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REGULATION OF THE ENERGY SECTOR IN FRANCE AND ITS JUDICIAL REVIEW

Jan Gola

University of Wroclaw, Poland
Email: golajan@op.pl

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Abstract

This paper concerns the activity of the French regulatory authority. The French Energy Regulatory Commission (Commission de Régulation de l'Energie) is an independent public authority, which aims at ensuring the proper functioning of the market of gas and electricity. Its activity safeguards proper operation of the electricity and gas market in France. The makeup, structure and independence of CRE comply with the UE requirements for regulating infrastructural sectors. Attention will be paid to its tasks concerning access to public networks of electrical energy and natural gas installations. The competences in terms of market regulation in France will be characterized. The catalogue of administrative decisions of regulatory nature will be presented, among others, concerning the rules for connecting to the network and operating system tasks. Particular attention will be paid to judicial review of those decisions exercised by the Court of Appeal in Paris (Cour d'Appel de Paris).

Keywords: Energy Law, French Law, Regulation of Infrastructure Sectors

1. Introduction

In the social market economy, infrastructural sectors play a significant role. Their proper operation affects development of the economy as well as security and public order of a state. In France, one of the most important regulatory bodies is the French Energy Regulatory Commission (Commission de Régulation de l'Energie, CRE). It is responsible for operation of the gas and energy sector. The main objective of the paper is presentation of the role of the CRE in the social market economy as well as competences of this regulatory body operating in the electricity sector in France.

The paper will discuss CRE's role, characteristic features and judiciary instruments available to this body. Furthermore, the aim of the paper is to place the above-mentioned body of the French economic administration in the pan-European system for energy sector regulation. It is essential to analyze available legislation which applies to the institution. CRE is counted among the most effectively operating bodies in the above-mentioned sectors in the European Union. At this point, note that its activity is strictly connected with the European single market operation standards. It is because restriction of monopolies of the member states in the energy sector is dependent on new regulations aimed at protecting national economies. Even more so, protection of the sector is important because of its significance and specific character. Its potential and specific consequences for the economy and the society is largely dependent on

how effective CRE is in pursuing its objectives. It may have a positive impact on the competition and limitation of various types of pathologies in the energy and gas sector. CRE may carry out its tasks indicated by the legislator in legal acts owing to its guaranteed financial, organizational and decision-making independence. It fulfills its responsibilities and influences the operation of entrepreneurs on a market by using legally permitted measures i.e. administrative decisions. Here note that it would not be possible if it was not for well-worded and structured structural solutions of CRE presented below in the paper.

The core research method applied in the paper is the functional analysis method used to analyze how law works in practice was also used. Sources of French law and literature on the energy sector regulation law were also analyzed. In addition, a formal and dogmatic method allows for identifying the content of applicable legal standards (including the rights and obligations of the body described in the paper and the entities administered by the body).

An analysis of French legal standards may contribute to continuing research in the commercial administration and to the application of a comparative method in order to formulate some interesting conclusions. In addition, it may also encourage Polish researchers to take up the topic related to the operation of energy sector regulatory entities also in other EU states.

2. European Union - Energy – France

France, as a UE member state, is obligated to introduce EU law regulations into the domestic legal order. It also comes with the fact that CRE's activity plays a role in building the European energy market which combines competition, security and sustainability in the whole EU (Szydlo, 2012). Also note that CRE is a very active member of the Council of European Energy Regulators (CEER) and the Agency for Cooperation of Energy Regulators (ACER). Furthermore, it is strongly engaged in building the European single energy market and monitoring wholesale markets. CRE maintains relations with its European counterparts with whom it works on setting out the rules for the operation of the European single market. CRE is also involved in operating several CEER working groups. Also note global presence of CRE, apart from its activity on the EU single market. CRE is a member of the International Confederation of Energy Regulators (ICER) operating to facilitate dialogue and collaboration of regulatory bodies from five continents to work out joint solutions of the key challenges to the sector. Works of the confederation are also focused on security of energy supplies, sustainable development, competition and good regulatory practices (for CRE activities, see Figure 1).

Energy security itself means security of supplies of fuel and energy at a level guaranteeing that the needs of individual European Union states are met and at prices affordable in economic terms, with the assumption of optimum use of power resources and via diversification of sources and directions of crude oil, liquid and gaseous fuels supply (Dlugosz, 2013). Proper functioning of the internal energy market requires the cooperation of individual regulators from European Union Member States (De Brabandere and Gazzini 2014). Such cooperation may be exemplified by the ACER (Kozak-Hamela, 2013). There is a need for development of a uniform energy policy at the European Union level that will be demonstrated by the existence of a uniform energy security management system encompassing a system of activities and measures aimed at achieving a sufficient level of security (Mack, 2014).

Energy security is defined in confrontation with some categories of risks that may arise from the political and economic situation of a given state (Heffron, 2015). They may result from the intentional actions of a state, an organization and even terrorist groups. The issue of energy security of the European Union contributes to the weakness of the Community demonstrated by the lack of internal cohesion concerning the Common Energy Policy (Naseem, 2017). There is a need to establish a basic cooperation framework at the European Union level that would pertain to economic relations in the energy industry. This is the only way in which the European Union may find itself among the states with a decisive voice in global energy policy (Talus, 2013).

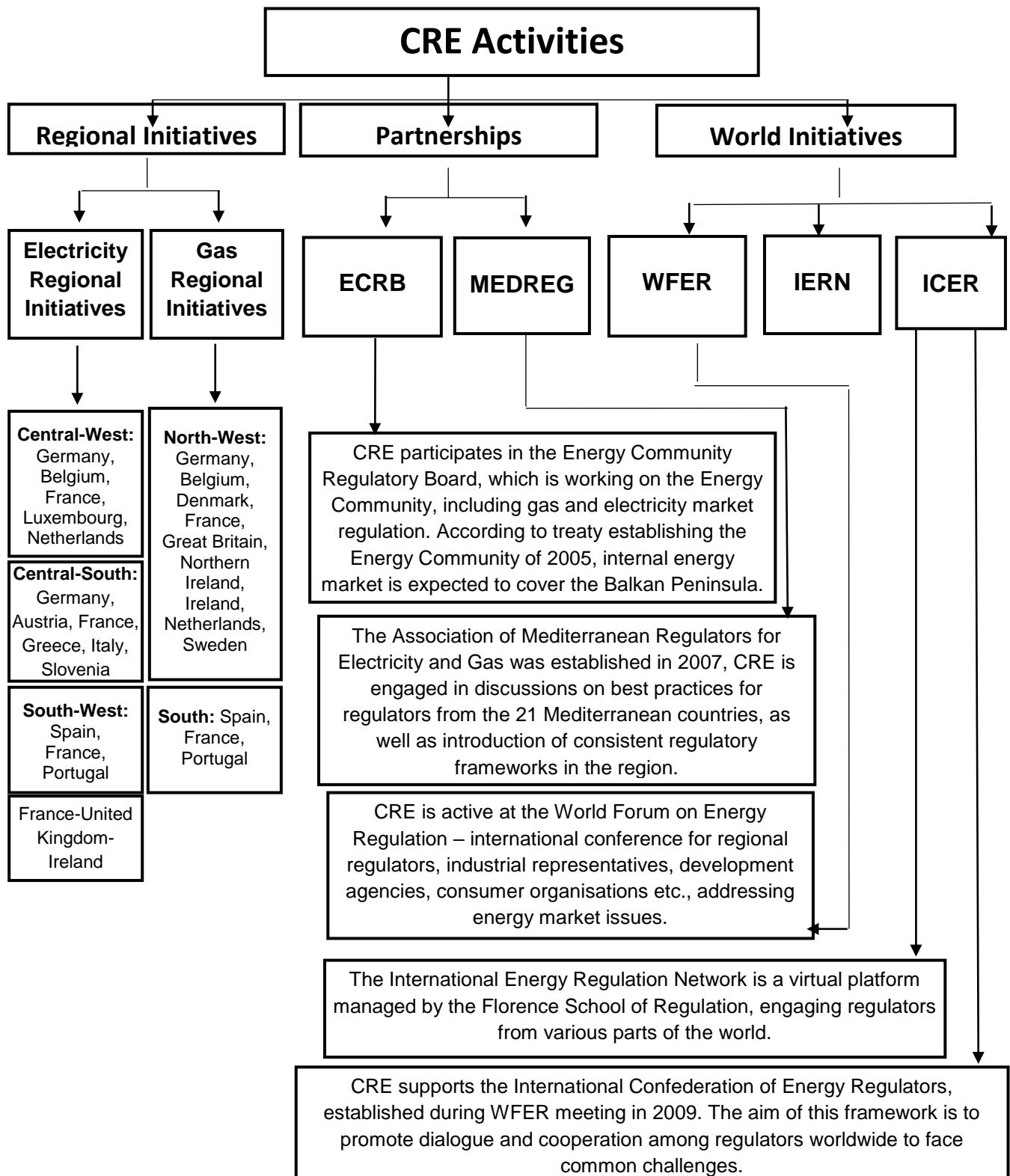


Figure 1. A brief review of CRE activities

Source: Commission de Régulation de l'Energie (2018)

Figure 1 shows a large commitment of CRE to the functioning of the pan-European system of regulation of infrastructure sectors. Only the intertwined relations between public administration bodies that are responsible for a given market in one of the EU Member States can guarantee the implementation of regulatory objectives and ensure the proper functioning of entities in a given sector. Mutual exchange of experiences, insights and presenting joint projects impacts the effectiveness of regulatory actions at the Community and international levels. The significant role of CRE in building the regulatory system should be assessed positively, and the initiatives of this body confirm its independence in relation to public authorities.

It is noteworthy that the energy security of the state is one of the basic assumptions of not only the energy policy of a state, but also of European energy policy. It is a component of the energy policy of each Member State harmonized with the EU policy. A number of EU legal acts refer to the issue of ensuring energy security. Their common assumption is to guarantee the security of supplies of all energy carriers while simultaneously respecting the principles of competition in the internal market and national markets.

Importantly, note that CRE is obligated to work closely with the EU bodies, also by maintaining permanent relations with the European Commission. Specifically, the activity of CRE is controlled by:

- the General Directorate for Energy (DG ENER) responsible for development and implementation of the European energy policy.
- the General Directorate for Competition, responsible for developing and implementing the rules for competition in the European Union.
- the General Directorate for Justice and Consumers (DG JUST) responsible for preparing and implementing consumer protection measures in the European Union.
- the General Directorate for Neighborhood Policy and Enlargement Negotiations (DG NEAR) responsible for implementing the policy of enlarging the European Union and assisting neighborhood countries through projects and programs (Commission de Régulation de l'Energie, 2018).

It is also important that, according to the community regulations, the EU energy policy is aimed at promoting sustainable, secure and inexpensive energy also through: ensuring effective operation of the energy market; ensuring security of energy supplies in the EU; promoting energy effectiveness and energy savings as well as development of new and renewable energy sources; and promoting mutual connections of the energy networks to guarantee solidarity of the member states (Szafranski, 2014).

In case of sources of law on which the activity of CRE is based, it may be divided into two categories - EU law standards and French law standards (Jones, 2016). The most important pieces of the EU legislation directly applicable to the electrical energy market are:

- Directive 2003/54/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC;
- Directive 2009/73/EC of the European Parliament and the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC;
- Regulation (EC) No 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators;
- Regulation (EC) No 714/2009 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 1775/2005 of 13 July 2009 on conditions for access to the network for cross-border exchanges in natural gas and repealing Regulation (EC) No 1775/2005 of 13 July 2009 (Leal-Arcas and Wouters, 2017).

On the other hand, the key pieces of legislation at the community level which apply to the energy sector are:

- Energy Code (Code de l'énergie) of 2010;
- The act on Modernizing and Developing Public Electrical Energy Services (relative à la modernisation et au développement du service public de l'électricité) of 2000;
- The act on Gas and Electrical Energy Market and Public Energy Service (relative aux marchés du gaz et de l'électricité et au service public de l'énergie) of 2003;
- The act on Transition into Green Energy (relative à la transition énergétique pour la croissance verte) of 2015.

The above testifies to the fact of an extensive catalog of sources of law regarding the energy sector in the French juridical system. It seems that it is necessary to pass a single legal act, the purpose of which would be to complement, unify and ensure consistency of its application. The current standards are characterized by an imprecise subjective and objective scope. De lege ferenda, it will be important to unify the system of French energy law, which will be more transparent. The need for changes in this area is undoubtedly a consequence of the often occurring lack of effectiveness of existing solutions.

3. The French Energy Regulatory Commission – the structure

The French regulatory body concerned is characterized by an interesting organizational structure which has supports fulfilment of its public functions. In the CRE structure, there is:

- The College of the Commissioners (le Collège des Commissaires) and
- the Committee for Settling Disputes and Imposing Sanctions (le Comité de règlement des différends et des sanctions, "CoRDIS").

The College is made up of 9 members appointed for a 9-year term of office: the President, 2 Vice-Presidents, and 6 members (Commission de Régulation de l'Energie, 2018). CoRDIS is made up of 4 members, including 4 counsellors of state and 2 counsellors of the French Cassation Court (Cour de Cassation). Note that the President of the College is appointed by the presidential decree while the two vice-presidents are appointed by the National Assembly and the Senate, respectively. Furthermore, the other two members are also appointed by the above-mentioned bodies, respectively, while one member is appointed by the President of the Economic, Social and Environmental Council. A member of the College and two representatives of the electrical energy and natural gas consumers are also appointed by a decree of the President of the Republic of France. Abuse of authority in the energy sector should be prevented by having non-renewable mandate of the College members, whose mandate may end with their resignation or they be requested to give up their mandate in case of breaching the core rules or when prevented from performance of their responsibilities as a result of occurrence of another event. As in the case of the College, members of CoRDIS cannot be dismissed and their mandate ends in the situations as described above. Also note that, in case of CoRDIS, two members - counsellors of state - are appointed by the Vice-President of the State Council (Conseil d'Etat), while two other members - Cassation Court Counsellors are appointed by the First President of the Cassation Court.

According to the EU law, France is required that all the regulatory bodies operating in the country are state institutions independent in legal, operational and financial terms with decision-making autonomy. Such body should have its autonomous budget and must be independent from other public and private entities. According to the doctrine, the manner in which CRE members are appointed (a 9-person makeup is appointed for a 6-year term of office) and the principle that they are full-time employees, dismissed in strictly defined cases and their mandates are not renewable, are certainly important steps towards ensuring independence from the market and, at least to a certain degree, from the state authorities. However, in terms of decision-making, it is the French Ministry of Finance that influences the operation of the

regulator. It is the Ministry that has the actual powers to interfere with the activity of the regulator on the basis of general rules, e.g. the rules common for the operation of the administration or on the basis of regulations which apply to the specific sector. Consequently, they can be resorted to at any time whenever convenient from the political point of view. For this reason, CRE is not fully and transparently independent (Nowak, 2010).

The CRE structure does not raise any objections and is similar to many other regulatory authorities in the European Union. Also, the sphere of its activity related to issuing administrative decisions does not contradict EU standards and norms. In addition, it should be emphasized that at present there is a juridical sphere, in which the major role in the supervision of legal acts issued by a regulatory body is fulfilled by the decisions of common courts guided by the principles of economy, which is found as frequent phenomenon in the Member States of the European Union.

4. The French Energy Regulatory Commission – responsibilities and tasks

CRE's mission is to ensure and safeguard proper operation of the gas and electricity market. The key CRE tasks are performed by the College and CoRDIs performs CRE tasks such as imposing sanctions and settling disputes related to the access to and use of the public electricity and natural gas networks. One of CRE's core tasks is to guarantee the right of access to the public electrical grid and to the network and system of natural gas transmission and distribution (Cameron, 2007). Furthermore, CRE ensures proper operation and development of the electricity grid and of the LPG network. Note that CRE is the guarantor of independence for the entities managing networks. Regulatory activities on the energy market are among the key functions of CRE to ensure a progressive opening of the market while maintaining the balance between public tasks and competitors. In addition, CRE evaluates sales of energy by smaller businesses and monitors demand for energy from new electricity producers on the market. In addition, CRE assesses consumer tariffs as well as supervises the market. CRE may also run proceedings looking into the reasons or causes of certain behaviors or deeds as well as impose sanctions. CRE performs its network management responsibilities (approving investment programs, discharging from imposed supply requirements). In addition, it follows the principle of accounting independence of vertically integrated businesses.

The basic measure available to CRE is an administrative decision. In the area of energy, CRE may take regulatory decisions in the following areas: operating systems, the rules for connecting to the grid/system, access to and use of systems. Note that the French legislator awarded CRE the right to demand that companies take steps require to unbundle their transmission/distribution activities from commercial activity such as production and/or sale of electrical energy or gas. In addition, the regulator has the right to collect any necessary information on unbundling in a company (Nowak, 2010).

CRE makes decisions on settling disputes related to access to the electrical grid and gas network, electricity and gas distribution, etc. and may impose sanctions. Here, CoRDIs is the competent authority. CRE imposes sanctions onto entrepreneurs operating in the energy sector. They may imposed also in case of breaching provisions of common law or breaching a CRE decision on access to the public electricity grid. CRE may impose two categories of sanctions: monetary sanctions and sanctions consisting in refusing, for a specified period, access to the electrical grid or to the natural gas system.

Also note that CRE has the right to submit proposed tariffs (e.g. a tariff for using/access to the public grid) or take measures to ensure security and reliable operation of the grid. CRE may take steps to obtain sectoral information or runs "investigative proceedings". On request of the competent minister, CRE may move to take actions related to running proceedings for awarding a public contract. However, the decision in this respect is still made by the competent minister. CRE also consults concepts and plans which concern the energy sector (Nowak, 2010).

An important role is played by the institution of court control of CRE decisions. In this respect, a decision on settling disputes may be appealed against by filing an appeal to the Court of Appeal in Paris (Cour d'Appel de Paris). Party/parties may appeal from decisions imposing

sanctions to the Council of State (Conseil d'Etat). In conclusion, it should be noted that the central government administration body in question is not completely independent from the influence of enterprises operating on the market, which should be assessed negatively. The French legislator should introduce juridical mechanisms concerning greater transparency of the body's activities and eliminate the conflict of interest that may threaten independence. It should be remembered, however, that a positive role in restricting the freedom of the body's operation is played by judicial control of decisions exercised by an independent court, which is the manifestation of the existence of a democratic state of law in France.

5. Conclusion

The French Energy Regulatory Commission plays a very important role in the French economic system. Its activity safeguards proper operation of the electricity and gas market in the country on the River Seine. The makeup, structure and independence of CRE comply with the UE requirements for regulating infrastructural sectors. It is through limiting the state monopoly that the competition can grow and pathologies can be limited in the sector. On the other hand, the difficulty of the regulatory mission in the energy domain comes from the fact that CRE is required to follow specific rules affecting operation of the energy sector so that it could be of transitory nature. CRE contributes to protecting public order and security and the nature of its activities is actually similar to delivery of the regulatory as well as the policing and restricting functions. Note that, in France, CRE is only a part of a general mechanism which shapes the electrical energy and gas sector. There are also other entities in the sector whose competencies permit them to participate in the process. As mentioned in the paper, the Minister of Economy plays an essential role in regulating the sector.

In consequence, one can conclude that the control by regulatory authorities plays a major role in the social market economy. It enables the correct development of businesses operating in the energy, as well as in telecommunications, railway and aviation sectors. Judicial revision has a positive impact on the limitation of shortcomings that appear in these crucial fields. An independent body can ensure the implementation of the fair competition rule fostering economic development (Hepburn, 2018).

Concluding, the complexity of economic mechanisms requires an extended and transparent system for maintaining correct operation of the energy sector regulatory bodies in France. It is one of the foundations of a contemporary democratic state of law which guarantees delivery on the principles of legality and economic freedom. It was demonstrated that the mechanisms available to the French Energy Regulatory Commission comply with the European energy regulation law and may have a positive impact on entrepreneurs' behavior on the market.

Finally, note that one of CRE's objective is to influence the society as one of its responsibilities is monitoring and promoting competition. It is important that, for the energy market transformation process, it is the attitude of energy sector clients that counts as their awareness in exercising their rights is growing, contributing to pushing the energy sector to reform, stressing that it is to serve them and not vice versa.

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