded that, “*to delegate a discretionary power, by entrusting it to bodies other than those which the Treaty has established to effect and supervise the exercise of such power within the limits of its own authority, would render the guarantee of balance of powers ineffective*.”⁵¹⁴ Sixth, the exercise of executive powers must be “*subject to strict review in the light of objective criteria determined by the delegating authority*” so as to make judicial review possible.⁵¹⁵ The Court of Justice *finally* held, in accordance with the *Romano case*, that a delegation of powers “*to adopt acts having the force of law*” to bodies other than the European Commission was illegitimate.⁵¹⁶

4.2.2.5.3 The application of the *Meroni doctrine* to the Agency

In the light of the above-mentioned criteria, the question arises whether the delegation of executive powers to the Agency by virtue of Regulation (EC) No 713/2009 satisfies the requirements of the Treaty.

⁵¹⁰ See *Meroni case*, p 150, p. 152 (n. 489).

⁵¹¹ See *e.g.* ECJ, Opinion 1/ 76, OF 26.4.1977, p. 744 at p. 752.

⁵¹² *Meroni case*, p 150, p. 152 (n. 489).

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid.*

⁵¹⁵ *Ibid.*

⁵¹⁶ See *Romano case*, para. 20 (n. 491).

As to the *first requirement*, one could argue that prior to the Lisbon Treaty the European treaties did not confer upon the European Union the power to regulate the energy sector with the consequence that it was not permitted to delegate powers in this sector to the Agency. However, although no specific provision of competence conferred upon the European Union powers such powers, they could nevertheless be drawn from the general provisions of competence, *i.e.* of article 308 TEC and article 95 TEC. One could furthermore deny compliance with the Meroni doctrine with the argument that the European Commission, *in fact*, did never carry out regulatory oversight over the energy sector with the consequence that it was not entitled to delegate such powers to the Agency.⁵¹⁷ However, in the *ENISA case* the Court of Justice held that decisive factor was that the Treaty did, *in principle*, entitle the European Commission to exercise these powers.⁵¹⁸

The *second, third and fourth requirement* of the *Meroni-doctrine* have equally been respected. The delegation of powers to the Agency is based upon an *express decision* of the European Commission in form of Regulation (EC) No 713/2009, which *clearly sets out the executive powers* of the Agency.⁵¹⁹ In addition, Regulation (EC) No 713/2009 ensures that any additionally tasks conferred upon the Agency are “*clearly defined by the European Commission in Guidelines*” (article 9 para. 3 Regulation (EC) No 713/2009). It furthermore ensures that the European Commission keeps *regulatory oversight and control* over the Agency through important co-decision rights (*Mitbestimmungsrechte*), such as the proposal of a list of candidates for the position as Director (article 16 para. 2 of Regulation (EC) No 713/2009) or the appointment of two members and alternates of the Administrative Board (article 12 para. 1 of Regulation (EC) No 713/2009).

⁵¹⁷ See *e.g.* Regulierungsbehörden zweifeln an EU-Energieagentur, Artikel EurActiv v. 25.01.2008, <http://www.euractiv.com/de/energie/regulierungsbehrden-zweifeln-eu-energieagentur/art.-169855> (11.02.2011).

⁵¹⁸ See *S. Neveling*, Europäisierung der Energieaufsicht? – Vorschläge von Kommission und ERGEG zur Neuordnung (Teil 1), IR, Heft 8/2007, p. 173 at p. 175, p. 176.

⁵¹⁹ *Ibid* at p. 175.

As to the *fifth requirement*, i.e. the prohibition to delegate discretionary powers, certain provisions of Regulation (EC) No 713/2009 are problematic. Indeed, article 7 para. 1 of Regulation (EC) No 713/2009 empowers the Agency “*to adopt individual decisions on technical issues*”, such as on network development plans and investment decisions (articles 5 and 22 of Directive 2009/72/EC), which *usually implies a certain margin of discretion*. The question is, however, whether the principle of institutional balance contained in article 13 TEU (ex-article 4 TEC) and developed in the *Meroni doctrine in 1958* can be applied *today* without the need of adopting it to the actual circumstances. The principle of institutional balance represents a constitutive principle is open to interpretation, depending on the needs of the European Union being constantly refined and developed.⁵²⁰ As such, it cannot be applied *today* without the need of being reassessed and “*appraised in the light of the system actually contemplated*”.⁵²¹ Applying the principle of *institutional balance of powers* in a static and unchangeable way would hinder the European Union to evolve.⁵²²

One could furthermore argue that the establishment of the Agency even supports the institutional balance of powers in that it fortifies the principle of separation of powers. Through the Agency’s establishment, the exercise of power is spread among further institutions, which contributes to a better fragmentation of powers. This in return supports the prevention of abuse of power as the underlying aim of the separation of powers.⁵²³

In addition, in comparison to 1958, the fields of activities of the European Commission have considerably been increased. Without the support of further created

⁵²⁰ See in this sense, M. Everson/ G. Majone/ L. Metcalfe/ A. Schout, The Role of Specialised Agencies in Decentralising EU Governance, Report presented to the European Commission, 1999, p. 12, http://ec.europa.eu/governance/areas/group6/contribution_en.pdf (20.02.2011).

⁵²¹ See ECJ, Opinion 1/ 76, OF 26.4.1977, p. 744 at p. 752.

⁵²² See Jean Monnet Center for International and Regional Economic Law & Justice, Delegation of Regulatory Authority in the European Union, p.12, <http://centers.law.nyu.edu/jeanmonnet/papers/01/010301-04.html> (20.02.2011).

⁵²³ *Ibid*, p.12 and p. 37.

European bodies the European Commission would in various areas have difficulties to carry out its tasks in an efficient manner and thus to satisfy its obligations under the Treaty.

Moreover, particularly as regards the energy sector, the application of the *Meroni doctrine* in a strict sense would ignore the highly technical nature of energy related measures. Indeed, over the years, the energy sector has become more and more complex and detailed and involves to a greater extent various financial interests. Various technical rules have been established that electricity companies must operate under (grid-codes), which need to be harmonised.

Additionally, constant progress needs to be made on new infrastructure. The European Commission had itself admitted that it was not able to pursue these tasks itself, given that it had never carried out such activities. It claimed that activities of such highly technical nature required the specialist expertise of the national regulatory authorities of the Member States to cooperate with each other and to work together. In the European Commission's view, only a body emanating from the national energy regulators could catalyse all the necessary resources of national regulators.⁵²⁴ As a result, the delegation of powers to the Agency contributes to simplification and clarification in that it frees the European Commission from dealing with complex technical regulations.⁵²⁵

Moreover, in the *Köster case* the European Court of Justice prohibited only a delegation of power that enabled the body to “*take a decision in place of the European Commission or the Council*”.⁵²⁶ It concluded as a consequence that the delegation of a mere “*implementing power of appreciable scope*”, which remained

⁵²⁴ See in this sense Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, presented by the European Commission on 19.09.2007, COM (2007) 530 final at 3.1.

⁵²⁵ See *Jean Monnet Center for International and Regional Economic Law & Justice*, Delegation of Regulatory Authority in the European Union, p.12.

⁵²⁶ See *Köster case*, para. 9 (n. 490).

subject to the power of the delegating body to take the decision itself, if necessary, did “*not distort the community structure and the institutional balance*” and therefore was legitimate.⁵²⁷ Similarly, in *Opinion 1/76 of 26 April 1977* the Court of Justice held that a grant of power was justified, if the delegated body was entrusted with “*implementing measures and not with decisions of principle of a political nature*”.⁵²⁸

Regarding Regulation (EC) No 713/2009, it does *not* confer upon the Agency the power to take decisions *in the place of the European Commission*. Although the Agency is able to take *legally binding decisions*, these apply only to *specific technical situations* that are foreseen in Regulation (EC) No 713/2009 or that are provided on a case-by-case basis through binding Guidelines. *The Agency has no political discretion outside this framework*. In addition, the Agency has *no power to take discretionary substantive decisions*. These are reserved to the European Commission, in which case the Agency plays merely a preparatory and advisory role. Hence, although the Agency has the power to implement laws through the adoption of individual decisions, its power is limited to *applying the rules of secondary legislation to specific cases*. An additional point that the Court of Justice considered was “*the direct effect which decisions taken under the delegation might produce*”.⁵²⁹ This is particularly important due to the fact that most of the Member States dispose of an express constitutional basis for the transfer to an international institution of the power to take decisions, which are *directly applicable with the national legal system*. From this follows that the transfer from the European Union to other international bodies of powers to take actions that have an immediate effect within the national legal systems, can be acknowledged only to a very limited extent.⁵³⁰

⁵²⁷ *Ibid.*

⁵²⁸ See ECJ, *Opinion 1/ 76*, OF 26.4.1977, p. 744 at p. 752.

⁵²⁹ *Ibid.*

⁵³⁰ See ECJ, *Opinion 1/ 76*, OF 26.4.1977, p. 744 at p. 752

As to the *sixth requirement*, demanding for judicial review, article 19 of Regulation (EC) No 713/2009 enables any natural or legal person, including national regulatory authorities to appeal against decisions taken by the Agency. Moreover, article 20 of Regulation (EC) No 713/2009 opens the review of decision taken by the Board of Appeal or the Agency through the European Court of Justice itself. Finally, as to the prohibition of conferring the power “*to adopt acts having the force of law*” (*Rechtsakt mit normativem Charakter*) to other institutions than the European Commission, the question is how such acts should be defined. If they included any abstract-general legal norm producing legal effect vis-à-vis third parties (*abstrakt-generelle Regelung mit rechtsverbindlicher Außenwirkung*)⁵³¹, the Agency would have been conferred upon the power to adopt acts having the force of law, allowing it to determine technical safety standards and operative network regulations, which constitute abstract-general legal norms. However, in the *Romano case*, the Court of Justice did not require such an extensive definition of “acts having the force of law”. In this case, it considered it already as illegitimate that the Administrative European Commission *autonomously* determined the point of time at which the regulation in question should enter into effect. It held that this could *not be considered as an implementing measure anymore but constituted an act having the force of law*. One can thus conclude that it is prohibited for the delegated body to determine *rules in an autonomous way, if these have not been defined in the act of the authority delegating the powers*.⁵³² As to Regulation (EC) No 713/2009, the Agency is not allowed to independently take decisions; the circumstances under which it may act are explicitly laid down. As a result, under consideration of the *Meroni doctrine*, the delegation of executive powers of the European Commission to the Agency through Regulation (EC) No 713/2009 complies with European law.

⁵³¹ An abstract-general legal norm can be defined as one that applies to an undefined number of cases (*unbestimmte Vielzahl von Fällen*) as well as addressees (*unbestimmte Vielzahl von Adressaten*), contrary to an individual-concrete legal norm, such as an administrative act, which applies only to a specific case (*konkret*) as well as to a specific person (*individuell*).

⁵³² S. Neveling, *Europäisierung der Energieaufsicht? – Vorschläge von Kommission und ERGEG zur Neuordnung* (Teil 1), IR, Heft 8/2007, p. 173 at p. 176.

4.2.2.5.4 The accountability of European agencies

There are no general rules governing the creation and operation of European regulatory agencies. Their role, structure and profile differ enormously, which raises doubts as to their accountability. As a public body of European law they must be organised in a way to respect the principles of democratic accountability.⁵³³

4.2.2.5.4.1 The principle of democratic accountability

As in national law, the principle of democratic accountability must also be ensured on European level. Whereas in the beginnings of the European Communities the *principle of democracy* was *indirectly* deduced from the constitutions of the Member States, today it is *directly* codified in European primary law.⁵³⁴ Indeed, in the Third Recital of the Preamble of the European treaties, the European Union declares drawing inspirations *inter alia* from the “inalienable rights of the human person, freedom, *democracy*, equality and the rule of law.” In addition, in the Eighth Recital of the Preamble of the European treaties, the European Union states desiring to “enhance further the *democratic and efficient functioning of the institutions...*” Moreover, article 2 TEU explicitly states that the European Union is “founded on the values of respect for human dignity, freedom, *democracy*, equality, the rule of law and respect for human rights...”. The competences of the European institutions derive therefore as well from the Member States on national level as well from the European Union on European level (*duale Legitimationsbasis*).⁵³⁵ As a result, if powers are delegated to European bodies, it must be guaranteed that these can be held

⁵³³ Communication from the European Commission to the European Parliament and the Council, European agencies – The way forward, COM (2008) 135 final, p. 4, 6 *et seq.*

⁵³⁴ See *e.g.* B. Holznagel/ P. Schumacher, ERGEGplus – Wieder der Versuch der Einführung eines Europäischen Regulierers durch die Hintertür, RdE 8/2007, p. 225 at p. 230.

⁵³⁵ *Ibid* at p. 231.

accountable before the *European institutions*, the *Member States* and the *European citizens*.⁵³⁶

That European Union aims to ensure the democratic accountability of European bodies is well illustrated in the *Meroni doctrine*, where it was held that any delegation of powers must be *strictly executive in nature and immediately traceable to the responsibility of named institutions of the European Union*. Additionally, in the *Romano case* it was held that any delegation of *legislative* functions from Parliament to other decision-making institutions constituted a violation of this democratic principle.⁵³⁷

Hence, *on the one hand*, it must be ensured that the Agency, by exercising autonomous responsibilities in the executive sphere, can be held accountable to the institutions, the Member States and the European citizens. *On the other hand*, however, in order to meet today's operating needs and administrative capacities of the European Union, the Agency must also be organised in a way enabling it to perform its tasks effectively. This includes the granting of a certain degree of autonomy in organisational, legal and financial terms.⁵³⁸ As a result, the organisation of the Agency must be based upon a *balance between the need for autonomy*, on one side, and *the need for control*, on the other side.

The need for autonomy takes several forms, such as the granting of legal personality, budgetary autonomy, collective responsibility, the conferral of own powers to the Administrative Board as well as the guarantee of independence of the Director and the other organs of the Agency. The autonomy of the Agency goes thereby hand in hand with the obligation to meet its responsibilities, which must be established and

⁵³⁶ See *J. Saurer*, The accountability of supranational administration: the case of European Union agencies, *Am. U. Int'l L. Rev.*, p. 429 at p. 470 *et seq.*

⁵³⁷ See *Meroni case*, para. 20 (n. 489).

⁵³⁸ See Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, 25.02.2005, COM (2005) 59 final at p. 2.

delimited in order to strengthen the legitimacy of the European Union.⁵³⁹ The principle of strict accountability as established through the *Meroni doctrine* in 1958, may today be ensured through *other, more flexible mechanisms of control*.⁵⁴⁰ In the judgment of 30 June 2009, the German Constitutional Court held that with increasing competences and further independence of the European institutions, it is necessary to establish safeguards that keep up with such development in order to preserve the fundamental principle of conferral exercised in a restricted and controlled manner by the Member States.⁵⁴¹ Through the interaction and complementation of these different mechanisms of control, an *overall system of control mechanism* can be created.⁵⁴² Such control mechanisms include well-drawn up founding statutes (4.2.2.5.4.2), the Agency's independence (4.2.2.5.4.3), judicial review of decisions (4.2.2.5.4.3), financial accountability (4.2.2.5.4.5), administrative accountability (4.2.2.5.4.6), political accountability (4.2.2.5.4.72), public accountability (4.2.2.5.4.8) and yearly reports of activities and reviews to be delivered to the institutions of the European Union (4.2.2.5.4.9).⁵⁴³

4.2.2.5.4.2 Founding statutes

Generally, founding statutes contribute to ensuring the accountability of European agencies in that they lay down *the general policy goals* and the *level of performance* that agencies must achieve.⁵⁴⁴ Regulation (EC) No 713/2009 determines

⁵³⁹ See Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, 25.02.2005, COM (2005) 59 final at p. 2, 5 *et seq.*

⁵⁴⁰ See *Jean Monnet Center for International and Regional Economic Law & Justice*, Delegation of Regulatory Authority in the European Union, p.12; see furthermore *B. Holznagel/ P. Schumacher*, ERGEGplus – Wieder der Versuch der Einführung eines Europäischen Regulierers durch die Hintertür, RdE 8/2007, p. 225 at p. 230 *et seq.*

⁵⁴¹ See BVerfG, 2 BvE 2/08 of 30 June 2009, paras. 235, 237 – 241.

⁵⁴² See *Jean Monnet Center for International and Regional Economic Law & Justice*, Delegation of Regulatory Authority in the European Union, p.12.

⁵⁴³ See *M. Everson/ G. Majone/ L. Metcalfe/ A. Schout*, The Role of Specialised Agencies in Decentralising EU Governance, Report presented to the European Commission, 1999, p. 12, http://ec.europa.eu/governance/areas/group6/contribution_en.pdf (20.02.2011).

⁵⁴⁴ *Ibid* at p. 39.

as general policy goals of the Agency the assistance to the national energy regulators in their regulatory tasks, in providing a framework to cooperate, a regulatory review of the cooperation between transmission system operators and a scope for taking specific individual decisions (article 2 of Regulation (EC) No 713/2009).⁵⁴⁵ It furthermore establishes the level of performance of the Agency, setting out in detail the scope and extent of the tasks to be performed (articles 4 *et seq.* of Regulation (EC) No 713/2009).

4.2.2.5.4.3 Independence

Generally, the possibility of attributing to European bodies a certain degree of independence by, for instance, releasing them from political instructions, is well recognised in European law (*ministerialfreie Räume auf europäischer Ebene*).⁵⁴⁶ Such guarantee of independence can contribute to democratic transparency in that it interrupts the close linkage that often exists between politics and administration. However, in order to satisfy the European principle of democracy, the deficit of democratic legitimation hereby occurred, must be compensated through other means of adequate control mechanisms. If, for example, a European body is released from the instructions of the European Commission and has the power to *autonomously* take decisions *in last instance* (*letztinstanzliche Entscheidungsgewalt*), adequate control mechanisms exercised through the other European institutions must be put in place.⁵⁴⁷ The organs of the Agency are formally released from seeking or following political instructions (article 12 para. 7 of Regulation (EC) No 713/2009 for the Administrative Board, article 14 para. 5 of Regulation (EC) No 713/2009 for the Board of Regulators, article 16 para. 1 of Regulation (EC) No 713/2009 for the Director and article 18 para. 3 of Regulation (EC) No 713/2009 for the Board of Appeal). In addition, the Agency

⁵⁴⁵ See *e.g.* Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, presented by the European Commission on 19.09.2007, COM (2007) 530 final at 3.1.

⁵⁴⁶ See *e.g.* B. Holznagel/ P. Schumacher, ERGEGplus – Wieder der Versuch der Einführung eines Europäischen Regulierers durch die Hintertür, RdE 8/2007, p. 225 at p 230.

⁵⁴⁷ *Ibid* at p 231.

has the power to adopt individual decisions on technical issues (article 7 para. 1 of Regulation (EC) No 713/2009). However, these decisions are limited to applying the rules of secondary legislation to specific cases determined through the European Commission.⁵⁴⁸

4.2.2.5.4.4 Judicial review: the legal accountability

Judicial review is guaranteed through a *two-step system*, establishing a direct lien of responsibility between the Agency and the European citizens.⁵⁴⁹ An internal Board of Appeal within the Agency grants any natural or legal person, including national regulators, to appeal against decisions taken by the Agency (article 19 para. 1 of Regulation (EC) No 713/2009). A negative decision of the Board of Appeal or its failure to take a decision is appealable to the Court of Justice, however only after the internal remedies have been exhausted (article 20 para. 1, 2 of Regulation (EC) No 713/2009).⁵⁵⁰ This system allows interested parties to directly challenge decisions of the Agency, which have personally affected their rights; where procedures have been incorrectly followed, or decisions do not contain sufficient reasoning, they may be overturned.⁵⁵¹

4.2.2.5.4.5 Financial accountability

On one side, the concession to the Agency of a certain degree of financial autonomy is crucial to the concept of regulatory agencies. Articles 21 *et seq.* of Regulation (EC) No 713/2009 require, in this regard, that the Administrative Board

⁵⁴⁸ See Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, 25.02.2005, COM (2005) 59 final at p. 5.

⁵⁴⁹ For a general overview of the legal accountability of the European institutions, see *D. Chalmers/ C. Hadjiemmanuil/ G. Monti/ A. Tomkins*, *European Union Law, Text and Materials*, Cambridge 2006, p. 410 *et seq.*

⁵⁵⁰ See *J. Saurer*, The accountability of supranational administration: the case of European Union agencies, *Am. U. Int'l L. Rev.*, p. 429 at p. 467.

⁵⁵¹ See in this sense *M. Everson/ G. Majone/ L. Metcalfe/ A. Schout*, *The Role of Specialised Agencies in Decentralising EU Governance*, Report presented to the European Commission, 1999, p. 39, http://ec.europa.eu/governance/areas/group6/contribution_en.pdf (20.02.2011).

has the necessary power to establish the budget, check its implementation, draw up internal rules and adopt financial regulations.

On the other side, however, the financial accountability of the Agency must be guaranteed. This is achieved through the establishment of budgetary principles, such as *budgetary control, internal audits, financial management and transparency, the annual discharge* for the execution of the Community budget, *investigations* conducted by European Anti-Fraud Office (OLAF) and the establishment of *annual reports* by the Court of Auditors (article 3 of Council Regulation 1605/2002).⁵⁵² Of particular importance in this regard is the framework Financial Regulation or the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No1605/2002 on the Financial Regulation applicable to the general budget of the European Communities,⁵⁵³ which contains essential rules concerning agencies' establishment plan, the application of the framework financial regulation for agencies, the consolidation of their accounts with those of the European Commission, and the discharge by the European Parliament. In addition, the framework Financial Regulation lays down common rules governing the establishment and implementation of their budget, including control aspects.

Moreover, *ex ante budgetary control* is exercised through the setting up and decision of the annual budget of the Agency. The Agency makes an estimate of revenue and expenditure of the Agency for the following year, which serves as basis for the overall draft general budget of the European Commission (article 23 paras. 1, 2 of Regulation (EC) No 713/2009). The overall budget of the European Union is set up through the

⁵⁵² See Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, 25.02.2005, COM (2005) 59 final at p. 6; see also *J. Saurer*, The accountability of supranational administration: the case of European Union agencies, *Am. U. Int'l L. Rev.*, p. 429 at p. 473.

⁵⁵³ OJEU, L 357, 31.12.2002, p.72.

European Council and the European Parliament as budget authority (article 23 paras. 3 of Regulation (EC) No 713/2009, ex-article 272 TEC).⁵⁵⁴

Ex post budgetary control is ensured through the submission of detailed annual accounts and financial statements, such as cash flow statements and the report on budgetary and financial management over the financial year (article 24 para. 2 of Regulation (EC) No 713/2009).

Additionally, the European Commission has the power to review the budget of the Agency, thus contributing to greater accountability, since the European Commission may either allow or deny the funding that the Agency has requested.⁵⁵⁵

Moreover, *financial management and transparency* is, *inter alia*, achieved through Council Regulation 1605/2002, which extends the transparency requirements in budgetary procedures and financial management.⁵⁵⁶ Article 185 no. 2 of 1605/2002 Financial Regulation empowers the European Parliament furthermore to give *discharge to the agencies for the implementation of their annual budgets on the recommendation of the Council*.⁵⁵⁷ Discharge is a formal process that marks the final closure of the accounts for the financial year in question.⁵⁵⁸ Article 23 paras. 1, 2 of Regulation (EC) No 713/2009 rules that the European Parliament, following a recommendation by the Council, grants a discharge to the Director for the

⁵⁵⁴ See *J. Saurer*, The accountability of supranational administration: the case of European Union agencies, *Am. U. Int'l L. Rev.*, p. 429 at p. 474.

⁵⁵⁵ See *M. Everson/ G. Majone/ L. Metcalfe/ A. Schout*, The Role of Specialised Agencies in Decentralising EU Governance, Report presented to the European Commission, 1999, p. 39, http://ec.europa.eu/governance/areas/group6/contribution_en.pdf (13.03.2011).

⁵⁵⁶ See *J. Saurer*, The accountability of supranational administration: the case of European Union agencies, *Am. U. Int'l L. Rev.*, p. 429 at p. 472.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ See *D. Chalmers/ C. Hadjiemmanuil/ G. Monti/ A. Tomkins*, *European Union Law, Text and Materials*, Cambridge 2006, p 110.

implementation of the budget for the respective financial year (article 24 paras. 10 of Regulation (EC) No 713/2009).

As to the *Agency's accountability to the Court of Auditors*, the Court of Auditors publishes, for example, detailed reports on the annual account together with a statement of the Agency in the Official Journal of the European Union (article 24 paras. 3, 7, 8 of Regulation (EC) No 713/2009). Moreover, the Agency is subject to the jurisdiction of the *OLAF*, an independent authority within the European Commission, which is entrusted with the task of fighting internal and external corruption.⁵⁵⁹

Finally, article 287 TFEU requires the Court of Auditors to examine the accounts of all revenue and expenditure of the Agency (para. 1) and shall judge whether the revenues have been received and the expenditure have been incurred in a “lawful and regular manner” and whether “the financial management has been sound” (para. 3).

4.2.2.5.4.6 Administrative accountability

Generally, article 15 no. 1 TEU requires agencies to “*conduct their work as openly as possible*”.⁵⁶⁰

For this purpose, administrative accountability ensures that a number of *procedural safeguards* are put in place so that the *interests of concerned parties* and the *quality of output* can be taken into account.⁵⁶¹ Decisions of the Agency must, for example, be

⁵⁵⁹ See e.g. art. 61 of Regulation 216/2008, O.J. (L 79) 1, 14 – 16 (EC) and art. 69 of Regulation 726/2004, O.J (L 136) 1, 1 (EC).

⁵⁶⁰ For more details on the transparency in the European Union, see *W. Kaufmann-Bühler*, in: C. O. Lenz/ K. - D. Borchardt, EU- und EG-Vertrag, Kommentar zu dem Vertrag über die Europäische Union und zu dem Vertrag zur Gründung der Europäischen Gemeinschaft, 4. Auflage, Köln 2006, art. 10 TEU, para. 9; see also *D. Chalmers/ C. Hadjiemmanuil/ G. Monti/ A. Tomkins*, European Union Law, Text and Materials, Cambridge 2006, p 317 *et seq.*

⁵⁶¹ See Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, 25.02.2005, COM (2005) 59 final at p. 6.

based on reliable information and expertise, making transparency and scientific competence essential requirements.⁵⁶² For this purpose, article 10 para. 1 of Regulation (EC) No 713/2009 requires the Agency “*to consult extensively and at an early stage*” with any interested parties “*in an open and transparent manner*”. Moreover, the Agency must ensure that information is exchanged on a day-to-day basis between the Agency, the European Commission and the national regulatory authorities. In addition, the public and any interested parties must be given objective reliable and easily accessible information with regards to the results of the Agency’s work (article 10 para. 2 of Regulation (EC) No 713/2009). The Agency is thereby subject to the general rules regarding public access to documents held by Community bodies, which requires that any citizen of the European Union as well as any natural or legal person residing or having its registered office in a Member State must be given a right of access to the documents of European agencies, whatever their medium. The Agency is thereby not only required that its proceedings are transparent, it must also provide for specific provisions in its own Rules of Procedure regarding access to its documents pursuant to article 15 no. 3 TEU.

4.2.2.5.4.7 Political accountability

Political accountability is exercised through the legislative authority and the European Commission.⁵⁶³ The European Parliament and the Council may, for example, call upon the Director to submit a report on the performance of his duties (article 16 para. 8 of Regulation (EC) No 713/2009). Moreover, the European Parliament makes increasingly use of its law-making power, which plays an active part in controlling the Agency. Although the European Parliament does not have initiative powers, it disposes of relevant participation and veto rights in the process of setting up the Agency. In addition, although Parliament has no general right to scrutinise the Agency’s activities, it is empowered to summon the Director of the

⁵⁶² For more details on transparency requirements, see *D. Chalmers/ C. Hadjiemmanuil/ G. Monti/ A. Tomkins*, *European Union Law, Text and Materials*, Cambridge 2006, p. 317 *et seq.*

⁵⁶³ *Ibid.*

Agency before its competent committee and answer questions put by the members of that committee (article 16 para. 8 of Regulation (EC) No 713/2009). Finally, the European Parliament disposes also of more informal instruments, such as inter-institutional agreements, which supplements the Agency's accountability.⁵⁶⁴

The accountability of the Agency to the *Member States* is, in particular, ensured through the participation of Member States' representatives as agents within the Agency. Article 14 para. 1 (a) of Regulation (EC) No 713/2009 guarantees one seat to a nominee of each Member State within the Board of Regulators of the Agency.⁵⁶⁵

4.2.2.5.4.8 Public accountability

Agency staff must be suited to the tasks, which they are required to perform. They must be experts in their fields. Such expertise can be assured through the obligation of taking decisions, allowing external experts to review and judge the work of the agencies. In addition, article 28(a), (b) TEU, amending ex-article 233 TEC, requires the European institutions, bodies, offices and *agencies* to “*conduct their work as openly as possible*” in order to “*promote good governance and ensure the participation of civil society*”. In addition, citizen of the European Union is granted access to “documents of the Union institutions, bodies, offices, *and agencies*, *whatever their medium*”.

⁵⁶⁴ See *J. Saurer*, The accountability of supranational administration: the case of European Union agencies, *Am. U. Int'l L. Rev.*, p. 429 at p.470.

⁵⁶⁵ *Ibid* at p. 475.

4.2.2.5.4.9 Yearly report of activities and review

The European Commission carries out regular evaluations of the Agency's activities, including the results of the Agency and its working methods (article 34 para. 1 of Regulation (EC) No 713/2009.⁵⁶⁶

4.2.2.5.5 Conclusion

As a conclusion it can be said that the establishment of the Agency complies with European law. Although the Agency has no direct legal basis in the European treaties, its establishment can nevertheless be regarded as legitimate, if one considers that, in accordance with former article 95 TEC (now 114 TFEU), the Agency contributes to the participation and cooperation of national energy regulators at European level and helps therefore preventing the emergence of disparities likely to create obstacles to the smooth functioning of the internal energy market. As a European regulatory agency, it disposes of its distinct administrative structure, consisting of a Director, an Administrative Board, a Board of Regulators as well as a Board of Appeal. These organs, although they are *formally* declared as *independent* bodies, prohibited to seeking or taking instructions from any Government, from the European Commission, or from any other public or private entity, are, *in fact*, *dependent from the European Commission*. Regarding its functions, the Agency has been vested, additionally to its general advisory functions vis-à-vis the European Parliament, the Council or the European Commission, with the power to adopt opinions, recommendations, non-binding framework guidelines and individual decisions. The delegation of executive powers to the Agency is thereby consistent with the *Meroni doctrine*, which is still applicable today. The attenuation of accountability towards the European institutions, the Member States and the European citizens, which is triggered through the attribution of a significant degree of independence, has been compensated through other mechanisms of control of

⁵⁶⁶ See Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, 25.02.2005, COM (2005) 59 final at p. 6.

Regulation (EC) No 713/2009, such as judicial review of the Agency's acts as well as financial, administrative, political and public accountability.

4.2.2.6 The control of the Agency for the Cooperation of Energy Regulators over the national energy regulators

In theory, the task of *the Agency* is to “assist” the national energy regulators with their regulatory tasks “at Community level” and, “where necessary, to coordinate their actions” (article 1 para. 2 of Regulation (EC) No 713/2009). *The Agency* shall furthermore ensure that “regulatory functions performed by the national regulatory authorities are properly coordinated” (Recital (6) of Regulation No 713/2009).⁵⁶⁷ It shall, in particular, “provide an integrated framework within which national energy regulatory authorities are able to participate and cooperate” (Recital (10) of Regulation No 713/2009) in order to ensure “the uniform application of the legislation on the internal markets in electricity (...) throughout the Community (Recital (10) of Regulation No 713/2009). When examining these provisions, the terms such as “assist”, “coordinate” or “providing a framework” give the impression that the role of *the Agency* is one of *supporting character*.⁵⁶⁸ The relationship between *the Agency* and the national energy regulators is therefore supposed to be one of *co-ordination* rather than sub-ordination.⁵⁶⁹ As a consequence, *the Agency* should have “equal powers” to the national energy regulators.⁵⁷⁰

⁵⁶⁷ Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, COM 2007 / 0197 (COD) at Recital (6).

⁵⁶⁸ C. Schoser, while explaining the European Commission's point of view in achieving a single European energy market, stresses, that the Agency is not supposed to gain the status of a European Energy Regulator, but to promote the cooperation of the national energy regulators; see C. Schoser, in: E. Ehlers, Wege zum “echten” Energiebinnenmarkt – Konsens im Ziel, Dissens über die Methoden, Bericht zur Fachtagung des Instituts für Berg- und Energierecht der Ruhr-Universität Bochum am 21.02.2008, RdE 7 /2008, p. 221.

⁵⁶⁹ For the cooperation between European agencies and national authorities in general, see T. Groß, Die Kooperation zwischen europäischen Agenturen und nationalen Behörden, EuR 1/2005, p. 54 *et seq*; for a detailed overview over the existence of European agencies, including their responsibilities, see publication Deutsche Bundestag – Wissenschaftliche Dienste, Europäische Agenturen, No. 9/07 (6. März 2007); see also Stellungnahme der Bundesnetzagentur für Elektrizität, Gas, Telekommunikation,

De facto, however, *the Agency controls* the national energy regulators. This becomes apparent upon Recital (11) of Regulation No 713/2009, which clearly states: “*the Agency has an overview of the national regulatory authorities*”. And indeed, upon article 4 of Regulation (EC) No 713/2009, the Agency is empowered to exercise control over the national energy regulators through the adoption of various acts.⁵⁷¹ As to the process of adoption, the national regulatory authorities are barely involved. Regarding opinions and recommendations issued by the Agency, the national energy regulators are not involved at all. The national energy regulators are however not bound by these acts. Regarding individual decisions, the influence of the Agency is less significant. It may only act where the regulatory authorities concerned have not been able to reach an agreement within a certain period of time (six months from the date the exemption was requested before the last of those regulatory authorities) or upon a joint request from the regulatory authorities concerned (article 8 para. 1 of Regulation (EC) No 713/2009). Moreover, before taking such decisions, the Agency is required to consult the regulatory authorities concerned as well as the applicants. However, once such decisions are taken by the Agency, they *prevail* over those of the national energy regulators.⁵⁷²

4.2.2.7 The control of the European Commission over the Agency for the Cooperation of Energy Regulators

The European Commission retains control over *the Agency* and secures thereby indirectly its control over the national energy regulators. The control over *the Agency*

Post und Eisenbahnen für den Ausschuss für Wirtschaft und Technologie des 16. Deutschen Bundestages zum 3. EU - Energiebinnenmarktpaket, 16(9) 967, 3 April 2008, p. 4 - 7.

⁵⁷⁰ See EurActiv, Piebalgs wants EU-wide energy regulator, 3.11.2008, <http://www.euractiv.com/en/energy/piebalgs-wants-eu-wide-energy-regulator/art.-176880> (14.08.2010).

⁵⁷¹ See section 4.2.2.6.

⁵⁷² See *e.g.* wording of art. 8 para. 1 of Regulation (EC) No 713/2009: “the Agency shall decide upon those regulatory issues that fall within the competence of national regulatory authorities”. See also *U. Ehricke*, Die geplante EU-Agentur für die Zusammenarbeit der Energieregulierungsbehörden, (Teil 1), IR 6/2008, p. 122 at p. 149.

is, according to the European Commission, necessary in order to secure its “position and role as a guardian of the Treaty”.⁵⁷³ For this purpose, the European Commission disposes principally of “*three different safeguards*”.⁵⁷⁴ The European Commission may, *firstly*, determine *the Agency*’s decisions on technical issues (article 7 no. 1 of Regulation (EC) No 713/2009) through the issuance of binding guidelines. *The Agency* has thereby “no political discretion outside this framework”.⁵⁷⁵ The European Commission may, *secondly*, require *the Agency* to provide information on whether the decisions of the national energy regulators comply with the Guidelines or any other provisions of Directives 2009/72/EC and Regulation (EC) No 714/2009 (b), (article 7 no. 4 and 5 of Regulation No 713/2009). The European Commission may, *thirdly*, require *the Agency* to take up a preparatory and advisory role with regard to substantive decisions that are taken by the European Commission (article 7 no. 2 of Regulation No 713/2009).⁵⁷⁶ These powers exist in addition to the European Commission’s general power to determine and specify, through binding guidelines, the role of *the Agency* with regard to its cooperation with the national energy regulators (article 38 para. 5 of Directive 2009/72/EC).

4.2.3 Conclusion

The regulatory regime of Directive 2009/72/EC vests the European Commission with indirect powers of control over the national energy regulators.

⁵⁷³ See Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, presented by the European Commission on 19.09.2007, COM (2007), p. 530 final at 3.5.

⁵⁷⁴ See Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, presented by the European Commission on 19.09.2007, COM (2007), p. 530 final at 3.5.

⁵⁷⁵ See Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, presented by the European Commission on 19.09.2007, COM (2007), p. 530 final at 3.5; see also H. Lecheler, Die Verschärfung des Regulierungsregimes durch die drei neuen Verordnungs-Entwürfe im Paket vom 19.09.2007, RdE 6/2008, p. 167 at p. 171.

⁵⁷⁶ See Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, presented by the European Commission on 19.09.2007, COM (2007) 530 final at 3.2 and 3.5.

These powers are indirect in the sense that they are established via European intermediaries, such as the European Network of transmission system operators and the Agency for the Cooperation of Energy Regulators. It is particularly the creation of the Agency, which raises concern.

On one side, the establishment of the Agency is certainly able to make a significant and useful contribution to the effective operation of the European Union. It enables the European Commission to concentrate on its core tasks and, thus, helping it to effectively carry out the tasks conferred upon it through the Treaty. It furthermore represents an institution, which is capable of *broadening the scope of cooperation between the institutions at national and European level*, given that it is placed mid-way between the national institutions and the bodies provided for by the Treaty. In addition, the Agency is able to work in parallel with both, the national *and* the international authorities, and can thus contribute to a better understanding between the European institutions and the Member States. In this way, the Agency promotes mutual trust of the actors involved within the regulatory process and enhances credibility and public confidence.⁵⁷⁷ Regulation (EC) No 713/2009 combined with the new provisions of the Treaty of Lisbon significantly enhances the position of European agencies.⁵⁷⁸ Indeed, the Treaty, by unifying the accountability regime of European agencies, enhancing the publicity of their actions, granting access to their documents and allowing for judicial review against their actions, results therefore indirectly in the constitutionalisation of the European agencies.

On the other side, however, the conferral upon the Agency of such extensive powers and competences give, particularly in connection with the Agency's independence vis-à-vis the European Commission, is questionable. The European Commission's requirement to establish *the Agency* as a "*separate entity, independent and outside the*

⁵⁷⁷ See *Jean Monnet Center for International and Regional Economic Law & Justice*, Delegation of Regulatory Authority in the European Union, p.37

⁵⁷⁸ See *J. Saurer*, The accountability of supranational administration: the case of European Union agencies, *Am. U. Int'l L. Rev.*, p. 429 at p. 479 – p. 481.

European Commission”⁵⁷⁹ fails. Whereas *the Agency* is, indeed, “*independent*” from the national energy regulators, it is merely “*outside*” of the European Commission.⁵⁸⁰ *The Agency’s* independence from the national energy regulators has been criticised by the Member States. Germany, for instance, claimed that the competences of the national energy regulators were not sufficiently taken into account and that the European Commission aimed merely to establish a powerful European agency rather than finding stable structures in order to resolve the obstacles relating to cross-border issues.⁵⁸¹ The European Commission justified its control over the Agency with the argument that the European treaties did not permit the conferral of *general autonomous powers* to regulatory agencies. It emphasised that agencies could not be given the power to adopt general regulatory measures, but that they were limited to taking individual decisions in specific areas where defined technical expertise is required. Such individual decision-making power had to be attributed under clearly and precisely defined conditions and without genuine discretionary power.”⁵⁸² It stressed furthermore that the agencies could not be “entrusted with powers which may affect the responsibilities which the Treaty has explicitly conferred on the European Commission (for example, acting as the guardian of Community law).”⁵⁸³ In the light

⁵⁷⁹ Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, presented by the European Commission on 19.09.2007, COM (2007) 530 final at 3.1.

⁵⁸⁰ In this sense also *U. Ehricke*, Die geplante EU-Agentur für die Zusammenarbeit der Energieregulierungsbehörden, (Teil 1), IR 6/2008, p. 122 at p. 148; see also art. on EurActiv, EU-Energierichtlinie an einem Wendepunkt, 23.02.2009, <http://www.euractiv.com/de/energie/eu-energie richtlinie-wendepunkt/art.-179682> (14.08.2010).

⁵⁸¹ See opinion of the BNetzA, Ausschuss für Wirtschaft und Technologie des 16. Deutschen Bundestages zum 3. EU - Energiebinnenmarktpaket, 3. April 2008, Ausschuss-Drucksache, 16(9) 967, p. 5.

⁵⁸² The European Commission’s view that European law does not allow for the establishment of independent agencies with wide discretionary powers (institutional balance) is based upon the so-called *Meroni-doctrine* of the European Court of Justice; see decision of 13.06.1958, Rs. 9/56, Slg. 1958, p. 11.

⁵⁸³ See Communication from the European Commission to the European Parliament and the Council, European agencies – The way forward, 11.3.2008, COM (2008) 135 final at p. 5; see also Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, 25.02.2005, COM (2005) 59 final at p. 2; See art. on EurActiv, “Regulierungsbehörden zweifeln an EU-Energieagentur (DE)”, 25.01.2008, <http://www.euractiv.com/de/energie/regulierungsbehörden-zweifeln-eu-energieagentur/art.-169855> (14.08.2010); see *C. Schlosser*, in: *C. Schimansky*, Wege

of these criteria, the Agency, although established as a *regulatory agency* rather than an executive agency, represents merely the “*prolonged arm*” of the European Commission.⁵⁸⁴

zum “echten” Energiebinnenmarkt – Konsens im Ziel, Dissens über die Methoden, DVBl, 2008, p. 899 at p. 899 and p. 900.

⁵⁸⁴ See *U. Ehricke* who refers to the Agency as the “*verlängerter Arm*” of the European Commission; see *U. Ehricke*, in: *F. Merkle*, Bericht über die Jahrestagung des Instituts für Berg- und Energierecht der Ruhr-Universität Bochum, EuZW 18/2008, p. 566 at p. 567; see also *M. Koch*, Mittelbare Gemeinschaftsverwaltung in der Praxis, EuZW, 15/ 2005, p. 455; critical also as to the limited powers conferred upon the Agency, see EurActiv, Regulators doubtful over EU energy agency, 25.01.2008, <http://www.euractiv.com/en/energy/regulators-doubtful-eu-energy-agency/art.-169850> (19.09.2010).

5 Final conclusion

Under the framework of Directive 2009/72/EC, the powers of control over the national energy regulators and, as a result of it, the powers of control over Member States' internal electricity markets shift. They shift away from the Member States to the European Union. This shift of regulatory powers is cleverly hidden under the cloak of "*strengthening energy regulators' market regulation powers*". Although there is no doubt that energy regulators' powers have been increased, they must not be considered in an isolated way. They need to be embedded in the overall context of electricity regulation, which consists not only of the regulatory authorities of the Member States, but comprises also the European Commission and its institutions. Within this regulatory framework, however, a different picture presents itself. Whereas Member States lose considerable power over their own national energy regulators, the European Commission gains considerable power over them. Member States' loss of power is thereby, in particular, triggered through article 35 para. 4 sent. 2 (b) (ii) of Directive 2009/72/EC, which requires national energy regulators to be independent in also *political terms*. However, *the European Commission*, while laying down the requirements of national energy regulators' independence, *applies double standards*. Whereas their independence towards *the Member States* is reinforced, their independence towards *the European Commission* is restricted. Whereas Member States' powers of control over their own national energy regulators have considerably been limited, the European Commission's powers of control, including those of its institutions, have significantly been increased.

The European Commission's power reveals itself in different forms. In some cases, it is easily apparent and recognisable, conferring to the European Commission *direct* powers of control over the national energy regulators. These powers include the power to adopt binding guidelines in crucial areas of Member States' electricity markets. In other cases, it is well hidden and more difficult to detect. They vest the European Commission with *indirect* powers of control in that they empower newly established European institutions, such as *the ENTSO for Electricity* or *the Agency*, in a *first* step, and secure the European Commission' control over these institutions, in a *second* step.

One can thus conclude that under the framework of Directive 2009/72/EC, it is the regulatory powers of the European Union, rather than of the national energy regulators that have been strengthened.

In practical terms, the strengthening of regulatory powers on a European level is, in my view, a necessary and consequent step of the European Union within its strategy called “An Energy Policy for Europe” (*Eine Energiepolitik für Europa*).⁵⁸⁵ Within this strategy, the European Union focused, in a *first phase*, on the energy markets *within the European Union*. As part of the *third legislative package*, the strengthening of regulatory powers constitutes thereby, together with *the first*⁵⁸⁶ and *second legislative package*⁵⁸⁷, a powerful tool to complete the harmonisation and liberalisation of the internal electricity markets. In a *second phase*, the European Union has been more concerned about the issue of securing energy supply from countries *outside of the European Union*, countries from which the European Union and, in particular Germany, are dependent on energy imports. Regarding these extra-European countries, I believe that it is crucial to “*talk with a single European voice*”.⁵⁸⁸ This gives the European Union a stronger position than if each individual Member State acted independently. Harmonising the European energy markets also helps to prevent a competitive race for energy supply within the individual Member States, which would be contradictory to the principle of loyalty (*Gemeinschaftstreue*) as laid down in article 4 para. 2 TEU. Hence, on practical terms, the strengthening of regulatory powers on European level constitutes, despite the restrictions that the Member States have to bear with regard to their regulatory competences, the right step for the realisation of a single European energy market.

⁵⁸⁵ See e.g. European Commission’s Paper, An Energy Policy for Europe, 10.01.2007, COM (2007) 1 final; see furthermore the European Council’s Action Plan (2007 – 2009) An Energy Policy for Europe, 8/9.03.2007, 7224/1/07 REV 1 CONCL 1, annexe 1, p. 16 at p. 19 *et seq.*

⁵⁸⁶ The first legislative package aimed at the opening of the internal energy markets to cross-border trade of energy.

⁵⁸⁷ The second legislative package aimed at the unbundling of network operation and energy supply.

⁵⁸⁸ See the European Council’s Action Plan (2007 – 2009) An Energy Policy for Europe, 8/9.03.2007, 7224/1/07 REV 1 CONCL 1, annexe 1, p. 16 at p. 19. See also *Matthias Schmidt-Preuß*, Energieversorgung als Aufgabe der Außenpolitik? – Rechtliche Aspekte, RdE 10-11/ 2007, p. 281 at p. 282 *et seq.*

In legal terms, however, the strengthening of regulatory powers on European level in favour of the European Commission evokes various problems:

Under the framework of Directive 2009/72/EC, the national concept of democratic legitimation of administration of the Member States gets intertwined with the constitutional mandate of the Member States (article 23 of the GG and article 23a *et seq.* of the B-VG) to realise a united Europe. As the German Constitutional Court stated in its judgment of 30 June 2009, “*the Basic Law wants a European integration and an international peaceful order: it is thus not only the principle of openness towards international law (Völkerrechtsfreundlichkeit), which applies, but also the principle of openness towards European law (Europarechtsfreundlichkeit)*”.⁵⁸⁹ It held, however, also that the authorisation to transfer sovereign powers to the European Union was granted under the condition that the sovereign statehood of a constitutional state is maintained, which included the respect of Member States’ constitutional identity.⁵⁹⁰ The European Commission interferes with Member States’ classical model of a hierarchical administration, which puts the constitutional identity at risk: on the lowest level stand the national energy regulators as the administrative authorities, which represent the interests of the national citizens in the energy sector, such as the smooth functioning of the energy market, security of energy supply, energy efficiency or energy.⁵⁹¹ These should normally be placed, on the next level, under the direction and supervision of their superiors, *i.e.* the national Governments of the Member States as the highest administrative organs of administration. It is on this level that the European Commission steps in, empowered upon the framework of Directive 2009/72/EC, to exercise powers of control over the national energy regulators in either direct or indirect form via intermediary European institutions, such as the Agency. These powers are, in my view, so extensive that one can assume

⁵⁸⁹ See BVerfG, 2 BvE 2/08 of 30 June 2009, para. 226; see also R. Bieber/ A. Epiney/ M. Haag, *Die Europäische Union, Europarecht und Politik*, 8. Auflage, Baden-Baden 2009, § 37 Ausblick, para. 1.

⁵⁹⁰ See BVerfG, 2 BvE 2/08 of 30 June 2009, para. 227.

⁵⁹¹ See art. 194 TFEU.

that the European Commission disposes *de facto* of a *power of instruction* (*Weisungsbefugnis*) vis-à-vis the national energy regulators!⁵⁹²

The power of instruction of the European Commission vis-à-vis the administrative authorities of the Member States is not foreseen within European law. European *primary* law entitles the European Commission merely, within the limits and under the conditions laid down by the Council acting by a simple majority in accordance with the Treaty, “to collect any information and carry out any checks for the performance of the task entrusted to it” (article 337 TFEU). It is, however, particularly upon European *secondary* law that the European Commission is able to exercise various forms of control over Member States’ administrative authorities, which are comparable to a power of instruction. Central provision in this regard constitutes article 288 TFEU enabling the European Commission to adopt regulations, directives, decisions, recommendations and opinions.

Among these instruments, *decisions* can be compared to *individual* instructions due to the fact that they may be addressed to a *single* Member State (288 para. 4 TFEU). Under the framework of Directive 2009/72/EC, the European Commission decides, for example, on the application of Member States of derogations for small isolated systems, which encounter substantial problems as to their operation; the decision must be published in the Official Journal of the European Union (article 44 para. 1 sent. 2 and 3 of Directive 2009/72/EC). Upon article 17 para. 7 sent. 2 of Regulation (EC) No 714/2009, the European Commission decides on exemption requests of new interconnectors. Although in comparison to former article 7 of Regulation (EC) 1228/2003, the Agency has been integrated into the process as a further decision-making body, the final decision-making power remains still with the European Commission, which shall reach a “*well-founded decision*” after having received all relevant information from the regulatory authorities.

⁵⁹² See B. Raschauer, Allgemeines Verwaltungsrecht, 3. Auflage, Wien 2009, para. 389.

In addition to these decision-making powers, the European Commission disposes of more general instruments of control, such as *directives, regulation or recommendations, opinions or guidelines*. Being usually addressed to all or at least a greater number of Member States and having a more *general* scope of application, these instruments are comparable to *general* instructions. Examples in the area of energy regulation include *Directive 2009/72/EC*, *Regulation (EC) No 714/2009*, *recommendations* on negotiation of relevant agreements on security of supply of energy with third countries (Recital 25 of Directive 2009/72/EC), on measures to achieve high public service standards (Recital 45 of Directive 2009/72/EC), on energy labelling (Article 47 para. 1 (h) of Directive 2009/72/EC) or various *Guidelines*, such as on the details on procedure to be followed on certification in relation to third countries (article 11 para. 10 of Directive 2009/72/EC) or in relation to transmission system operators (article 3 para. 5 of Regulation (EC) No 714/2009), on compliance of transmission system operators with regard to confidentiality requirements (14 para. 3 of Directive 2009/72/EC), on the extent of the duties of national energy regulators to cooperate with each other and with the European Commission (38 para. 5 of Directive 2009/72/EC) and on defining record-keeping requirements (40 para. 4 of Directive 2009/72/EC).

The reason of the European Commission's extensive powers of control can be found in its role within the European Union. The European Commission assumes, apart from proposing legislation to Parliament and the Council (article 17 para. 2 TFEU), managing and implementing EU policies and the budget (article 17 para. 1 sent. 4 TFEU), representing the European Union on the international stage (article 17 para. 1 sent. 1 and sent. 5 TFEU), *the role of ensuring the application of the Treaties, and of measures adopted by the institutions pursuant to them* (article 17 para. 1 sent. 2 TFEU) *and overseeing the application of Union law under the control of the Court of Justice of the European Union*" (article 17 para. 1 sent. 3 TFEU). Indeed, if the European Commission finds that a Member State is not applying European law and therefore does not fulfil its legal obligations, it may launch a so-called infringement procedure, which involves sending a reasoned opinion including a statement why it considers that this Member State is infringing European law (article 258 para. 1. of the TFEU) as well as setting a period for sending the European Commission a

detailed reply (article 258 para. 2. of the TFEU). If the Member State does not comply with the opinion, the European Commission refers the matter to the Court of Justice, which has the power to impose penalties. The Court's judgment is binding on all the Member States and the European institutions. Hence, in being responsible for making sure that European law is properly applied in all the Member States, the European Commission acts as the *Guardian of the Treaties*.⁵⁹³

The integration between the national and European level together with the European Commission's power of instruction has the consequence that the European Commission becomes *de facto* an organ that is comparable to a *highest organ of administration* as defined on national level.

In taking up such a position, *the question of democratic legitimation of the European Commission* arises. This question needs to be distinguished from *the question of accountability of the European Commission*. The accountability is concerned with subjecting decisions and actions of institutions to ex-ante and ex-post examination. It requires the institutions to *justify* what they do, to make themselves politically *liable* for and to *take responsibility* for what they do. These institutions, being called or held to account, need not necessarily be democratic; they might be, but they need not be. Hence, the principle of accountability and the principle of democracy may overlap, but the securing of accountability of an institution does not necessarily make this institution more democratic. As a result, there is not necessarily a link between the principle of accountability and the principle of democracy.⁵⁹⁴

On national level, the link between the principle of accountability and the principle of democracy exists. Indeed, since in most of the Member States the institutions and their representatives must themselves be democratically legitimised, *the principle of*

⁵⁹³ See B. Raschauer, Allgemeines Verwaltungsrecht, 3. Auflage, Wien 2009, para. 389; see also Website of the European Union, Institutions of the EU, European Commission, http://europa.eu/institutions/inst/comm/index_en.htm (19.03.2011).

⁵⁹⁴ See D. Chalmers/ C. Hadjiemmanuil/ G. Monti/ A. Tomkins, European Union Law, Text and Materials, Cambridge 2006, p 312 *et seq.*

accountability constitutes a crucial part of the principle of democracy, requiring a connection of legitimation that allows any state activities to be traced back to the will of the People.⁵⁹⁵ The result is the establishment of a hierarchy of administration, consisting of the administrative organs under the direction, supervision and responsibility (*Leitungs- Aufsichts- und Verantwortungszusammenhang*) of the highest organs of administration, which are *democratically accountable to their national Parliaments or citizens*.⁵⁹⁶

On European level, however, there is, in my opinion, still a gap between the principle of accountability and the principle of democracy. Regarding the *accountability of the European Commission*, unsolved issues remain: although article 17 para. 3 TFEU states that “*the European Commission, as a body, shall be responsible to the European Parliament*”, it remains unclear, how this responsibility is to be defined. What should be the consequences in case the European Commission fails to comply with its obligations? What should the sanctions be? Who should be empowered to implement them?⁵⁹⁷ Can the accountability of the European Commission equal that of the Governments of the Member States?⁵⁹⁸

⁵⁹⁵ This becomes, for instance, apparent upon art. 10 para. 2 TEU, which states that “Member States are represented in the European Council by their Heads of State or Government and in the Council by their Governments, *themselves democratically accountable either to their national Parliaments, or to their citizens*”. See furthermore B. Raschauer, who speaks of a “*brick within the principle of democracy*” (*Baustein im Demokratieprinzip*), in: Allgemeines Verwaltungsrecht, 3. Auflage, Wien 2009, para. 389.

⁵⁹⁶ See B. Raschauer, Allgemeines Verwaltungsrecht, 3. Auflage, Wien 2009, para. 389.

⁵⁹⁷ Similar questions of accountability were examined by a Committee, which had been appointed by the European Parliament in order to examine mismanagement in the European Commission in 1999. This *Committee of Independent Experts* identified in its report a series of allegations of fraud and mismanagement, which lead to the resignation of the twenty members of the *Santer European Commission*. For more details, see European European Commission, Report on the implementation of the principles in Regulation 1049/2001 regarding public access to European Parliament, Council and European Commission documents, COM (2004) 45, para. 10 to 11, http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0045en01.pdf (21.03.2011)); see also A. Tomkins, Responsibility and Resignation in the European European Commission, 62 MLR, p. 744; V. Mehde, Responsibility and Accountability in the European European Commission (2003), 40 CML Rev., p. 423; P. Craig, The Fall and Renewal of the European Commission: Accountability, Contract and Administrative Organisation (2000) 6 European Law Journal, p. 98.

Regarding the democratic legitimization of the European Commission, as quasi highest organ of administration, two questions arise. *First*, is there a need for the European Commission to be legitimised (*Legitimationsbedürftigkeit*)? And, *second*, if the answer is positive, is there a sufficient connection of legitimization between the administrative organs carrying out the specific tasks on national level, here the national energy regulators, the European Commission as sort of a “highest administrative organ” and the national Parliaments or their citizens? Or can, with today’s progress of the European Union, even a connection of legitimization be established to a *European People*? (*Legitimationsfähigkeit*).

As to the *first* question, the answer is undoubtedly yes, since the European Commission is part of the European Union, which constitutes a legal order that has *direct effect* ⁵⁹⁹ and *prevails over the national orders of the Member States (principle of supremacy of European law)*.⁶⁰⁰

⁵⁹⁸ See furthermore W. Frenz, Handbuch Europarecht, Wirkungen und Rechtsschutz, Band 5, Neuaufgabe, Berlin 2010, para. 1918; see also BVerfG, 2 BvE 2/08 of 30 June 2009, paras. 297 – 298.

⁵⁹⁹ See ECJ, Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Reference for a preliminary ruling: Tariefcommissie - Pays-Bas, E.C.R. (1963) 0001. The Court ruled that „The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community (section B, substance of the case).

⁶⁰⁰ See ECJ, Case 6-64, *Flaminio Costa v E.N.E.L.*, Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy, E.C.R (1964), 00585. The Court of Justice stated that „By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law *which binds both their nationals and themselves*“ (p. 593). „It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question“The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries

As to the *second* question, it needs again to be taken into account that the national and European level gets intertwined. Considered separately, each of these levels has established institutions that dispose of a sufficient democratic basis of legitimation. *On national level*, we have demonstrated that the national energy regulators as administrative organs are themselves sufficiently legitimised, even when executing European law. *On European level*, in order to determine whether the European Commission is sufficiently legitimised, it needs to be defined what should be the criterion of examination. It is clear that it is not possible to apply the same measurements for the European Commission's democratic legitimation as to the nation-states due to the fact that the European Union is not a nation-state at pan-European level, but a community of states, which consists of nation-states with sovereign rights.⁶⁰¹ Hence, does the concept of democracy, which has been reached on European level with the Lisbon Treaty, constitute a sufficient basis?⁶⁰² Or does its basis still need to be drawn from the democratic legitimation of the Member States *and* the democratic legitimation of the European Union?⁶⁰³ In my view, the concept

with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail; see p. 594, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964J0006:EN:PDF> (19.03.2011). For more details on the accountability of the European Union, see *H. Dreier*, in: *H. Dreier, Grundgesetz Kommentar, Band II, Art. 20-82, 2. Auflage, Tübingen 2006*, art. 20, para. 46; see also *W. Erbguth*, *Allgemeines Verwaltungsrecht: mit Verwaltungsprozess- und Staatshaftungsrecht*, 3. Auflage, Baden-Baden 2009, p. 39 – p. 41.

⁶⁰¹ Regarding a model of participatory democracy, *D. Chalmers/ C. Hadjiemmanuil/ G. Monti/ A. Tomkin* points out three sources of democratic legitimation in the European Union: firstly, the characteristic of a certain constitutional tolerance, requiring the Member States to recognise the independence of each other, to accept their adherence to different values and principles, to respect each other's rights and interests and to recognise that each Member State brings something different but equally valuable to the European Union. Secondly, its foundation upon common institutions, requiring Member States to come together, decide matters of common interest and realise together common projects in the interest of the European Union, rather than to act in a self-interested manner. Thirdly, its character of pluralism, spreading power across supranational institutions and national Governments; see *D. Chalmers/ C. Hadjiemmanuil/ G. Monti/ A. Tomkin*, *European Union Law, Text and Materials*, Cambridge 2006, p 171 - 172.

⁶⁰² For a historical overview of the European concept of democracy, see *H. Dreier*, in: *H. Dreier, Grundgesetz Kommentar, Band II, Art. 20-82, 2. Auflage, Tübingen 2006*, art. 20, para. 34 *et seq.*

⁶⁰³ For more details, *ibid*, art. 20, para. 46 *et seq.*; see also *R. Bieber/ A. Epiney/ M. Haag*, *Die Europäische Union, Europarecht und Politik*, 8. Auflage, Baden-Baden 2009, § 37, para. 12 *et seq.*

of (representative) democracy on European level is not yet sufficiently achieved.⁶⁰⁴ This is mainly due to the fact that the transfer of powers from the Member States to the European Union has resulted in a loss of law-making powers of the national Governments, but has not been accompanied by a corresponding transfer to the European Parliament.⁶⁰⁵ The European Parliament does not constitute a unified representative organ of the European People, but is still an association of states (*Staatenversammlung*).⁶⁰⁶ It is more a representative organ of the Member States (*Staatenvertretung*), rather than of the People (*Volksvertretung*).⁶⁰⁷ This view has recently been confirmed through the German Federal Constitutional Court in the judgement of 20 June 2009, considering that the European Union still had “*a structural democratic deficit*”, which could not be resolved in an association of sovereign national states.⁶⁰⁸ It based its assumption, *inter alia*, on the role of the European Parliament. According to the Court, the development of competences of the European Parliament could reduce, but not completely fill the gap between the decision-making powers of the European institutions and the democratic power of action of the citizens within the Member States.⁶⁰⁹ The European Parliament was not prepared, neither from its composition nor its position within the European Union’s

⁶⁰⁴ In this sense, see *e.g.* W. Kaufmann-Bühler, in: C. O. Lenz/ K. - D. Borchardt, EU- und EG-Vertrag, Kommentar zu dem Vertrag über die Europäische Union und zu dem Vertrag zur Gründung der Europäischen Gemeinschaft, 4. Auflage, Köln 2006, art. 10 TEU, para. 2.

⁶⁰⁵ See *e.g.* D. Chalmers/ C. Hadjiemmanuil/ G. Monti/ A. Tomkins, European Union Law, Text and Materials, Cambridge 2006, p. 167 *et seq.*; for details on the participatory democracy, see p. 171 *et seq.* and on the deliberative democracy, p. 175 *et seq.*; see also W. Kaufmann-Bühler, in: C. O. Lenz/ K. - D. Borchardt, EU- und EG-Vertrag, Kommentar zu dem Vertrag über die Europäische Union und zu dem Vertrag zur Gründung der Europäischen Gemeinschaft, 4. Auflage, Köln 2006, Art. 11 TEU, para. 1 *et seq.*

⁶⁰⁶ See BVerfG, 2 BvE 2/08 of 30 June 2009, paras. 279 and 281; for more details on the relationship between the European Union and the Member States, see D. Ehlers, in: R. Schulze/ M. Zuleeg/ S. Kadelbach, Europarecht, Handbuch für die deutsche Rechtspraxis, 2. Auflage, Baden-Baden 2010, § 11.

⁶⁰⁷ For more details on the European Union, its institutions and the principle of democracy, see H. Dreier, art. 20, para. 38, in: H. Dreier, Grundgesetz Kommentar, Band II, Art. 20-82, 2. Auflage, Tübingen 2006.

⁶⁰⁸ BVerfG, 2 BvE 2/08 of 30 June 2009, paras. 264, 277, 290; see furthermore J. Bitterlich, in: C. O. Lenz/ K. - D. Borchardt, EU- und EG-Vertrag, Kommentar zu dem Vertrag über die Europäische Union und zu dem Vertrag zur Gründung der Europäischen Gemeinschaft, 4. Auflage, Köln 2006, art. 1, para. 7.

⁶⁰⁹ BVerfG, 2 BvE 2/08 of 30 June 2009, para. 281.

structure of competences, to take representative decisions in form of uniform decisions on political direction. In addition, it was not competent to take decisions on political direction in the context of the balancing of interests between the Member States. It concluded that the European Parliament could therefore not support the parliamentary Government and organise itself with regard to party politics in the system of Government and opposition in a way that its decision on political direction could have a politically decisive effect.⁶¹⁰ The Court based its assumption furthermore on the argument that the peoples of the Member States were the holders of the constituent power of the European Union. It considered that as long as no uniform European people as subject of legitimation existed, the peoples of the Member States remained the decisive holders of public authority.⁶¹¹

As a consequence, the democratic legitimation of the European Commission is still to be drawn from the democratic legitimation of the Member States *and* the European Union.⁶¹² The interaction of these two strings of democratic legitimation becomes apparent upon the European Commission's appointment procedures, its composition and its responsibility, which involves European *and* national institutions. Regarding the appointment of the European Commission's *members*, they are chosen among nationals of Member States' Governments, which are themselves democratically legitimised, being accountable either to their national citizens or Parliaments (article 10 para. 3 TEU).⁶¹³ Moreover, Member States' Governments agree together on whom to designate as the new European Commission President (article 17 para. 7 TFEU) as well as the members of the European Commission are selected on the suggestions

⁶¹⁰ *Ibid*, paras. 285 – 288; see also Press release no. 72/2009 of 30 June 2009 of the Constitutional Court, <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-072en.html> (20.03.2011).

⁶¹¹ BVerfG, 2 BvE 2/08 of 30 June 2009, leading principles, para.1; see also *R. Bieber/ A. Epiney/ M. Haag*, Die Europäische Union, Europarecht und Politik, 8. Auflage, Baden-Baden 2009, § 37 Ausblick, para. 13.

⁶¹² See *e.g.* *W. Kaufmann-Bühler*, in: C. O. Lenz/ K. - D. Borchardt, EU- und EG-Vertrag, Kommentar zu dem Vertrag über die Europäische Union und zu dem Vertrag zur Gründung der Europäischen Gemeinschaft, 4. Auflage, Köln 2006, art. 10 TEU, para. 5.

⁶¹³ See *W. Frenz*, Handbuch Europarecht, Wirkungen und Rechtsschutz, Band 5, Neuauflage, Berlin 2010, Rn. 1918.

made by the Member States (article 17 para. 7, subpara. 2 TFEU). In addition, the European Parliament is involved in the appointment procedure of the European Commission President and the members of the European Commission. It approves the European Commission President-designate (article 14 para. 1 sent. 2 TEU, article 17 para. 7 TFEU) and elects the President of the European Commission (article 17 para. 7 sent. 2 in connection with article 14 para. 1 sent. 2 TFEU) and subjects the members of the European Commission to its vote of consent (article 17 para. 7, subpara. 3 TFEU).⁶¹⁴

As a result, considered separately, the national and European level dispose of institutions that are sufficiently legitimised. However, due to the fact that these two levels interact with each other, the problem remains that the European Commission, as the sole administrative organ of the European Union, constitutes an independent organ of executive power.⁶¹⁵ As article 17 para. 3, subparagraph 2 TFEU states: “*in carrying out its responsibilities, the European Commission shall be completely independent*” and its members “*shall neither seek nor take instructions from any Government or other institution, body, office or entity.*”

⁶¹⁴ See e.g. Website of the European Union, institutions of the European Union, the European European Commission, http://europa.eu/institutions/inst/comm/index_en.htm (19.03.2011).

⁶¹⁵ See W. Frenz, Handbuch Europarecht, Wirkungen und Rechtsschutz, Band 5, Neuauflage, Berlin 2010, Rn. 1921.

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7 Appendices

7.1 Abstract in English

The paper examines the powers of Member States' national regulatory authorities under the framework of 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 (OJEU L 176/37) and analyses the implications of framework of Directive 2009/72/EC on the national laws of the Member States, in particular on the Austrian and German constitutional, administrative and energy laws.

The Introductory Part (1) gives a historical overview of the development of national energy regulators under European energy legislation, in particular under the framework of Electricity Directive 1996/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJEU L 027, 30/01/1997, p. 0020 – 0029) and of Electricity 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 (OJEU L 211/55). This Part shows that the national regulatory authorities attract increased attention and that their regulatory powers are on a constant rise. In order to understand the huge impact of the framework of Directive 2009/72/EC on the regulatory regimes of the Member States, this Part briefly examines the former and current powers of the national energy regulators under Austrian and German law.

Part Two (2) analyses whether the powers conferred upon national energy regulators under the framework of Directive 2009/72/EC have been enhanced in comparison to those established under the framework of Directive 2003/54/EC. The main focus lies thereby on the propositions made by the European Commission in its Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity (COM (2007) 528 final, 2.1) and laid down in Directive 2009/72/EC. This includes, *firstly*, the question whether the requirement of article 35 para. 1 of Directive 2009/72/EC to establish a single national regulatory authority at national level constitutes *indeed*, as

the European Commission claims, an effective tool of enhancing the powers of the national regulatory authorities (2.1). An *in-depth analysis* deals with the conflict that arises in this regard between the constitutional laws of the Member States and European law, particularly with regard to the constitutionally guaranteed principle of Federalism as prevalent in Germany and Austria. It reveals that paragraph 1 of article 35 of Directive 2009/72/EC interferes deeply with the federal structures of federally structured Member States and that paragraph 2 and paragraph 3 of article 35 of Directive 2009/72/EC contribute few to attenuate its huge impact on these structures. It examines, *secondly*, whether the duties assigned to the national energy regulators in the internal electricity markets, including in competitive areas, as well as in areas involving cross-border issues have been increased. It elaborates, *finally*, on the central provision of article 37 para. 4 sent. 2 (b) sent. 1 of Directive 2009/72/EC, which vests the regulatory authorities with a new set of regulatory powers, including new investigation rights, decision-making powers, enforcement powers and information rights. Particular attention is thereby paid to the question whether this new set of powers is restricted to monopoly areas or whether it extends to competitive areas as well and where the delimitation of competences between the national energy regulators and the national competition authorities needs to be drawn (2.2). Part Two comes to the conclusion that the powers of the national energy regulators under the framework of Directive 2009/72/EC have *indeed* been enhanced in comparison to former regime of Directive 2003/54/EC (2.3).

Part Three (3) demonstrates that the enhancement of national energy regulators' powers does not benefit the Member States. On the contrary, they lose considerable powers of control over their own national energy regulators. While comparing national energy regulators' status of independence under the regime of former Directive 2003/54/EC and Directive 2009/72/EC, it becomes apparent that the loss of powers suffered by the Member States is mainly triggered through article 35 par. 4 sent. 2 (b) (ii) of Directive 2009/72/EC. This article requires Member States to ensure that the national regulatory authorities do not seek or take instructions from any government or any other public or private entity (3.1). An *in-depth analysis* assesses whether this required political independence can be regarded as compatible with Austrian and German constitutional law. It establishes that article 35 par. 4 sent. 2 (b) (ii) of Directive 2009/72/EC is strongly opposed to the Austrian and German hierarchical

model of administration. Since both constitutional systems subject, based upon the principle of democracy, their administrative organs principally to the instructions of their superiors and allow for their release in only exceptional and limited cases, the analysis focuses on the question whether article 35 par. 4 sent. 2 (b) (ii) of Directive 2009/72/EC can be treated as such an exception. The analysis comes here in view of Germany and Austria to a different result. This is due to the fact that the supervision of the energy sector in these countries is organised in a different way. Whereas the German *BNetzA* has been established as a separate higher Federal authority within the scope of business of the Federal Ministry of Economics and Technology, the *E-control GmbH* has (until 1st of March 2011) been established as an entity of private law outsourced from the hierarchical structure of administration and the *E-control Commission* as a collegial body having within its membership at least one judge. Whereas the release of the German *BNetzA* would not be justifiable upon the cases developed by German law doctrine and administrative practice, the release of the Austrian *E-control GmbH* complies with Austrian constitutional law (3.2). As a result, whereas article 35 par. 4 sent. 2 (b) (ii) of Directive 2009/72/EC can be regarded as compatible with Austrian constitutional law, the inconsistency with German constitutional law subsists (3.3).

Part Four (4) reveals that it is the European Commission, which benefits from national energy regulators' increase of powers. Its gain of powers under the regime of Directive 2009/72/EC appears *directly*, in form of *e.g.* binding guidelines (4.1), as well as *indirectly*, in form of powers exercised through its European institutions, such as the European Network of Transmission System Operators or the Agency for the Cooperation of Energy Regulators (4.2). It is particularly the creation of the Agency, including the determination of its legitimate legal basis and its independence vis-à-vis the European Commission, which raises concern within the Member States. An *in-depth analysis* deals with the question of legal protection against decisions taken by the Board of Appeal or the Agency. This right being explicitly codified in article 263 TFEU contributes to the Agency's indirect constitutionalisation within the Treaty on European Union. Another *in-depth analysis* focuses on the question whether European institutions may legitimately delegate executive powers to European agencies, such as the Agency. Here, the *Meroni doctrine*, including its subsequent judgments as well as the question of the Agency's accountability towards the Member States becomes

relevant again. This Part concludes that the Agency, although established as a separate entity, is all but independent from the European Commission.

This Paper concludes under **Part Five (5)** that, although the powers of national energy regulators have undoubtedly been increased in comparison to former Directive 2003/54/EC, their position has not been strengthened. It is the European Commission, which, equipped with a powerful set of powers, is the real “winner” as to the regulatory powers of the energy markets. The new regime of Directive 2009/72/EC leads to a drastic shift of energy regulatory powers, shifting away from the Member States on a national level towards the European Commission on a European level. Although the strengthening of regulatory powers on a European level may, *in practical terms*, be a positive step towards the realisation of a common European energy market, *in legal terms*, it evokes various problems. The powers of control conferred upon the European Commission, in particular via the Agency, are so extensive that the European Commission disposes *de facto* of a power of instruction vis-à-vis the regulatory authorities of the Member States. This raises the question as to the democratic legitimisation of the European Commission and its accountability towards the European institutions and the Member States. Directive 2009/72/EC illustrates well that in the energy sector the national and European level gets more and more intertwined and that procedures need to be put in place, which ensure, *on the one hand*, that Member States’ internal orders remain intact and which foster, *on the other hand*, the process of the European integration.

7.2 Abstract in German

Die Arbeit untersucht die Befugnisse der nationalen Regulierungsbehörden der Mitgliedstaaten unter dem Regime der Richtlinie 2009/72/EG des Europäischen Parlaments und des Rates vom 13. Juli 2009 über gemeinsame Vorschriften für den Elektrizitätsbinnenmarkt und zur Aufhebung der Richtlinie 2003/54/EG (Abl. EU L 211/55) und analysiert ihre Auswirkungen auf die nationalen Rechtsordnungen der Mitgliedstaaten, insbesondere auf das österreichische und deutsche Verfassungs-, Verwaltungs- und Energierecht.

Die Einleitung (1) gibt einen historischen Überblick über die Entwicklung der nationalen Energieregulierungsbehörden unter dem Europäischen Energierecht, insbesondere unter der Richtlinie 96/92/EG des Europäischen Parlaments und des Rates vom 19. Dezember 1996 betreffend gemeinsame Vorschriften für den Elektrizitätsbinnenmarkt (Abl. EU L 027, 30/01/1997, S. 0020 – 0029) und der Richtlinie 2003/54/EG des Europäischen Parlaments und des Rates vom 26. Juni 2003

über gemeinsame Vorschriften für den Elektrizitätsbinnenmarkt und zur Aufhebung der Richtlinie 96/92/EG (Abl. EU L 176/37). Dieser Teil der Arbeit zeigt auf, dass den nationalen Energieregulierungsbehörden vermehrt Aufmerksamkeit zukommt und dass deren Regulierungskompetenzen beständig ausgeweitet werden. Um die Auswirkungen der Richtlinie 2009/72/EG auf die Regulierungssysteme der Mitgliedstaaten in ihrem ganzen Umfang ermessen zu können, werden die vergangenen und aktuellen Befugnisse der nationalen Energieregulierungsbehörden unter österreichischem und deutschem Recht kurz dargestellt.

Teil 2 (2) untersucht, ob die Kompetenzen, die den nationalen Energieregulierungsbehörden durch das Regime der Richtlinie 2009/72/EG übertragen wurden im Vergleich zu den Kompetenzen aus der Richtlinie 2003/54/EG gestärkt wurden. Der Schwerpunkt der Untersuchung liegt hierbei auf den Vorschlägen der Europäische Kommission zur Änderung der Richtlinie 2003/54/EG im Rahmen des „Dritten Legislativpakets“, welche in das Regelwerk der Richtlinie 2009/72/EG übernommen wurden. Dieser Teil geht in einem *ersten Abschnitt* der Frage nach, ob die in Artikel 35 Abs. 1 der Richtlinie 2009/72/EG grundsätzlich an jeden

Mitgliedstaat gerichtete Verpflichtung „auf nationaler Ebene eine einzige nationale Regulierungsbehörde“ zu benennen *tatsächlich*, wie von der Europäischen Kommission behauptet, ein wirksames Mittel darstellt, die Kompetenzen der nationalen Regulierungsbehörden zu stärken (2.1). Eine *Schwerpunktanalyse* behandelt den Konflikt, der in diesem Zusammenhang zwischen dem Verfassungsrecht der Mitgliedstaaten und dem Europäischen Recht entsteht und dies insbesondere im Hinblick auf das verfassungsrechtlich garantierte Prinzip des Föderalismus, das in Deutschland und Österreich vorherrschend ist. Die Analyse deckt auf, dass Absatz 1 des Artikel 35 der Richtlinie 2009/72/EG tief in die föderalen Strukturen föderal organisierter Mitgliedstaaten eingreift und dass die in den Absätzen 1 und 2 enthaltenen Abschwächungen nur wenig dazu beitragen, diese Eingriffe abzumildern. Ein *zweiter* Abschnitt untersucht, ob den nationalen Regulierungsbehörden zusätzliche Aufgaben übertragen wurden, und zwar innerhalb der Binnenmärkte (einschließlich der Wettbewerbsbereiche) und in grenzüberschreitenden Bereichen. Die Untersuchung behandelt im *letzten Abschnitt* die zentrale Vorschrift des Artikel 37 Abs. 4 Satz 2 (b) sent. 1 der Richtlinie 2009/72/EG, welche die nationalen Regulierungsbehörden mit einem neuen Bündel an Regulierungsbefugnissen ausstattet, einschließlich neuer Untersuchungs-, Beschlussfassungs- und Durchsetzungsbefugnisse sowie zusätzlicher Informationsrechte. Besonderer Aufmerksamkeit kommt in diesem Zusammenhang der Frage zu, ob der Anwendungsbereich dieses neuen Bündels an Eingriffsbefugnissen auf den Netzbereich beschränkt ist oder sich auf offene Märkte mit funktionierendem Wettbewerb ausdehnt und wo die Kompetenzabgrenzung zwischen den nationalen Energieregulierungsbehörden und den Wettbewerbsbehörden zu ziehen ist (2.2). Teil 2 kommt zu dem Schluss, dass die Befugnisse der nationalen Energieregulierungsbehörden unter dem Regelwerk der Richtlinie 2009/72/EG im Vergleich zu den Befugnissen unter dem Regelwerk der Richtlinie 2003/54/EG *tatsächlich* ausgeweitet wurden (2.3).

Teil 3 (3) legt dar, dass die Ausweitung der Kompetenzen der nationalen Energieregulierungsbehörden nicht den Mitgliedstaaten zugute kommt. Diese verlieren im Gegenteil sogar erheblich an Einfluss- und Steuerungsmöglichkeiten gegenüber den eigenen nationalen Energieregulierungsbehörden. Ein Vergleich des Unabhängigkeitsstatus der nationalen Energieregulierungsbehörden unter dem vorherigen Regime der Richtlinie 2003/54/EG und dem der Richtlinie 2009/72/EG

verdeutlicht, dass der Machtverlust der Mitgliedstaaten im Wesentlichen durch Artikel 35 Abs. 4 Satz 2 (b) (ii) der Richtlinie 2009/72/EG ausgelöst wird. Diese Vorschrift gibt den Mitgliedstaaten nämlich auf, sicherzustellen, dass ihre nationalen Regulierungsbehörden bei der Wahrnehmung ihrer Regulierungsaufgaben keine Weisungen von Regierungsstellen oder anderen öffentlichen oder privaten Einrichtungen einholen oder entgegennehmen **(3.1)**. In einer *Schwerpunktanalyse* wird geprüft, ob diese geforderte politische Unabhängigkeit als mit dem österreichischen und deutschen Verfassungsrecht vereinbar angesehen werden kann. Die Analyse stellt fest, dass Artikel 35 Abs. 4 Satz 2 (b) (ii) der Richtlinie 2009/72/EG in diametralem Gegensatz zum österreichischen und deutschen hierarchischen Verwaltungsmodell steht. Da beide Rechtsordnungen als Ausfluss des Demokratieprinzips ihre Verwaltungsorgane grundsätzlich den Weisungen ihrer vorgesetzten Organe unterwerfen und Ausnahmen hiervon in nur eng begrenzten Fällen zulassen, konzentriert sich die Untersuchung auf die Frage, ob Artikel 35 Abs. 4 Satz 2 (b) (ii) der Richtlinie 2009/72/EG als eine derartige Ausnahme angesehen werden kann. Die Analyse kommt hier im Hinblick auf Deutschland und Österreich zu einem unterschiedlichen Ergebnis. Dies ist darauf zurückzuführen, dass die Aufsicht über den Energiesektor in diesen Ländern unterschiedlich ausgestaltet ist. Während die deutsche *BNetzA* als selbständige Bundesoberbehörde innerhalb des Geschäftsbereichs des Bundesministeriums für Wirtschaft und Technologie angesiedelt ist, ist die österreichische *E-control GmbH* (bis zum 1. März 2011) als ausgegliederter Rechtsträger des privaten Rechts und die *E-control Kommission* als Kollegialbehörde mit richterlichem Einschlag eingerichtet. Die Entlassung der *BNetzA* aus der Weisungsgebundenheit auf Grundlage der von der deutschen Staats- und Verwaltungspraxis entwickelten Ausnahmen wäre nicht gerechtfertigt, eine Entlassung der *E-control GmbH* hingegen ist mit österreichischem Recht vereinbar **(3.2)**. Im Ergebnis ist also Artikel 35 Abs. 4 Satz 2 (b) (ii) der Richtlinie 2009/72/EG mit österreichischem Verfassungsrecht vereinbar, nicht dagegen mit deutschem Verfassungsrecht **(3.3)**.

Teil 4 (4) enthüllt, dass letztlich die Europäische Kommission von der Stärkung der Befugnisse der nationalen Energieregulierungsbehörden profitiert. Ihr Machtgewinn tritt unter dem Regime der Richtlinie 2009/72/EG sowohl *unmittelbar* in Erscheinung, wie beispielsweise in Form der Befugnis, bindende Leitlinien zu erlassen **(4.1)**, also

auch *mittelbar*, in Form von Befugnissen, die durch Europäische Institutionen ausgeübt werden, wie das Europäische Netzwerk der Übertragungsnetzbetreiber oder die Agentur für die Kooperation nationaler Regulierungsbehörden (4.2). Es ist insbesondere die Schaffung der Agentur, einschließlich der Bestimmung ihrer richtigen Rechtsgrundlage und ihrer Unabhängigkeit gegenüber der Europäischen Kommission, die Bedenken in den Mitgliedstaaten erregt. Eine *Schwerpunktanalyse* beschäftigt sich mit der Frage nach dem gerichtlichen Rechtsschutz gegen die vom Berufungsausschuss oder der Agentur erlassenen Entscheidungen. Dieses Recht, nunmehr ausdrücklich in Artikel 263 AEUV festgeschrieben, trägt hierbei zur mittelbaren Konstitutionalisierung der Agentur im Vertrag über die Europäische Union bei. Eine weitere *Schwerpunktanalyse* dieses Teils widmet sich der Frage, ob Europäische Institutionen in rechtmäßiger Weise Ausführungsbefugnisse auf Europäische Agenturen, wie z.B. die Agentur, übertragen können. In diesem Zusammenhang lebt die *Meroni Doktrin*, einschließlich der im folgenden ergangenen Entscheidungen, sowie die Frage der Verantwortlichkeit der Agentur gegenüber den Mitgliedstaaten wieder auf. Der Teil schlussfolgert, dass die Agentur, obwohl sie als Rechtsträger mit eigener Rechtspersönlichkeit eingerichtet wurde, alles andere als von der Europäischen Kommission unabhängig ist.

Teil 5 (5) dieser Arbeit stellt abschließend fest, dass die Position der nationalen Energieregulierungsbehörden trotz der erfolgten Ausweitung ihrer Regulierungsbefugnisse nicht gestärkt wurde. Es ist die Europäische Kommission, die, bewaffnet mit einem hochwirksamen Bündel an Befugnissen, zu den tatsächlichen Gewinnern des Energieregulierungsmarktes zählt. Das neue Regime unter der Richtlinie 2009/72/EG führt zu einer drastischen Machtverschiebung der Energieregulierungskompetenzen, weg von den Mitgliedstaaten auf nationaler Ebene hin zur Europäischen Kommission auf europäischer Ebene. Auch wenn die Stärkung der Regulierungsbefugnisse auf Europäischer Ebene aus *praktischer Sicht* der richtige Schritt sein mag, einen einheitlichen Energiebinnenmarkt zu verwirklichen, so wirft sie aus *rechtlicher Sicht* eine Vielzahl an Problemen auf. In der Tat sind die der Europäischen Kommission zugewiesenen Befugnisse so umfangreich, dass ihr *de facto* Weisungsbefugnis gegenüber den nationalen Energieregulierungsbehörden der Mitgliedstaaten zukommt. Dies wirft wiederum die Frage nach der demokratischen Legitimation der Europäischen Kommission sowie ihrer Verantwortlichkeit gegenüber

den Europäischen Institutionen und den Mitgliedstaaten auf. Das Regime der Richtlinie 2009/72/EG ist ein Beispiel dafür, dass auf dem Energiesektor die nationale und Europäische Ebene mehr und mehr miteinander verflochten sind und dass Verfahren festgelegt werden müssen, die auf der einen Seite sicherstellen, dass die nationalen Rechtsordnungen der Mitgliedstaaten gewahrt werden, die aber auf der anderen Seite die Fortentwicklung der Europäischen Integration ermöglichen.

7.3 Curriculum vitae

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Berufs- und Schulausbildung

- 01/08 - heute **Universität Wien, Juristische Fakultät, Wien, Österreich**
Doktoratsstudium, Energierecht, o. Univ.- Prof. Dr. Bernhard Raschauer
- 06/07 **Rechtsanwaltskammer München, OLG - Bezirk München, Deutschland**
Zulassung zur Rechtsanwaltschaft
- 05/05 **Bayerisches Staatsministerium der Justiz, München, Deutschland**
Zweites juristisches Staatsexamen, München
Schwerpunkt: Internationales Recht, Europarecht
- 04/03 - 06/05 **Oberlandesgericht München, Referendariat, München, Deutschland**
Zulassung zum Rechtsreferendariat
- 07/03 **Ludwig-Maximilians-Universität München, Deutschland**
Erstes juristisches Staatsexamen, München, *Prädikat*
Schwerpunkt: Europarecht
- 1997 – 2002 **Ludwig-Maximilians-Universität München/ Université Panthéon-Assas (Paris II),
Deutschland/Frankreich**
Studium des deutschen und französischen Rechts
- 1988 - 1997 **Dom - Gymnasium Freising, Deutschland**
- 1994/1995 **Lycée Privé Mongazon, Angers, Frankreich**

Internationale Weiterbildungen

- 09/05 - 10/06 **University of Birmingham, Juristische Fakultät, Großbritannien**
LL.M. International Commercial Law, *mit Auszeichnung*
Schwerpunkt: carriage of goods by sea, international commercial arbitration,
comparative merger and takeover regulations, company law
Dissertation: “Offshore Wind Farm Development in the North and Baltic Sea”
- 09/99 – 09 **Université Panthéon-Assas (Paris II), Paris, Frankreich**
Licence en Droit in Französischem Recht
Stipendium des Deutschen Akademischen Austauschdienstes (DAAD)
Schwerpunkt: Französisches Gesellschaftsrecht, Allg. und bes. Vertragsrecht,
Verwaltungs- und Zivilprozessrecht
- 09/97 - 10/01 **Ludwig-Maximilians-Universität, Institut für Internationales Recht-
Rechtsvergleichung, München, Deutschland**
Zertifikat in Europäischem und vergleichendem Deutsch - Französischen Recht.
Schwerpunkt: Europäisches Recht, deutsches und französisches Privatrecht,
Öffentliches Recht

Berufliche Laufbahn

- Seit 09/10 **Solon Investments, Projektierung, Finanzierung, Bau und Vertrieb von
Solarkraftwerken, Freiburg, Deutschland**
Unternehmensjuristin/ Projektmanagement

- 01/09 - 06/09 **Schlüter Graf & Partner, Legal Consultants, Dubai, V.A.E.**
Rechtsanwältin, Internationales Vertrags- und Wirtschaftsrecht
- 01/07 - 01/08 **Debevoise & Plimpton, London, Großbritannien**
Rechtsanwältin, Litigation Abteilung - Interne Ermittlungen
- 01/05 - 04/05 **Gide Loyrette Nouel, Paris, Frankreich**
Wahlstation, Abteilung für Wirtschafts- und Europarecht
- 07/03 - 01/04 **Velte/ Kalveram/ Eichinger, Anwaltskanzlei, München, Deutschland**
Selbständige Mitarbeiterin, Vertrags- und Wirtschaftsrecht

Rechtsreferendariat und Praktika

- 04/03 - 06/05 **Bayerisches Staatsministerium der Justiz, München, Deutschland**
Rechtsreferendarin am Amtsgericht München - Allgemeine streitige Zivilsachen;
Amtsgericht München – Jugendstrafgericht; Öfftl. Verwaltung, Bauen und Umwelt
- 09/4 - 01/05 **Dr. S. Ulsenheimer, Rechtsanwalt, München, Deutschland**
Rechtsreferendarin, Vertragsrecht
- 09/00 / 09/01 **Fuchs/ Dr. Eichinger, Anwaltskanzlei, München, Deutschland**
Praktikantin, Zivilrecht
- 08/01 **Dr. G. Kroll, Anwaltskanzlei, München, Deutschland**
Praktikantin, Vertragsrecht
- 08/98 - 09/98 **Société Générale, Bank, La Défense, Paris, Frankreich**
Praktikantin, Rechtsabteilung – Litigation

Sprachen

Deutsch: Muttersprache	Französisch: Verhandlungssicher
Englisch: Verhandlungssicher	Italienisch: Grundkenntnisse

Seminare

Projektmanagement, Solon Berlin (2011)
Photovoltaics Advanced, Solon Berlin (2011)
Kommunikationsseminar, Solon, Freiburg (2010)
The Political Independence of National Energy Regulators under European Law, Wien (2009)
Individualrechtsschutz im Umweltrecht unter Einfluss des Europäischen Recht, Wien (2009)
Selbstmanagement: Prioritäten, Ziele und Zeit, A. Heller, Wien, (Sept. 09)
Souveräne und zielorientierte Kommunikation, A. Heller, Wien, (seit Juni 09)

Veröffentlichungen

Rechtliche und wirtschaftliche Herausforderungen bei der Errichtung von Photovoltaikanlagen in Frankreich”, DGS - Zeitschrift „Sonnenenergie“ (Juni 07)
Mitwirkung an der Neuauflage des Lehrbuchs “Agrarrecht”, Prof. Dr. Ch. Grimm, C.H. Beck, München (Überarbeitung des Kapitels zum Neuen Schuldrecht) (00/01)

Mitgliedschaften

Deutsche Institution für Schiedsgerichtsbarkeit (DIS40) (2008)
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