Power generation regulatory practices in major European countries

by Mr. Jacopo Gasperi
Managing Partner at Eptalex – JgLegal in Milan

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Outline

1. Legal framework of the European Union

2. European Authority

3. Power Generation Regulation in the major European Countries
1. Legal framework of the European Union

• The European Union membership implies, from the Member States, the conferring legislative powers of the matters specified in Treaty on the Functioning of the European Union (TFEU in force since 2009).

• According to Article 4 TFEU, the energy sector belongs to the category of concurrent legislative competence between the European Union and Member States; that means that Member States can act only if the EU has chosen not to do so.
Critical issues in the field of energy for Europe:

- increasing import dependency;
- limited diversification;
- high and volatile energy prices;
- growing global energy demand;
- security risks affecting producing and transit countries;
- the growing threats of climate change;
- slow progress in energy efficiency;
- challenges posed by the increasing share of renewables; and
- the need for increased transparency, further integration and interconnection on energy markets.
European energy policy – EU Legislation

• A variety of measures aiming to achieve an integrated energy market, security of energy supply and sustainability of the energy sector are at the core of the European energy policy.

• The regulation on power generation in the European Union develops on the basis of primary legislation enacted by the EU Council and the European Parliament, supported by the European Agency for the Cooperation of Energy Regulators.

• These regulations are then transposed and implemented in the various Member States.
Legal basis of the energy policy in Europe:
Article 194 of the Treaty on the Functioning of the European Union (TFEU).

Article 194 – TFEU - Energy
“1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

(a) ensure the functioning of the energy market;
(b) ensure security of energy supply in the Union;
(c) Promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
(d) promote the interconnection of energy networks.
Article 194 – TFEU – Energy (continued 2)

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).
3. By way of derogation from paragraph 2., the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.”
Other specific provisions affecting energy policy are:

- **TFEU**: Article 122 TFEU (security of supply); Articles 170-172 TFEU (energy networks); Article 114 TFEU (internal energy market); Articles 216-218 TFEU (external energy policy).

- **Protocol 37** (coal);

- **Euratom Treaty** (serves as the legal basis for most European actions in the field of nuclear energy);
Mechanism for regulation in EU member countries

- UE
  - Art. 194 TFUE
    - Regulations, Directives and Decisions
      - European countries
        - National regulatory practices

• For the European Union is of particular relevance the issue of renewable energies; one of the most important examples of a supranational regulation at the European level is the Renewable Energy Directive (2009/28/EC).

  
  o establishes an overall policy for the production and promotion of energy from renewable sources in the EU.

  o requires the EU to fulfill at least 20% of its total energy needs with renewables by 2020 – to be achieved through the attainment of individual national targets.

  o All EU countries must also ensure that at least 10% of their transport fuels come from renewable sources by 2020.
The Renewable Energy Directive (2009/28/EC) (continued 2)

• The Directive promotes cooperation amongst EU countries (and with countries outside the EU) to help them meet their renewable energy targets. This cooperation can take the form of:
  - statistical transfers of renewable energy;
  - joint renewable energy projects;
  - joint renewable energy support schemes.

• Biofuels and bioliquids are instrumental in helping EU countries meet their 10% renewables target in transport. The Renewable Energy Directive sets out biofuels sustainability criteria for all biofuels produced or consumed in the EU to ensure that they are produced in a sustainable and environmentally friendly manner.

• Companies can show they comply with the sustainability criteria through national systems or so-called voluntary schemes recognised by the European Commission.

- Each Member State, in fulfilling their obligations under the European Directive 2009/28/EC, has drawn up and published its national action plan.

- Individual EU countries have different available resources and their own unique energy markets. This means that they will have to follow distinctive paths when it comes to meeting their obligations under the Renewable Energy Directive, including their legally binding 2020 targets. In their national action plans, they explain how they intend to do this.

Each plan covers:

• individual renewable energy targets for the electricity, heating and cooling, and transport sectors;

• the planned mix of different renewables technologies;

• policy measures to achieve national targets including cooperation between local, regional, and national authorities;

• any planned statistical transfers and/or joint projects with other countries;

• national policies to develop biomass resources;

• measures to ensure that biofuels used to meet renewable energy targets are in compliance with the EU's sustainability criteria.

• The Directive specifies national renewable energy targets for each country, taking into account its starting point and overall potential for renewables. These targets range from a low of 10% in Malta to a high of 49% in Sweden.

• EU countries set out how they plan to meet these targets and the general course of their renewable energy policy in national renewable energy action plans.

• Progress towards national targets is measured every two years when EU countries publish national renewable energy progress reports.
2. European Authority

• Among the bodies charged with the regulation in Europe, jointly the Commission and the Parliament, in 2010 was established the European Agency for the Cooperation of Energy Regulators (ACER, based in Slovenia) (EC Regulation n. 713/2009), which began its work in March 2011.

• As monitoring body with an advisory role, the Agency shall make recommendations to the Commission regarding market regulation and the priorities for the transmission/transport infrastructure.
2. European Authority (continued 2)

• ACER helps ensure the single European market in gas and electricity functions properly. It assists national regulatory authorities in performing their regulatory function at European level and, where necessary, coordinates their work.

• More specifically, ACER:
  o complements and coordinates the work of national regulatory authorities;
  o helps formulate European network rules;
  o where appropriate, takes binding individual decisions on terms and conditions for access and operational security for cross border infrastructure;
2. European Authority (continued 3)

ACER:
• advises European institutions on issues relating to electricity and natural gas;

• monitors the internal markets in electricity and natural gas and reports on its findings; and

• monitors wholesale energy markets to detect and deter market abuse, in close collaboration with national regulatory authorities (it took on this function in 2012 under EU Regulation 1227/2011 on wholesale energy market integrity & transparency (REMIT).
2. **European Authority** (continued 4)

- ACER can issue non-binding opinions and recommendations to national energy regulators, transmission system operators, and the EU institutions.

- ACER can take binding individual decisions in specific cases and under certain conditions on cross-border infrastructure issues.

- Upon request from the European Commission, ACER submits draft framework guidelines which serves as basis for the drafting of network codes. The network codes only become binding after comitology procedure involving Member States and the European Commission.
3. Power Generation Regulation in the major European Countries

(e.g. Italy, France, Germany and England)
Power Generation Regulation in Italy

At primary legislation level, the Italian Constitution deals with the energy sector:

Art. 117

“1. Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.

...........

3. Concurring legislation applies to the following subject matters: ....... national production, transport and distribution of energy;...”
• The production and sale of electricity in Italy is governed by provisions that are matters of law (and therefore are enacted by legislative bodies provided in the Constitution: State and Regions) and others who have regulatory character (i.e. they are issued by sector authorities legislatively recognized).

• The Authority for electricity, gas and water system is an independent body established by Law n. 481/1995 with the task of protecting the interests of consumers and to promote competition, efficiency and deployment of services with adequate levels of quality, through the regulation and control activities.
• With the Decree n. 201/11, converted into Law n. 214/11, the Authority have also been attributed regulation and control functions in the field of water services. With the Decree n. 102/2014, the Authority was also assigned control functions in the field of district heating and cooling, with powers of inspection and sanction too.

• In general, resolutions defined by the Authority do not introduce distinctions between sources and types of plant, except in cases where the primary law expressly provides benefits. In particular, this is the case of renewable sources and/or high efficiency cogeneration.
### Summary of the main legislative and regulatory aspects indispensable for the production of electric energy.

<table>
<thead>
<tr>
<th>Access to system services</th>
<th>Who regulates the service</th>
<th>Who provides the service</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Permissions</strong></td>
<td>Regions or State</td>
<td>Regions, State or local authorities</td>
</tr>
<tr>
<td><strong>Connections</strong></td>
<td>Authority</td>
<td>Distributions companies or Terna S.p.A.</td>
</tr>
<tr>
<td><strong>Transport and dispatching</strong></td>
<td>Authority</td>
<td>Distributions companies or Terna S.p.A.</td>
</tr>
<tr>
<td><strong>Measure</strong></td>
<td>Authority</td>
<td>Distributions companies or Terna S.p.A.</td>
</tr>
</tbody>
</table>

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<thead>
<tr>
<th>Sale or exchange of energy</th>
<th>Who regulates the service</th>
<th>Who provides the service</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Energy connection</strong></td>
<td>Authority</td>
<td>Free market or GSE</td>
</tr>
<tr>
<td><strong>Metering</strong> (as an alternative to the sale)</td>
<td>Authority</td>
<td>GSE</td>
</tr>
<tr>
<td><strong>Incentives</strong></td>
<td>Incentives</td>
<td>Ministry of Economic Development</td>
</tr>
</tbody>
</table>
• Only national legislation may provide for simplification and incentives for plants powered by renewable sources; they are excluded from the regional or local initiatives and tax breaks.

• Law defines the high-efficiency cogeneration, while Authority’s resolutions regulate in detail the rules governing the matter, as well as define electrical energy accumulation systems.

• The Authority has also promoted many initiatives in support of electricity producers: Help Desk for energy consumers and Conciliation Service; audits with regard to network operators and producers.
Power Generation Regulation in France

• The French regulatory framework is made up of various laws, which were adopted in the wake of the EU legislative packages.

• The most recent and important parliamentary laws are the French Energy Code, issued in 2011 with the clear objective of bringing together the various oil, gas and electricity legal provisions into one piece of legislation and the French Environmental Code.

• Unlike what happens in Italy and in Germany, France Regions lack separate legislative authority and therefore cannot write their own statutory law. Accordingly, the primary legislative competence in the field of energy belongs exclusively to the French Parliament.
• In France the "Commission de Régulation de l’Énergie" (CRE) is an independent administrative authority created by the law of 10 February 2000, the Electricity Act 2000 (Loi du 10 février 2000 relative à la modernisation et au développement du service public de l'électricité). CRE regulates the energy sector in France, in particular the French electricity and gas networks and markets.

• Under the provisions of the Code of Energy, which clarified the European Directives concerning the European Internal Market of electricity and gas, CRE has powers which are traditionally devolved for independent administrative authorities responsible for regulating a market or a sector open to competition characterised by the presence of public operators.
CRE Powers:

- powers of decision, approval or authorisation (system operators, contribution to the public electricity service, etc.);
- dispute settlement and sanctions relative to access to the electricity and gas networks (CoRDiS);
- dowers of proposal (tariffs for the use of public electricity grids, contribution to the public electricity service, etc.);
- information and investigative powers with stakeholders;
- advisory powers (tariffs, regulated access to incumbent nuclear electricity, etc.);
- additional power (processing of tenders for electricity generation).
As part of a regulatory "auxiliary" authority provided for in Articles L 134-1 and L 134-2 of the Code of energy, CRE has the power in the electricity and gas sectors to take regulatory decisions regarding:

- the missions of electricity and gas network operators (transmission and distribution) regarding exploitation and development of networks as well as those of the operators of liquefied natural gas facilities and those of the operators of underground storage of natural gas;

- conditions of connection to electricity and natural gas networks;

- conditions of access and use of electricity and gas networks, as well as use of liquefied natural gas facilities;

- implementation and adjustment of appeal programs, supply and consumption and the financial compensation for differences in terms of electricity;
CRE has the power in the electricity and gas sectors to take regulatory decisions regarding (continued 2):

• contracts or purchase protocols for losses or the reservation of power of the electricity transmission system operator and contracts or purchase protocols for gas required for the operation of gas networks and liquefied natural gas facilities;

• the principles of account separation;

• the method of identification of costs referred to in Article VII of the L 337-14 of the Code of energy;

• regarding electricity, the rules of calculation and adjustment of the rights of suppliers to regulated access to incumbent nuclear electricity.
Power generation regulation in Germany

• In Germany, Energy Regulation is mainly subject to the Energy Industry Act (Energiewirtschaftsgesetz - hereinafter „EnWG") which is Federal Law.

• The new EnWG dealing with the general structure of electricity and gas markets came into effect on 29 April 1998 and is directed towards the liberalization and deregulation of the German electricity and gas markets with the intention to lower prices for electricity and gas to a competitive level within in the European common market.

• The amending law serves to implement the EU Directive concerning common rules for the internal market for electricity into national law, in particular by changing the Energy Industry Act of 1935 and the Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen - hereinafter „GWB"). The EnWG aims to achieve a safe, reasonably-priced and ecological-oriented energy supply for the public benefit (§ 1 EnWG).
• In accordance with the EU Directive, the EnWG lays down objective and non-discriminating principles for the taking up of energy supply and the construction of power plants and power lines.

• Due to Art. 21 (2) of the EU-Directive, under the new EnWG every undertaking intending to take up power generation or power supply is free to construct power plants or power lines.

• According to § 3 (2) EnWG, the permission to supply energy may only be rejected if the applicant does not have the necessary personal, technical or economical productivity or its activities would lead to less favorable conditions of supply for the entirety of customers in the market or to disadvantages in the remaining supply area of the existing supplier. Thereby the objective of a secure, low-priced and environment-protecting energy supply shall be adequately considered.
• **No authorization is required** to induct electricity in power grids of electricity undertakings and to supply customers beyond the public energy supply, as far as the supply mainly results from plants using renewable energies, cogeneration-plants or plants run by industrial undertakings for meeting its own requirements.

• In Germany, the **authority which deals with the regulation of the energy sector** is the “**The Bundesnetzagentur**” for Electricity, Gas, Telecommunications, Post and Railway, which promotes effective competition in the regulated areas and ensures non-discriminatory access to networks. It protects important consumer rights and is also the root certification authority under the Electronic Signatures Act.
• **The Bundesnetzagentur** (Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway) is a separate higher federal authority within the scope of business of the Federal Ministry of Economics and Energy, and has its headquarters in Bonn.

• The Bundesnetzagentur's core task is to ensure compliance also with the Energy Act (EnWG) and their respective ordinances. In this way, it guarantees the liberalisation and deregulation of the market for energy too, via non-discriminatory network access and efficient system charges.

• To achieve its regulatory aims, the Bundesnetzagentur has effective procedures and instruments at its disposal, including rights of information and investigation along with the power to impose graded sanctions.
In the area of energy, the Bundesnetzagentur ensures:

- the most secure, low-priced, consumer-friendly, efficient, and environmentally sustainable supply of electricity and gas possible for the general public;

- effective and genuine competition in the supply of electricity and gas, and efficient and reliable operation of energy supply systems for the long term;

- implementation and execution of Community law on energy supply, and

- efficient approval proceedings to adapt the German extra-high voltage network to the growing use of renewable energy sources.
• With entry into force of the Energy Industry Act (EnWG) on 13 July 2005, the Bundesnetzagentur (BNetzA) and the respective regulatory authorities at state level (LRegB) took up their regulatory activity in the field of energy and gas supply.

• **The Bundesnetzagentur** performs tasks and executes powers which under the EnWG have not been assigned to the regulatory authorities of the German Länder.

• **The regulatory authorities of the German Länder** are responsible for regulating power supply companies with fewer than 100,000 customers connected to their electricity or gas networks und whose grids do not extend beyond a federal state's borders.
Power Generation Regulation in UK

- Energy in Great Britain is generally a reserved matter for the UK Government, many of the mechanisms to help deploy greater levels of renewables are matters for Devolved Administrations.

- The UK Government is working closely with the Devolved Administrations in Wales, Scotland and Northern Ireland who have a key part to play in meeting UK’s overall target. The Devolved Administrations are keen to increase the use of renewable energy.
Ofgem

• **Ofgem** is the Office of Gas and Electricity Markets in United Kingdom. It is a non-ministerial government department and an independent National Regulatory Authority, recognised by EU Directives.

• Ofgem’s **principal objective** when carrying out its functions is to **protect the interests of existing and future electricity and gas consumers.** It does this in a variety of ways including:
  o promoting value for money;
  o promoting security of supply and sustainability, for present and future generations of consumers, domestic and industrial users;
  o the supervision and development of markets and competition;
  o regulation and the delivery of government schemes.
Ofgem (continued 2)

• Ofgem works effectively with, but is independent of, government, the energy industry and other stakeholders within a legal framework determined by the UK government and the European Union.

• Ofgem regulatory activity can be grouped around four main themes:
  o promoting value for money;
  o promoting security of supply;
  o promoting sustainability and delivering government programs.
Conclusion

Power generation regulation as takes place in Italy is specific of the Italian legal order and does not apply to other nations took to compare; however, from the analysis carried out, it is clear that regulatory structures are comparable and similar to several European Union countries.
Thank you - Questions

Jacopo Gasperi
Eptalex - Jglegal
Beirut, Milan, Dubai, Abu Dhabi, Johannesburg, Cape Town

Address:
Via Melegari, 1,
20122, Milano
Italy
Tel: +39 33 49 98 64 73
Email: milan@eptalex.com
Website: www.eptalex.com

Sources and references:
www.autorita.energia.it; Testo Unico ricognitivo della Produzione Elettrica (TUPE); www.terna.it;