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Towards a European Principle of Independence: The Ongoing Constitutionalisation of an Independent Energy Regulator

This article analyses recent case law of the European Court of Justice in which the European requirements concerning the political independence of national regulatory authorities in the energy sector were interpreted in a broad way. These judgements were delivered in a time in which a strong independent authority plays a crucial role in the acceleration of the energy transition by safeguarding fair market access to new entrants offering innovative energy services. At the same time, the European developments towards a politically independent regulatory authority with discretionary, regulatory, powers is at odds with the way the democracy principle and the legality principle have traditionally been interpreted in several Member States, such as in the Netherlands and Germany. However, it is argued that the latter principles do offer scope for a different interpretation than the more traditional one of the principle of legislative supremacy. A condition, however, is that accountability mechanisms must be improved to provide citizens a legal guarantee that they can have a say and that the regulatory authority can be held accountable by the courts.

Saskia Lavrijsen*

I. Introduction

Independent national supervisory authorities (or energy regulators) play an important role in implementing European energy directives and regulations. They contribute to the pursuit of European environmental and climate targets and help guarantee a competitive internal energy market that provides consumers freedom of choice, good service provision, affordable energy prices and security of supply. The public values of a secure, affordable and environmentally sustainable energy supply have been established as cornerstones of European energy policy, and are to be optimised to the greatest extent possible. However, these values can sometimes be at odds with one another. In those cases trade-offs between them must be balanced in what has been termed the ‘energy trilemma’. National regulatory authorities, too, must balance the energy trilemma goals when implementing their duties such as fixing or approving network tariffs or tariff methodologies.

The principles of good market supervision are aimed at designing high quality regulatory frameworks enabling the national authorities to perform their supervisory and regulatory tasks in a good way.

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At the same time they guide the authorities in exercising their tasks in line with the requirements of good governance, including the principles of transparency, independence, accountability and effectiveness. Some of the principles of good market supervision have explicitly been recognized in European case law, and play a large role on both European and national level. In the European Union, the principles of good market supervision provide a basis for legislation and regulation in the energy sector and other network sectors. The principle of independence is considered as a cornerstone of good market supervision and is one of the fundamental principles of good market supervision. The current contribution addresses the independence principle not only in view of recent developments in European case law, but also because it is a very fundamental precept. If the independence of the supervisory authority is not sufficiently provided for, other principles of good oversight, such as the principle of accountability and the principle of effectiveness, will also not be adequately fulfilled.

The independence principle has, also acquired a legal basis in European energy law. In the assumption that the independence of oversight promotes a consistent, objective and impartial application of European legislation, EU law has moved towards increasingly strict requirements regarding the independence of national energy regulators. This embraces independence from market parties and, since the entry into force of the third generation energy directives, independence from political influences as well. These requirements were further tightened with the entry into force of the amended Electricity Directive of the Clean Energy Package. In other sectors, too, European law has gone on to establish a clearer framework for the European requirement of independence of oversight authorities. This has given rise to a European principle of independent market supervision in broad terms, though specific interpretations of the independence requirement can vary from sector to sector. However, it should be clarified that the independence principle does not mean that the supervisory authority is completely independent, as the latter remains to some extent accountable to democratically elected and/or democratically controlled institutions and to the national courts. The independence requirements relate to an independent exercise of regulatory powers that are derived from EU law, but EU law recognizes that still some democratic control mechanisms may be in place, like reporting obligations and the appointment procedures of the authorities’ board members, making the authorities politically accountable for their overall performance. Furthermore, interested parties will have the right to seek legal protection at independent courts when they claim their rights derived from EU law are being infringed by an administrative decision taken by a supervisory authority.

In the Netherlands, the Authority for Consumers and Markets (ACM) is responsible for supervision and regulation of the energy market. In addition, the ACM carries out general competition oversight, supervises compliance with consumer protection rules, and supervises and regulates the transport, postal and electronic communications sectors. To guarantee its independence, the ACM enjoys the status of an independent administrative body. That means the

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7 ibid.
9 (n 6) Hancher, Larouche and Lavrijsen.
12 (n 10) Lavrijsen and Ottow; See also the tightening of the independence requirements for national competition authorities in the application of European competition law. Directive (EU) 2019/1 of the European Parliament and Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (text with EEA relevance) (OJ 2019, L 11/3).
responsible Minister of Economic Affairs and Climate cannot issue specific instructions to the ACM regarding any individual case.\(^{14}\) The ACM has no separate legal personality. Its budget forms part of the budget of the Ministry of Economic Affairs and Climate, though ACM has autonomy in allocating it. Civil servants working within the ACM are formally employees of the minister, though they may not receive instructions from the minister.\(^{15}\)

In recent rulings, the European Court of Justice (ECJ) has provided a broad interpretation of the European independence requirements and the powers of energy regulators. These clearly establish that the executive and legislative branches of government may not lay down rules and principles regarding the duties and regulatory powers ascribed to the national authorities by European law.\(^{16}\) These recent European-level developments concerning the independence of oversight authorities, however, contrast to recent developments in the Netherlands. When transposing the amended energy directive into national law, in the form of the Energy Act 1.0, the Dutch Ministry of Economic Affairs and Climate initially introduced drastic restrictions to ACM independence, referencing the primacy of political decision-making in the first version of the draft law. That draft contained so many jurisdictional grounds for ministerial regulations and general administrative rules as to hamper independent assessments by the ACM, thus limiting its ability to carry out its duties. The Ministry has published a more recent draft of the Energy Act which is more in line with the case law of the ECJ, tough at some points the limits of ministerial powers and the exact independence of the national authority remain in a grey area.

The resistance of the Dutch government and of other Member States to strengthening the independence of national energy regulators can be traced to the fundamental question of whether the assignment of wide discretionary powers to an independent authority is consistent with national constitutional principles, such as those of democracy and legality.\(^{17}\) This contribution examines if and how the European independence requirements can be reconciled with the principles of legality and democratic legitimacy.\(^{18}\) It examines whether these principles could/should also be interpreted in another way, in view of European developments regarding market supervision in the energy sector. The contribution is structured as follows. It first explores the meaning of the legality principle, the primacy of political decision-making and the principal of democracy. It then briefly sketches the development of regulatory oversight in the Netherlands energy sector since the European liberalisation directives entered into force, also going into more detail about the independence and powers of the ACM. It then investigates what European legal requirements apply to the independence of energy regulators and how those requirements have been interpreted by the ECJ. Given that the ECJ has delivered a number of important rulings regarding interpretation of the independence requirement as it applies to authorities charged with personal data protection, it examines these cases’ implications for interpretation of the independence requirement as it applies to energy regulators. In addition, it considers the requirements laid down in European law for the functional independence of regulatory authorities, which in the European energy directives are designated as national regulatory authorities (NRAs).

Furthermore, the nature and independence of the powers of the regulatory authorities are explored, discussing whether the European provisions do in fact require powers that are regulatory in nature, in that they establish generally binding rules, to be assigned to energy regulators. This is followed by an investigation of how these developments relate to the principles of democracy, legality and legislative supremacy. The contribution then closes with a conclusion.

II. The Legality Principle and the Primacy of Political Decision-Making

The principle of democracy requires that citizens be involved, either directly or indirectly, in governmen-
tal decision-making. The principle envisages that everyone has equal opportunity to exercise influence over the actions of government. In the Netherlands, this principle is effectuated via a representative parliamentary system. If the legislature delegates regulatory powers, citizens’ influence must be assured via procedures for public participation and administrative transparency.

The legality principle arises from the democracy principle and establishes that any unilateral legal or factual intervention by the government in the rights and freedoms of citizens must have a sufficient basis in law. The legality principle requires that the legislator formalises in law the market authority’s main areas of intervention and provide sufficiently clear legal grounds for its powers. The legislator of the Netherlands interprets the legality principle in line with the principle of legislative supremacy. It is thus not sufficient to have mere legal grounds for government action. The democratically legitimated legislator must itself issue the main rules and sufficiently standardise attributed and delegated powers. From this, it also follows that the power to establish generally binding rules must, in principle, be vested in a democratically legitimated legislator; regulatory powers cannot be assigned to an independent administrative body. According to this traditional interpretation of the legality principle, restraint must be exercised in assigning any wide discretionary and regulatory powers to market authorities which operate at arm’s length from political decision-making. Moreover, powers assigned to independent authorities must be interpreted in as restricted a manner as possible.

With regard to market supervisors tasked with the implementation of European law, this is not to say, according to some, that these bodies are not obliged to operate within the national framework established by the electorally legitimated government. In a recent opinion, the Dutch Council of State advised:

Market regulators cannot be compared to classic independent administrative bodies. They have more power because they carry out more duties simultaneously: implementation, oversight, sanctioning, dispute resolution and (pseudo)regulation. Especially paramount is that, for the interpretation of legal open standards, they have exceedingly wide (pseudo)regulatory and policymaking powers... that are often in part executed by the national regulators together at the European level. Similarly regarding policymaking, originally the preeminent domain of political decision-makers, these supervisory authorities, or regulators, have an independence guaranteed in law. Due in part to the expansion of European regulation and its associated institutional embedding, the execution of these powers is at risk of being rendered outside the purview of the national constitutional framework. Ministerial accountability for market authorities’ implementation of their duties is then very limited, or zero.

Given that the responsible minister has limited ability to direct the independent regulatory authority and

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23 ibid (Lavrijssen and Ottow) 73-95; ibid (Van Ommen) 62; Saskia Lavrijssen, Onafhankelijke mededingingstoezichthouders, regulerende bevoegdheden en de waarborgen van goed governance (dissertation Tilburg), The Hague: Boom Juridisch (2006)
24 (n 22) Van Ommen, 62; ibid, Lavrijssen, 73.
26 J.L. Broeksteeg, ‘De regelgevingse bevoegdheid van zelfstandige bestuursorganen, mede in het licht van het EU recht’ (2015) 30 RegelmAat 3, 170-182; See also (n 23) Sjoerd Zijlstra, 2-6; (n 25) de Ru. For a different view, see in 22 Ottow, 86; (n 6) Hancher, Lanouche and Lavrijssen 2003, 355-389.
27 (n 17) 217.
that the regulator has wide discretionary powers at its disposal, ministerial accountability is eroded, according to the Council of State. The Council therefore advocates restraint in the legal establishment of new independent authorities.29 Furthermore, the Council noted the lack of sufficient provisions for public accountability of regulatory authorities with a European mandate. While these authorities are largely placed outside the purview of existing constitutional accountability mechanisms, it is not clear what public European and national accountability mechanisms have been put in their place.30 The Council therefore also recommended that the accountability of regulatory authorities to the public should be improved.31

The principle of legislative supremacy, and resultant restraint in assigning regulatory powers to independent regulatory authorities, is anchored and elaborated in the Netherlands in formalised Instructions for Rules and Legislation.32 These Instructions must be taken into account by departments in drafting legislation, though they have no binding external consequences and do not entail hard-and-fast legal rules. The principle of legislative supremacy can be seen as a legal policy interpretation of the legality principle.33

III. Development of Oversight of the Energy Market in the Netherlands

When the market regulators were being created, the Dutch government did not initially intend to estab-

lish ‘economic regulators’ along the lines of the Anglo-Saxon model, with broad and regulatory powers geared to contribute to the advancement of liberalisation and the restructuring of the network sectors.34 At first, energy regulation in the Netherlands was entrusted to the Office of Energy Regulation, which operated entirely under the responsibility of the Ministry of Economic Affairs.35 When the State of the Netherlands became sole shareholder in the gas and electricity transmission networks, oversight of the energy sector was transferred as a separate division of the Netherlands Competition Authority (NMa), with the latter given the status of independent administrative body (or autonomous administrative body).36 According to the so-called ‘all in one hand’ model (whereby all duties are carried out within one and the same organisation), the powers to implement the Electricity Act (E-Act) 1998 and the Gas Act were ascribed to the NMa Board of Directors. The Board then delegated these powers to the director of the Office of Energy Regulation. The delegation of this mandate had to be approved by the Minister of Economic Affairs. Although the Office of Energy Regulation was no longer a separate administrative body, but operated as a division of the NMa, it had its own identity and its own website.37 Later, the NMa was absorbed into the ACM, along with the Independent Post and Telecommunications Authority (Dutch acronym OPTA) and the Consumer Authority (CA).38

Subsequent to a performance evaluation of energy oversight during the first regulatory period (1999-2002), the Minister of Economic Affairs concluded that regulatory powers should, insofar as possible, be removed from the then-supervisory body, the Office of Energy Regulation.39 According to the minister, the delineation of roles between the minister and the Office was insufficiently clear. Moreover, formalised standards hardly existed for key functions of the Office, meaning that it was unclear what objectives and rules the Office must follow in exercising its powers.40 Another factor that played a role during the evaluation was the fact that the NMa and oversight of the energy sector were to be placed at arm’s length from political decision-making authority, as the NMa was to receive the status of independent administrative body. This meant, according to the minister, that legislative supremacy had to be repaired. In the end, due to the adoption of an amendment to the Intervention and Implementation Act

29 Council of State, 65.
30 Council of State, 65.
31 Council of State, 65.
32 See Regulatory Notice 124F, Stat. 1996, 177, 16. The assignment of regulatory powers to an independent administrative body is permitted only insofar as it concerns organisational or technical subjects or in exceptional cases, provided that provision is made for a minister to approve of the regulation.
34 (n 23) Lavrijsen, 25-26; (n 23) Otter.
36 Act of 9 December 2004, amending the Competition Act in connection with the transformation of the administrative body of the Netherlands Competition Authority into an independent administrative body, Staatsblad (2005) 172.
37 (n 23) Lavrijsen, 137.
40 (n 23) Lavrijsen, 139-141.
(I&I Act) concerning the implementation and tightening of network management supervision, the powers of the Office of Energy Regulation were not transferred to the minister. However, the minister was given the authority to establish ministerial regulations concerning the regulatory powers of the NMAs.

Stemming in part from the influence of EU law, the ACM has received increasingly wide discretionary (regulatory) powers. In the energy sector, the ACM sets in advance, network tariffs, the methodologies for calculating tariffs, tariff structures and conditions for access to the electricity and gas networks. These powers entail the authority to establish generally binding rules. These rules are grounded in law; they set objective binding standards with outward effect and encompass general, abstract stipulations suitable for repeated application.

It merits clarifying here that the powers of the ACM comprise the regulation and supervision of the activities of the energy companies (consumer protection, security of supply), the system operators ( unbundling, network access, security of supply, safety, quality) and the infrastructure companies ( unbundling and ancillary activities). The ACM does not have the authority to decide whether particular public duties can be assigned to private parties or to state holdings. The Minister of Economic Affairs and Climate, together with the Minister of Finance, is responsible for determining whether private parties or state holdings will be tasked to carry out particular activities, such as, for example, assigning the task of developing an offshore grid to TenneT.

The minister’s authority to establish regulations concerning the powers of the ACM presents the risk that the ACM will not be given the freedom it needs to assess in an objective and impartial manner how costs, tariffs and conditions should be assessed and in so doing, to ensure a fair playing field. Indeed, the Minister of Economic Affairs has sometimes been overruled by the highest court, the Trade and Industry Appeals Tribunal, because in drawing up certain regulations the minister was said to have interfered too much in the independent assessment capacity of the ACM. The scope of the minister’s authority to issue regulations concerning the powers of the ACM long remained somewhat ambiguous. As discussed in the section below, recent rulings of the ECJ have curtailed the scope of this ministerial authority.

IV. European Independence Requirements


The European requirements concerning the independence of national authorities, including energy regulators, are made up of two components. The first component, which is not generally contested, requires that national authorities be independent from market participants, the objective being to create a level playing field. The ECJ has already recognised this component of independence as a binding principle deriving from Treaty law. The principle is al-

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42 See Art 3 (1) of Regulation (EC) 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty (text with EEA relevance) (OJ 2003, L 1/1).

43 Art 41c Electricity Act 1998 and Art 81c Gas Act.

44 Art 41 Electricity Act 1998 and Art 81 Gas Act.

45 Arts 12a and 12f Gas Act, Arts 27 and 36 Electricity Act 1998.

46 Arts 31 and 36 Electricity Act 1998 and Arts 12b and 12f Gas Act.


48 Court of Audit, In publieke handen: Nieuwe taken voor staats-deelnemingen in de energieaanbouw, 2021.

49 Trade and Industry Appeals Tribunal 29 June 2010, ECLE:NL:CB:2010:BM9470; Antje Ottow and Saskia Lavrijsen, ‘Het Europese recht als hoeder van de onafhankelijkheid van nationale toezichthouder’ (2011) 2 Tijdschrift voor Energierect, 1, 136-143; (n 49) Lavrijsen and Ottow, 7.3-95.

50 (n 23) Ottow, 62-66; Saskia Lavrijsen and Thomas Nauta, ‘De Europenisering van het toezicht op de energiesector’ (2010) 3 Tijdschrift voor Energierect, 1, 136-143; (n 49) Lavrijsen and Ottow, 7.3-95.

51 Maartje de Visser, Network-based governance in EC law: The example of EC competition and EC communications law, (Hart Publishing, 2009) 89.

52 EC 27 October 1993, C-69/91, ECLE:EU:C:1993:853 (Decoster), 19. In this regard, see also (n 49) Lavrijsen and Ottow, 81-82; P. Larouche, CERRE, Code of conduct and best practices for the setup, operations and procedure of regulatory authorities, (2014) 12; Maartje de Visser, Network-based governance in EC law: The example of EC competition and EC communications law, (Hart Publishing, 2009) 89.
so enshrined in the European energy directives and in the electronic communications directives. In the Netherlands, the principle of independence from market participants is particularly important, as the State is the sole shareholder in the national systems for transmission of gas and electricity. In addition, provincial and municipal authorities hold shares in the distribution system operators and, as a result of the decentralisation of energy provision, local authorities are increasingly becoming involved in establishing local energy companies.

There is greater debate surrounding the second component of independence, namely, the requirement that the national regulatory authorities must also, to a degree, be independent from political influences (the responsible minister and parliament). This means that the national authorities must be able to independently exercise the powers ascribed to them by the European directives without the executive power or legislative power imposing any restriction on those powers. Nevertheless, the national authorities must adhere to general government policy in the exercise of their powers in any individual case.

In the doctrine, several different arguments have been presented for some extent of political independence of the national authorities, such as to guarantee consistent and impartial decision-making, to enable decisions about technically complex issues based on expert judgments following from complex legal-economic assessments and to facilitate effective, efficient and fair decision-making. These reasons also played a role in the formulation of the European independence requirements in the Data Protection Directive, its successor, the General Data Protection Regulation and the European directives for the network sectors (energy and electronic communications).

Comparing the relevant provisions, we find that the independence requirements regarding the authority for personal data protection have been formulated in the most far-reaching terms, and these have been further strengthened in the General Data Protection Regulation to guarantee complete independence of the supervisory authority. The authority for personal data protection must execute its duties ‘in complete independence’. Regarding national authorities in the energy and electronic communications sectors, they must have the power to exercise their regulatory duties in an autonomous manner – free from political influence. They may not request or receive instructions from any other body in the day-to-day implementation of their duties in implementing EU law. Unlike the Data Protection Regulation, the energy and communications directives acknowledge explicitly that the authorities are not entirely independent of political and legal accountability mechanisms as exercised in conformance with national constitutional traditions. The authorities must still respect general guidelines issued by gov-

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54 (n 4) 266–280; (n 6) Hancher, Larouche and Lavrijsen, 360; (n 50) Lavrijsen and Nauta, 136–145.

55 De Visser 2009, p. 119.


2. The Vague Distinction Between Policy and Implementation

Reading the energy directives it becomes clear that general policy guidelines issued by the minister are allowed, but that these may not concern the supervisory duties of the energy regulators, such as the setting of tariffs, tariff calculation methodologies and determination of conditions for access to the energy system. The text does raise the question of what policy guidelines the minister can adopt. In practice, it is not always easy to distinguish which guidelines should be considered general and which should be construed as related to energy regulatory duties, as the distinction between policymaking and policy implementation can be very difficult to make.\textsuperscript{60}

Hanretty and others have argued that a reasonable interpretation of the independence requirements would be that the allowed regulations pertain to policy choices so general that they raise no obvious controversy between the different market players, and also have no direct economic consequences for the various players.\textsuperscript{61} Following this reasoning, the minister may issue general regulations regarding national energy policy. These could stipulate, for example, that energy regulators must contribute to the pursuit of European environmental and climate objectives, they must advance national energy efficiency goals and they must provide for an adequate level of network investment and supply security.\textsuperscript{62} Apart from the question of whether these goals really are always uncontroversial, the question could be raised of whether inclusion of such general objectives adds much to the regulator’s mandate. Indeed, the European energy directives themselves already include stipulations obliging regulators to pursue these goals. However, the responsibility for the way these goals are to be achieved, such as the choice of tariff-setting methodologies and the design of regulatory procedures towards achieving these goals, lies with the energy regulator itself. The discussion below analyses how the ECJ has interpreted the European independence requirements in the European directive for the protection of personal data and in the electronic communications directives. These latter directives contain independence requirements comparable to those in the energy directives and therefore provide clues as to how the stipulations in the energy directives might be interpreted. Then, several recent rulings are discussed in which the ECJ interprets the European independence requirements in the energy directives. With these rulings, the ECJ precludes the possibility of a minister or government establishing regulations and principles relating to those powers of national energy regulators which are governed by European law.

3. ECJ Interpretation of the European Independence Requirements in Data Protection Cases

An examination of ECJ case law reveals that the Court has explained the independence requirements in European legislation on personal data protection in a broad, teleological way.\textsuperscript{63} For example, in case


\textsuperscript{59} For example, the European energy and electronic communication directives contain no specific provisions regarding the appointment procedure of board members of the regulators or rules for the sanctioning of personnel found to have violated rules on independence. The amended electricity directive stipulates that the criteria and procedure for appointments and dismissals of members of the board of directors of the national regulatory body must be further elaborated and also foresees provisions on conflicts of interest (Article 57 (5), part c of Directive (EU) 2019/944).


\textsuperscript{61} ibid, Hanretty, Larouche and Reindl, 15.


\textsuperscript{63} (n 8) Lavrijsen; (n 49) Lavrijsen; (n 10) Lavrijsen and Ottow.
C-518/07, European Commission v. Federal Republic of Germany, the Commission brought an action before the Court because it considered the German authorities responsible for monitoring the processing of personal data in the non-public sector as failing to meet the independence requirements set out in Directive 95/46/EC. Although the laws of the Länder differ, they all expressly subject these authorities to public supervision. This does not necessarily imply influencing, but according to the ECJ’s ruling, ‘the mere risk that the scrutinising authorities could exercise a political influence over the decisions of the supervisory authorities is enough to hinder the latter authorities’ independent performance of their tasks’, meaning that the stipulation of ‘complete independence’ as set out in the relevant directive cannot be regarded as fulfilled.

In this case, the ECJ also explicitly addressed how the independence requirements reconcile with the principle of democracy. Germany had asserted that a broad interpretation of the independence principle conflicted with the principle of democracy. However, in the Court’s estimation, the democracy principle does not exclude bodies from existing outside the classic administrative hierarchy and more or less independent of the government. Although these authorities must be able to carry out their duties in a way which is free from political influence, as these bodies emanate from national law, they must comply with that law and be subject to judicial review. According to the ECJ, this is sufficient to ensure democratic legitimacy.

Case C-614/10, European Commission v. Republic of Austria, continues from where the German case ended. According to the ECJ, the key issue here was to investigate whether, as the Commission argued, the Austrian policy prevented the data protection commission (the DSK, or Datenschutzkommission) from performing its duties ‘in complete independence’. In this case, the ECJ was more explicit about what it understood as functional independence, namely, the fact that the members of the DSK, under the applicable legislation, ‘shall be independent and shall not be bound by instructions of any kind in the performance of their duties’. However, it is not enough for the functional independence of the supervisory authority to be guaranteed by law; the authority must also, in actual practice, be capable of functioning independently. Any form of indirect influence that could affect the decisions of the supervisory authority must be excluded, according to the ECJ. This means, for example, that the establishment of general regulations by a ministry could be in conflict with the independence requirement if those regulations have consequences for specific cases. It is not strictly necessary, according to the ECJ, for the supervisory authority to have its own budget and personnel; Directive 95/46 does not stipulate that the authority itself must be entirely organisationally independent. The supervisory authority must, however, have at its disposal sufficient personnel and financial means to carry out its duties independently, which itself implies a certain organisation relationship with a ministry. Meanwhile, the General Data Protection Regulation has set out in greater detail how the requirements for organisational, financial and personnel independence should be implemented within the authorities for personal data protection.

4. What do the Data Protection Cases Mean for Energy Oversight?

The question can be posed as to what the rulings discussed above mean for oversight in the energy sector. In clarifying the independence requirements in the Austrian case, the ECJ referred to the fundamen-
tual status of the right to protection of personal data, which the Charter of Fundamental Rights and TFEU also mandate should be subject to independent monitoring. This seems to distinguish monitoring of data protection from other forms of oversight, such as market supervision in the energy sector.\(^\text{74}\)

Lavrijsen and Ottow argue that the relevance of these European rulings for market supervision lies in the fact that ECJ has interpreted the European independence requirements in a broad and teleological way.\(^\text{75}\) The ECJ also applied this teleological methodology in its interpretation of the requirements of independence of the supervisory authorities from market parties and their powers based on the European telecommunications directives. In case C-55/06, Arcor, the ECJ interpreted the powers of the telecommunications authorities in a broad manner.\(^\text{76}\) It held that the authorities must have the necessary power to effectively perform their duties and pursue the goals of the European directives. To this end, according to the ECJ, the authority must have sufficient flexibility to weigh conflicting interests against one another.\(^\text{77}\)

In three recent rulings, the ECJ confirmed that the independence requirements and powers of the energy regulators should be interpreted in a broad manner. In case C-378/19, Prezident Slovenskej republiky, the Court ruled that the concept of independence, ‘in its normal meaning, refers to a status that ensures that the body in question is able to act completely freely in relation to those bodies in respect of which its independence is to be ensured.’\(^\text{78}\) The Court continued by stating that the independence requirements ‘mean that the national regulatory authority must carry out its regulatory tasks without being exposed to any external influence.’\(^\text{79}\) The ECJ has acknowledged that the energy directives do not preclude the application of general policy guidelines enacted by the concerned Member State, ‘which, however, cannot affect the regulatory duties and powers referred to in Article 37 of Directive 2009/72.’\(^\text{80}\)

In this case, the ECJ confirmed that the national energy regulator must be able to exercise its regulatory duties independently and ‘on the sole basis of the public interest... without being subject to external instructions from other public or private bodies’. Guidelines issued by the minister, therefore, may not pertain to regulatory duties assigned to the national regulatory bodies by the European directive. At issue in this case, among other things, was the question of whether the government’s power to communicate its position on the public interest, via representatives of ministries, to the national regulatory body, is consistent with the European requirements on independence. Referring to the institutional autonomy of the Member States in the organisation and structuring of regulatory bodies, the ECJ argued that the fact that national provisions provide for participation by representatives of national ministries in certain price-setting procedures, does not necessarily lead to this happening, and that for this reason alone the regulatory body is not independent in exercising its tariff-related duties.\(^\text{81}\) However, to ensure full effectiveness of the European independence requirements, representatives of national ministries cannot use their participation in such price-setting procedures either to exert pressure on the regulatory body or to issue instructions that could influence decisions it makes in the context of duties deriving from the directive.\(^\text{82}\) Moreover, the rules on participation by government representatives may in no way counteract the scope and binding nature of the decisions taken by the regulatory authority in performance of its European duties.\(^\text{83}\)

This rationale and relevant considerations from the Slovak case were later also applied by the ECJ in

\(^{74}\) (n 18) Lavrijsen, 182-201.

\(^{75}\) (n 10) Lavrijsen Ottow, 419-445.

\(^{76}\) ECJ 24 April 2008, C-55/06, ECLI:EU:C:2008:244 (Arcor), para 59: “The answer to Question 3(e) must therefore be that it is apparent from Article 4(1) and (2) of Regulation No 2887/2000 that, when examining the rates of notified operators for the provision of unbundled access to their local loop in light of the pricing principle laid down in Article 3(3) of that regulation, the NRAs have a broad discretion concerning the assessment of the various aspects of those tariffs, including the discretion to change prices, and thus the proposed tariffs. That broad discretion also relates to the costs incurred by notified operators, such as interest on invested capital and depreciation of fixed assets, the calculation basis of those costs and the cost-accounting models used to prove them.”

\(^{77}\) ECJ 3 December 2009, C-424/07, ECLI:EU:C:2009:749 (Commission/Germany); Lavrijsen and Ottow (2011) p. 73-95.

\(^{78}\) ECJ 11 June 2020, C-378/19, ECLI:EU:C:2020:462 (Prezident Slovenskej republiky), para. 32.

\(^{79}\) ECJ 11 June 2020, C-378/19, ECLI:EU:C:2020:462 (Prezident Slovenskej republiky), para. 33.

\(^{80}\) ECJ 11 June 2020, C-378/19, ECLI:EU:C:2020:462 (Prezident Slovenskej republiky), para 52.

\(^{81}\) ECJ 11 June 2020, C-378/19, ECLI:EU:C:2020:462 (Prezident Slovenskej republiky), para 57-65.

\(^{82}\) ECJ 11 June 2020, C-378/19, ECLI:EU:C:2020:462 (Prezident Slovenskej republiky), para 62.

\(^{83}\) ECJ 11 June 2020, C-378/19, ECLI:EU:C:2020:462 (Prezident Slovenskej republiky), para 63.
case C-767/19, European Commission v. Kingdom of Belgium. 84 This concerned, among other things, the authority of the Kingdom of Belgium to determine the technical regulations for operation of the electricity transmission network and access to it, as well as a code of conduct regarding access to the natural gas transmission network, storage installations for natural gas and LNG facilities (liquefied natural gas). The technical regulation and code of conduct define rules, data and procedures concerning conditions and eligibility for access and connection to the national networks, as understood in the third generation energy directives. 85 The ECJ ruled that the relevant provisions of EU law stipulate that the regulating body disposes of the requisite authority to lay down or approve of these conditions, or at minimum, the methodologies by which they are established. According to the ECJ, interference in this regard by the Kingdom of Belgium deprives the regulatory body of a number of powers which it should possess in accordance with the energy directives. Here, the ECJ also made reference to previous case law concerning the independence of the regulatory authorities. 86

Recently, the ECJ ruled on the question of whether the German government’s power to establish regulations concerning the conditions in which the national authority can execute its duties (so-called ‘normative Regulierung’) is reconcilable with the European principle of independence. In an extensive conclusion referencing the rulings set out above, Attorney General Pitruzzella stated that such forms of substantive legislation are incompatible with the European independence requirements. 87 The Attorney General also stated that while the directives allow general guidelines, they offer no scope for specific instruc-

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84 ECJ, 1 December 2020, C-767/19, ECLI:EU:C:2020:984 (Commission/Belgium), para 110.
85 ECJ, 1 December 2020, C-767/19, ECLI:EU:C:2020:984 (Commission/Belgium), para 104.
86 ECJ, 1 December 2020, C-767/19, ECLI:EU:C:2020:984 (Commission/Belgium), para 108. See also ECJ, 29 October 2009, C-474/08, ECLI:EU:C:2009:681 (Commission/Belgium).
89 ECJ, 2 September 2021, case C-718/18, ECLI:EU:C:2021:662, (Commission/Germany), para 112.
90 ibid., Para 113.
91 ibid., Para 116.
92 ibid., Para 126.
parliamentary influence.\textsuperscript{93} In addition, the Court addressed the German government’s argument that the principles established in the Meroni ruling, of 13 June 1958,\textsuperscript{94} are also applicable when EU law ascribes powers to independent national bodies.\textsuperscript{95} According to those principles, powers can be conferred upon such authorities only if the EU legislature has in advance adopted sufficient stipulations regarding their precise duties and competences. According to the German government, this same obligation also ‘arises from the principles of democracy and rule of law, which form part of the fundamental political and constitutional structures of the Federal Republic of Germany, which, in accordance with Article 4(2) TEU, the EU must respect.’\textsuperscript{96} In regard to this argument, the ECJ observed that, assuming all the relevant case law also applies to the conferring of powers upon national authorities, the powers of the national authorities are in line with the case law. According to the Court, the powers of the national authorities, indeed, are executive in nature, with their execution grounded upon a specialised and technical assessment of factual realities.\textsuperscript{97} In addition, in exercising these powers, the authorities are subject to the principles and rules defined in a detailed regulatory framework established in EU law which limits their discretion and prevents them from making political choices.\textsuperscript{98}

V. Limits of Ministerial Guidelines

From the above, it follows that the national energy regulator must have the capacity to independently exercise the regulatory powers ascribed to them by European law, such as the setting of tariffs and the fixing or approving of methodologies for calculating tariffs and technical conditions for connection and access to the energy system and for support services. The power to define methodologies for calculating rates and technical conditions constitute generally binding rules. The regulatory authority must be capable of exercising these duties independently.\textsuperscript{99} In the draft Energy Act, the Minister of Economic Affairs and Climate elaborates a vision in which the technical conditions and tariff structures are determined by the network operators themselves, with the ACM no longer defining these contractual conditions and tariff methodologies, but only approving them. This seems to imply that the ACM does not have the power to define rules, but can only approve of conditions that the law requires network operators to apply in their agreements. Even if the ACM’s power changes to an approval authority, it would be in line with the European case law discussed above for the ACM to take responsibility for the substance of the tariff-setting methodologies and conditions. This implies that the ACM must have the capacity to conduct an integrative assessment, to review and if necessary, to propose revisions to the relevant methodologies and conditions. The decision to approve such methodologies and conditions therefore has, de facto, the same effect as a generally binding rule, if the methodologies and conditions are binding and can be repeatedly applied by the network operators in their relationship with connected parties.

As discussed, the government may establish no guidelines or rules concerning national regulatory authorities’ exercise of their powers deriving from EU law. The case law of the ECJ assumes that the powers of the national supervisory authorities are executive in nature and grounded upon a technical and specialised assessment. This does not seem to have been based on extensive research. Although the powers of the national authorities involve complex technical and economic assessments, and they are to a large extent dictated by the regulatory framework established in EU law and especially by the European network codes adopted by the Commission (see par. 7), there is nonetheless often substantial discretionary freedom.\textsuperscript{100} In exercising their powers, the authorities must further interpret vague concepts such as efficiency, cost-effectiveness and a high level of universal service provision and reliability. Doing so requires them to constantly balance the goals of the energy trilemma. We therefore see here a clear

\textsuperscript{93} ibid, Para 126.
\textsuperscript{94} ECJ, 13 June 1958, case 9/5, EU:C:1958:7 (Meroni/High Authority).
\textsuperscript{95} ibid, Para 96 and Para 131.
\textsuperscript{96} ibid, Para 131.
\textsuperscript{97} ibid, Para 132.
\textsuperscript{98} ibid, Para 132.
\textsuperscript{99} Trade and Industry Appeals Tribunal 6 June 2007, ECLI:NL:CBB:2007:BA7163. Compare ECJ 29 October 2009, C:274/08, ECLI:ECLI:C:2009:673 (Commission/Sweden) in which the ECJ ruled that by not making the national authorities responsible for either fixing network tariffs or approving of the methodologies used to calculate them, the Swedish government had failed in its obligations under Art 23 (2a) of Directive 2003/54/EC.
\textsuperscript{100} Huhta 2021, p. 260.
tension between European law and the way the legality principle is interpreted in the Netherlands. In the German case, too, the German government points to an area of tension between the principle of normative regulation and the wide margin of discretion possessed by the national authority. The principle of ‘normative Regulierung’ requires the execution of powers by the national authorities to be structured in advance (‘vorstrukturiert’) to ensure that the chain of democratic legitimacy is not broken, as required by German constitutional law.\(^{101}\) Indeed, according to the normative Regulierung principle, such regulatory powers do not belong to an independent authority.

VI. Comments on the Design of Independent Energy Oversight in the Netherlands

In light of the above, it is clear that the current authority of the Minister of Economic Affairs and Climate to issue ministerial regulations concerning the powers of the ACM deriving from European law are incompatible with the European requirements for independence as interpreted by the ECJ. This concerns the power to establish technical conditions and tariff structures for regulation of the network operators of the energy system (Article 26b E Act 1998, Article 12 Gas Act). The minister’s initial intention to issue further regulations concerning the powers of the ACM exacerbates the conflict with European law.\(^{102}\) By invoking the authority of political decision-making to intervene, the minister had created considerable scope in the draft law to control elements of tariffs and access conditions (the applied tariff setting methodologies, support services, transmission and connections) by general administrative regulation. In an increasingly complex market with a widening field of players (aggregators, energy companies, active customers) it is important for the independent supervisor to be able to reach impartial and objective decisions and have sufficient authority to intervene if competition is impeded or consumer interests are at risk. Recently a new draft Energy Act was published, which was brought more in line with European Law. Nevertheless, the draft Act still provides the basis for the ministry to regulate certain elements of the tasks of the network operators and the tariff methodologies. These elements, amongst others, concern the principles for the allocation of costs to different groups of network users. As these basic principles have redistributive effects and impact the affordability of energy tariffs, they go beyond a pure techno-economic assessment. Therefore, it seems understandable why the ministry wants to regulate them. However, after the judgements of the ECJ, it is not clear to what extent the minister is allowed to regulate these basic cost allocation principles, while allowing the regulator sufficient autonomy to implement them by setting cost calculation methodologies. EU law needs to provide more clarity on the division of responsibilities between the ministries on the one hand and the regulators on the other hand.\(^{103}\)

VII. Other Interpretations of the Principle of Democracy

It follows from the analysis above that EU law has gradually restricted the institutional autonomy of the Member States in the design of independent market supervision in the energy sector. Not only has the political independence of the supervisory authorities increased, the authorities must now also possess the necessary discretionary powers to make legal and economic choices framed largely, though not entirely, by European directives and regulations. Their powers can include the establishment of generally binding rules and the authority to comprehensively review and to approve general rules proposed by the network operators. These powers are at odds with the way the Netherlands and Germany have traditionally interpreted the principles of democracy and legality.\(^{104}\) Although it is important to critically examine the assignment of regulatory powers to authorities that operate at arm’s length from political influences, the identified threat of an undemocratic element to these powers should not be exaggerated. The assignment of such powers to independent au-


\(^{102}\) The draft law and the draft memorandum of explanation were published on the Dutch government web portal “Overheid nl”. Also the amended version of the draft law is published on this site.

\(^{103}\) Huhta 2021, p. 261.

\(^{104}\) (in 19) Broeksteeg, 170-182.
Authorities can even be brought in line with the principle of democracy. For this, first, it is important that independent authorities never operate entirely independently from political power. In exercising their authority, independent authorities remain bound by European and national rules. Representative bodies still monitor their main policy lines, because existing accountability mechanisms remain in force, such as the minister’s right to be informed and annual reporting requirements. Second, it is important that the assignment of powers to oversight authorities in the energy sector ensure that economic and legal choices can in fact contribute to the effective application of European and national law. The authority must often balance complex economic, legal and technical issues, such as in defining a methodology for valuation of capital costs of the energy networks, on which it would be difficult or impossible to reach consensus at the political level. An expert authority, having the knowledge and expertise to base judgements on complex legal and economic assessments, is better positioned to make such choices autonomously, transparently and impartially. This provides a better guarantee of a consistent, predictable and impartial application of the law. The result being that the objectives of legislation are better achieved and the will of the people as set out in law is better served.

As discussed above, both EU law and national law offer scope for a different, less traditional interpretation of the principles of democracy and legality. It is important to do justice to the essence of these principles, namely that the people should have equal opportunity to influence decision-making on rules and policies, and that any intervention in the private sphere of the citizenry must have a basis in law. However, the legislator is not required to set out every detail in law. It is possible for independent authorities to have regulatory powers, provided that adequate checks and balances are built in to guarantee that national authorities exercise their powers in a balanced manner and with respect for the will of the legislator. Accountability to democratically elected bodies still plays a role in control of the authorities, but these procedures are interpreted in another, wider, manner – in broad outline. As emphasised by the ECJ, a different interpretation of the principle of democracy entails, at least, that the legislator defines the objectives, duties and powers of the national authority; that the authority provides accountability to political powers by submitting annual reports; and that the authority is subject to review by an independent court. The court is the final station in guaranteeing that the law, and thus the rule of law, and the principle of democracy are respected.

In addition, the regulatory authorities in the energy sectors are increasingly subject to European control processes and must adhere to a rather detailed European legislative framework. For example, the regulatory authorities can inquire to the Agency for the Cooperation of Energy Regulators (ACER) as to whether a decision taken by an authority is in compliance with the European directives and European guidelines. ACER can advise and, if its advice is not acted upon, the European Commission can, in some cases, even block national decisions. The national authorities increasingly cooperate within ACER too. For example, under the ACER umbrella, national authorities comment on each other’s decisions, they conduct peer reviews of one another’s best practices, and they submit advice to the Commission regarding proposals for European legislation. The national authorities are also working together within ACER on the preparation of proposals for European network codes; these are technical regulations for access to and operation of cross-border networks. These are ultimately to be adopted by the European Commission, and subsequently further elaborated by the national authorities in collaboration. Extensive consultation with all involved stakeholders is taking place as part of the proposal preparation process. Moreover, national courts can refer questions to the ECJ for a preliminary ruling if, when assessing national decisions for implementation of European leg-
islation, doubts arise about the correct application of European law.

In addition to European control and accountability procedures, the ACM adheres to transparency practices in its regulatory decision-making and provides direct accountability to the interested parties (a form of public or social accountability). One of the ways it does this is by involving stakeholders. Interested parties get the opportunity to participate in decision-making processes, and they can express their views on consultation documents. They can also comment on draft decisions, including through the uniform public preparatory procedure or through special legal provisions enacted to ensure that interested parties have opportunity to get involved. If the authority does not follow transparency practices, interested parties can submit the decisions to the courts, which in recent years have been increasingly rigorous in their reviews of ACM decisions.\(^\text{113}\)

Participation, transparency and accountability, as well as the opportunity for court review, promote the authority’s lawful interpretation of its powers, while also fostering support among stakeholders for the choices made by the authority.\(^\text{114}\) As such, the actions of the independent authority are democratically legitimated not only by the law and traditional democratic accountability mechanisms, but also via other means of control. As already discussed, these new, in part replacement, accountability mechanisms, do justice to the principle of democratic legitimacy, as they legally entrench citizens’ influence on government policy. This does not mean there is nothing to improve in the way the regulatory authority must provide accountability. For example, the role of the minister in overseeing the supervisory authorities needs to be clarified in light of the European requirements, specifically, clarification is needed of what is and is not included under the minister’s authority to issue general guidelines both at the European and national levels.\(^\text{115}\) The Netherlands Council of State has also pointed out the need for clarification of the system responsibility of the minister. In consultation with the Parliament and the Senate the government needs to take stock of areas where further agreements are needed on what specific aspects the ministers most directly involved can be called on to provide accountability. For example, the Minister of Economic Affairs is currently responsible for deciding what new tasks towards acceleration of the energy transition should and should not be assigned to state holdings. A recent critical report by the Court of Audit concluded that the minister needs to provide much better argumentation for the choices made regarding state holdings, in view of their financial consequences and the public interests at stake. Thus, the minister should provide more clarity about the objectives underlying these choices, the public interests involved and their financial implications, so that the Parliament can exercise its supervisory role.\(^\text{116}\)

In addition, the regulatory authority itself can be stimulated to provide more explanation to parliament about its duties and activities. This could be done by asking the regulatory authority to provide annual accountability to parliament regarding its priorities, activities and achievement of goals. Furthermore, it should be noted that in practice, not all interested market parties will exercise their right to participate to the same extent. This can lead to government efforts to enable certain groups, such as consumers, to exercise their rights more fully, for example, by providing them with information and advice.\(^\text{117}\)

The United Kingdom has traditionally expended substantial effort to involve consumers in regulatory procedures, for example, with the regulator establishing consumer panels or setting up consumer organisations. A nuanced approach is called for in this regard. The type of consumer involvement and participation that is desirable has to be determined on a case-by-case basis, depending on the procedural circumstances and topic.\(^\text{118}\) Due to the lack of clear rules regarding European procedures for establishing network codes and restrictive admissibility conditions for direct judicial protection before the European courts, stakeholders have only limited ability to hold

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115 Council of State, Ministeriële verantwoordelijkheid: Ongevraagd advies van de Afdeling advisering: June 2020, W04.20.0135/3, 66-68.

116 Court Of Audit 2021, 5-6.


the bodies involved in drafting network codes – the ACER, the Commission and the European Network of Transmission System Operators for Electricity (ENTSO-E) – accountable for taking their interests and submitted feedback into consideration. Although the earlier-mentioned European developments do provide extra assurance that the authorities will apply EU law consistently, opportunities remain to improve these procedures as well, to make more effective stakeholder participation possible.

VIII. Conclusion

The scope of ministerial authority over the European powers of the independent energy regulators is restricted by EU law. Within the limits prescribed by EU law, these regulatory authorities enjoy a wide margin of discretion and policy freedom. They are required to exercise their powers in a context of constant tension between the three goals of the energy trilemma, which require them to weigh interests and balance objectives. Because of this, the European developments towards a politically independent regulatory authority with discretionary, regulatory, powers is at odds with the way the democracy principle and the legality principle have traditionally been interpreted in the Netherlands and Germany. However, this contribution has argued that the latter principles do offer scope for a different interpretation than the more traditional one of the principle of legislative supremacy. A condition, however, is that adequate accountability mechanisms must be built in to provide citizens a legal guarantee that they can have a say and that the regulatory authority can be held accountable by the courts. Independence then does not mean that the regulatory authority is not accountable and cannot be held accountable. The European rules for market supervision are shifting increasingly towards a checks and balances approach in which a mix of political, public and legal accountability instruments ensures that the independent supervisory authorities exercise their regulatory powers in a lawful and reasonable manner.

Analysis of the independence and accountability of the energy regulator must consider the complex, multi-level and multi-actor context in which the regulatory authority operates. This intersection of forces should serve as the starting point for discussions of how the role and function of the different accountability mechanisms can be effectively shaped, without infringing upon the independence of the regulatory authority. Salient here is the fact that the influence of EU law has grown much stronger than many politicians and academics foresaw. It is therefore also important for national parliaments to keep a sharp eye on European developments in market oversight. National parliaments need to critically examine whether European regulatory processes provide adequate procedural and monitoring guarantees, given that regulatory powers are, in large part, beyond the reach of ministerial responsibility. Under a checks and balances approach, traditional accountability mechanisms, such as ministerial responsibility, are interpreted differently, and implemented more in broad outline. This development requires that the role and breadth of ministerial responsibility be clarified both at the European and national levels, whereby the minister’s existing powers are also implemented in a better and more effective way, such as for example, when assigning public tasks to state holdings. Regulatory authorities are required to translate key general policy rules into more specific technical and economic rules in a process that can involve the balancing of interests. For that reason, a sound interpretation of the checks and balances approach requires that all involved stakeholders have sufficient legal and factual opportunities to participate in the regulatory process, both at the national level and at the European level.

119 (n 112) Kohlbacher and Lavrijsen, 2.
120 ibid.