

## THE INDEPENDENCE OF NATIONAL REGULATORY AUTHORITIES AND THE EUROPEAN UNION ENERGY TRANSITION

LAURA KASCHNY  AND SASKIA LAVRIJSEN\* 

**Abstract** National regulatory authorities (NRAs) play a key role in energy transition from fossil fuels to renewable energy sources. A recent judgment of the Court of Justice of the European Union has clarified the requirements of NRA independence under European Union (EU) energy law. The Court classified the exclusive competence of NRAs to fix network tariffs as purely technical assessments of factual realities. This article challenges this assumption and examines whether the technical administrative tasks of NRAs can in fact be separated from political choices. It also explores the delineation of competences between NRAs and national governments at the EU and national levels, as exemplified by the Netherlands and by the proposed Dutch Energy Act.

**Keywords:** European Union energy law, energy transition, national regulatory authorities, independence, network tariffs, gas phase-out, integration of renewable energy sources, affordability, Electricity Directive, Dutch energy law.

### I. INTRODUCTION

In a number of recent judgments,<sup>1</sup> including *Commission v Germany*,<sup>2</sup> the Court of Justice of the European Union (CJEU) has clarified the independence requirement of national regulatory authorities (NRAs) under the energy law of the European Union (EU), which requires NRAs to be independent of both political and private bodies. In *Commission v Germany* the Court held the German Energy Industry Act (*Energiewirtschaftsgesetz*) incompatible with the independence guarantees of the German NRA, *Bundesnetzagentur*, and confirmed that Germany had failed to transpose various aspects of the EU Energy Directives of the Third Energy Package properly.<sup>3</sup> The European

\* PhD Candidate, Tilburg Institute for Law, Technology and Society (TILT), Tilburg Law School, Tilburg University, Tilburg, The Netherlands, [L.S.Kaschny@tilburguniversity.edu](mailto:L.S.Kaschny@tilburguniversity.edu); Professor, Tilburg Institute for Law, Technology and Society (TILT), Tilburg Law School, Tilburg University, Tilburg, The Netherlands, [S.A.C.M.Lavrijssen@tilburguniversity.edu](mailto:S.A.C.M.Lavrijssen@tilburguniversity.edu).

<sup>1</sup> See Case C-378/19 *Prezident Slovenskej republiky* ECLI:EU:C:2020:462; Case C-767/19 *Commission v Belgium* ECLI:EU:C:2020:984; Case C-718/18 *Commission v Germany* ECLI:EU:C:2021:662.

<sup>2</sup> *Commission v Germany* *ibid.*

<sup>3</sup> *ibid.*, paras 103–136.

Commission raised concerns regarding the lack of autonomy of NRAs when conducting key responsibilities, including their duty to fix or approve network tariffs.<sup>4</sup> The CJEU confirmed the Commission's position and declared the statutory rules laid down by the German legislator incompatible with EU law and an infringement of NRA independence.<sup>5</sup> The Court's findings are considered to link the previous CJEU case law on NRA independence with the exclusive competences of NRAs for the first time.<sup>6</sup>

This judgment has reignited legal discussions<sup>7</sup> concerning the independence of NRAs with regard to democratic legitimacy, governmental control and judicial review.<sup>8</sup> One central finding of the CJEU, however, has received relatively little attention:<sup>9</sup> the Court held that the 'powers reserved to NRAs are executive powers that are based on the technical and specialist assessment of factual realities'.<sup>10</sup> The judgment further establishes that NRAs are subject to principles and rules established at the EU level, which limit their discretion and prevent NRAs from making political choices.<sup>11</sup> This suggests that the Court considers the competence of NRAs to be limited to questions of a purely technical and apolitical nature and that are prevented from policy-making by the legislative framework that governs NRAs at the EU level.

The soundness of the Court's finding is challenged by the very nature of the tasks that are delegated to NRAs. Key responsibilities include their duty to fix and approve network tariffs or their methodologies.<sup>12</sup> For consumers, network tariffs manifest in network charges, which—alongside supply costs and other surcharges such as taxes—often amount to approximately one-third of the final electricity bill.<sup>13</sup> Network charges reflect the costs related to the usage, maintenance and the investment needs of energy infrastructure, such as distribution networks. The tariffs and methodologies according to which network operators, such as distribution system operators (DSOs) and

<sup>4</sup> *ibid.*, paras 85–90.

<sup>5</sup> *ibid.*, paras 103–133.

<sup>6</sup> A-K Kaufhold, 'Complete, Yet Limited: The Guarantee of Independence for National Regulatory Authorities in the Energy Sector: *Commission v. Germany*' (2022) 59(6) CMLRev 1853, 1865.

<sup>7</sup> See S Lavrijssen, 'Naar een Europees onafhankelijkheidsbeginsel: De verdere constitutionalisering van de onafhankelijkheid van de energietoezichthouder' (2021) *Toezicht op de energiesector 1*; S Lavrijssen 'Independence, Regulatory Competences and the Accountability of National Regulatory Authorities in the EU' (2019) 1 OGEL 1.

<sup>8</sup> See most recently, K Huhta, 'C-718/18 *Commission v. Germany*: Critical Reflections on the Independence of National Regulatory Authorities in EU Energy Law' (2021) 30(6) *EEELR* 255; S Lavrijssen, 'Towards a European Principle of Independence: The Ongoing Constitutionalisation of an Independent Energy Regulator' (2022) 16(1) *CCLR* 25; Kaufhold (n 6).

<sup>9</sup> For partial discussion, see Huhta *ibid.*

<sup>10</sup> *Commission v Germany* (n 1) para 132.

<sup>11</sup> *ibid.*

<sup>12</sup> Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [2019] OJ L158/125 (Electricity Directive) art 59(1)(a).

<sup>13</sup> See also European Commission, Report from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: Energy prices and costs in Europe, SWD(2020) 951 final.

transmission system operators (TSOs), can calculate their charges are generally fixed or approved by NRAs. This aims to ensure fair access for market participants and to prevent abuse of a dominant position by network operators that are natural monopolies.<sup>14</sup> The Court thus failed to highlight that network tariffs are important instruments which contribute to the realization of more general objectives of network regulation and energy policy.<sup>15</sup> Hence, these decisions of a seemingly purely technical nature have direct consequences for consumers and the quality of energy services.

The central question addressed in this article is whether the technical administrative tasks of NRAs can in fact be separated from political choices. It clarifies the responsibilities and nature of NRA competences and highlights potential regulatory gaps which need to be clarified by the EU legislator or national governments.

This article examines whether the exclusive competences of NRAs can be divided neatly into the ‘technical’ and the ‘political’, and what consequences such a distinction (or lack thereof) has for the role of NRAs in fixing and approving network tariffs. It also considers which responsibilities remain with the national governments of the Member States and clarifies the interaction between NRA and governmental competences in the context of the central challenges of the energy transition. The article does not address questions of democratic legitimacy, judicial review, parliamentary control of maladministration or issues concerning the structural organization of NRAs, which are outside its scope and have been the focus of many previous discussions.<sup>16</sup>

The article proceeds as follows. Section II examines the CJEU’s classification of NRA tasks as ‘technical assessments of factual realities’ in the context of the liberalizing intentions of the EU legislator when it comes to network industries. It then considers whether the critique of legal scholarship is justified in that NRAs cannot be considered apolitical but execute their discretionary powers through the prioritization and balancing of competing interests that govern their exclusive competences. The article then explores what room for manoeuvre remains with national governments. Section III applies the suggested legal framework and potential delineation of competences to the Dutch energy sector, and in particular the discretion that the proposed Dutch Energy Act<sup>17</sup> grants the Dutch NRA, *Autoriteit Consument en Markt* (Authority for Consumers and Markets; ACM). The Dutch Act aims to transpose the EU Electricity Directive but has been continually delayed—in

<sup>14</sup> See also C Banet, ‘Electricity Network Tariffs Regulation and Distributive Energy Justice: Balancing the Need for New Investments and a Fair Energy Transition’ in I del Guayo et al (eds), *Energy Justice and Energy Law* (OUP 2020) 83. <sup>15</sup> *ibid* 89.

<sup>16</sup> See most recently, Huhta (n 8); Lavrijssen (n 8); Kaufhold (n 6).

<sup>17</sup> For the current proposal for the Dutch Energy Act ‘Energiewet’, see Tweede Kamer, ‘Energiewet’ (13 June 2023) <<https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A36378#wetgevingsproces>>

part due to the ongoing amendments concerning NRA independence. These amendments are the consequence of recent CJEU case law, which took a narrow view of NRA autonomy and broad ministerial powers incompatible with EU law.<sup>18</sup> The article then explores the rights reserved to NRAs to set priorities and balance competing interests: (1) within areas of exclusive NRA competence; and in interaction with (2) EU energy objectives; or with (3) the general public interest in energy services. It is concluded that decision-making within the exclusive competence of NRAs cannot be considered purely ‘technical’ but is in fact political. This is of particular relevance in the context of the ongoing energy transition, ie the simultaneous decarbonization, decentralization and democratization of the energy sector, which requires close cooperation of NRAs and national governments. The latter cannot encroach on the autonomy of NRAs, but government responsibility manifests itself through general policy guidelines that clarify how the energy transition is to be executed. The role of the CJEU is to define the nature of cooperation of NRAs and Member States in promoting the targets and objectives of the energy transition through their respective spheres of competence.

## II. NRA INDEPENDENCE

The following section first explores the role of NRAs in the liberalization of network industries and how CJEU case law has described NRAs as only conducting technical and economic assessments. It shows that the discretion that NRAs are granted under EU law must be understood as exclusive competences. This section then explores the critique that the position of the CJEU is facing, particularly the difficult or impossible delineation between ‘technical’ administrative tasks and ‘political’ ones. Finally, it analyses the discretion that EU law and CJEU case law grant national governments when issuing general policy guidelines, and explores the extent to which such decisions are subject to substantive *ex-post* control.

### A. NRA Independence: Competence in Technical Assessments of Factual Realities?

Since the early 2000s, the EU has obliged Member States to guarantee the independence of NRAs in many network industries including the energy sector, but also in the fields of telecommunications and railways.<sup>19</sup> While the development of NRA independence has been asymmetric and differs from

<sup>18</sup> See *Prezident Slovenskej republiky* (n 1); *Commission v Belgium* (n 1); *Commission v Germany* (n 1).

<sup>19</sup> For a detailed overview, see Kaufhold (n 6); S de Somer, *Autonomous Public Bodies and the Law – A European Perspective* (Edward Elgar 2017) 23–100; outside of network industries independent regulatory authorities can also be found in national antitrust-, data protection- and national banking supervisory authorities.

sector to sector, it is rooted in the legislative intent to liberalize network industries that formerly were largely dominated by State monopolies.<sup>20</sup> In the context of network industries, NRA independence therefore primarily seeks to secure the completion and integration of a functioning internal market.

The energy sector is one of the fields pioneering political independence for NRAs, which has evolved through a series of regulatory packages which have periodically revised EU energy regulation.<sup>21</sup> Following the enactment of the Second Energy Package in 2003, Member States must guarantee that NRAs are able to act ‘wholly independently’ from the interests of market participants and industry.<sup>22</sup> Since 2009, in the context of the Third Energy Package, the independence of NRAs also extends to public actors and requires that NRAs have functional independence from ‘any other public entity’ or ‘any public body’.<sup>23</sup> Today, the fourth revision of EU energy regulation, namely the Clean Energy Package (2019),<sup>24</sup> reconfirms the guarantee of NRA independence from other public or private entities.<sup>25</sup> It further extends safeguards warranted under EU law to ensure the autonomy of NRAs through their organizational structure.<sup>26</sup> The currently proposed amendments within the Hydrogen and Decarbonised Gas Market Package (2021)<sup>27</sup> would extend the present independence requirements of NRAs in the electricity sector to the gas sector as well.<sup>28</sup> Consequently, the independence of NRAs from both private and public bodies grants them exclusive competence as regards the realization of the responsibilities and tasks with which NRAs are entrusted under EU law.<sup>29</sup>

<sup>20</sup> de Somer *ibid* 37.

<sup>21</sup> *ibid* 39.

<sup>22</sup> For electricity, Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37, art 23(1); for gas, Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/57, art 25(1).

<sup>23</sup> For electricity, Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55, arts 35(4)(a) and (5)(a); for gas, Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94, arts 39(4)(a) and (5)(a).

<sup>24</sup> The Clean Energy Package constitutes the fourth revision of the EU energy law framework, which aims to transition the energy sector away from fossil fuels and towards renewable energy sources. Among other legislative changes, it also includes amendments to the Electricity Directive.

<sup>25</sup> Electricity Directive (n 12) arts 57(4)(a) and (5)(a); Council Directive 2009/73/EC (n 23), arts 39(4)(a) and (5)(a)—for gas, currently still in force.

<sup>26</sup> Electricity Directive (n 12) arts 57(5)(a)–(g).

<sup>27</sup> This package specifically targets the energy transition in the gas sector and aims to facilitate the integration of renewable and low-carbon gases into the existing EU gas network.

<sup>28</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on common rules for the internal markets in renewable and natural gases and in hydrogen, 15 December 2021, COM(2021) 803 final, arts 70(4)(a) and (5)(a)–(h); the proposal also adds the possibility of Member States to apply an *ex-post* control of NRAs’ annual accounts by an independent auditor; these legislative proposals are part of the Hydrogen and Decarbonised Gas Market Package (2021).

<sup>29</sup> See also Kaufhold (n 6) 1856.

The development of EU legislation shows an increasing focus on NRA independence throughout the process of energy market liberalization, which is also mirrored in the evolution of CJEU case law. In 2008, the Court established that the sphere of influence that Member States enjoy in regulating tasks that fall under NRA competence is limited by the objectives and obligations laid down in EU law.<sup>30</sup> While this judgment applied to the telecommunications sector, in 2009 the Court also followed suit in the electricity sector, holding that the Belgian government exerted impermissible influence on activities that fell under exclusive NRA competences.<sup>31</sup> The Court confirmed its case law in a series of judgments in 2020 and 2021.<sup>32</sup> Most recently in *Commission v Germany*, the Court held that the scope of independence granted under EU law gives NRAs exclusive competence with regard to their tasks delegated under EU law.<sup>33</sup> In this judgment, the CJEU also found the executive power of NRAs to be based upon their ‘technical and specialist assessment of factual realities’.<sup>34</sup> This repeats the Opinion of Advocate General (AG) Pitruzzella, who also stated that the executive powers of NRAs do not ‘imply decision-making of a political nature’.<sup>35</sup> This confirms an often implicit presumption that tasks of NRAs are purely technical in nature with no political dimensions.<sup>36</sup>

The rationale for this is the widespread acknowledgement that the tasks of NRAs often involve scientific and economic questions that require high levels of technical, economic and legal proficiency.<sup>37</sup> The regulation reflects the view that elected politicians may lack the necessary technical skills and their decision-making may be influenced by short-term political agendas.<sup>38</sup> The independence of NRAs is aimed at furthering public interests through apolitical economic choices and the neutral support of long-term system efficiencies.<sup>39</sup>

The CJEU held that NRAs are prevented from making political choices by a detailed legislative framework at the EU level which limits their political discretion.<sup>40</sup> This legal framework regulates the pivotal role of NRAs in fixing and approving network tariffs or their methodologies prior to network operators applying these network charges to their services. Here, the

<sup>30</sup> Here, for the telecommunications sector; Case C-82/07 *Comisión del Mercado de las Telecomunicaciones* ECLI:EU:C:2008:143, para 24.

<sup>31</sup> Case C-474/08 *Commission v Belgium* ECLI:EU:C:2009:681, paras 28–31.

<sup>32</sup> *Prezident Slovenskej republiky* (n 1); *Commission v Belgium* (n 1); *Commission v Germany* (n 1).

<sup>33</sup> *Commission v Germany* (n 1) is the first judgment which deals with both the distribution of competences as well as the guarantee of independence; see also Kaufhold (n 6) 1865.

<sup>34</sup> *Commission v Germany* (n 1) para 132.

<sup>35</sup> *ibid*, Opinion of AG Pitruzzella, para 134.

<sup>36</sup> de Somer (n 19) 58.

<sup>37</sup> Lavrijssen (n 8) 31; de Somer (n 19) 62; P Nicolaïdes, ‘Regulation of Liberalised Markets: A New Role for the State?’ in D Gardien, R Muñoz and N Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Edward Elgar Publishing 2005) 23, 29.

<sup>38</sup> See also Agency for the Cooperation of Energy Regulators (ACER), ‘Report on Distribution Tariff Methodologies in Europe’ (February 2021) <[https://www.acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Publication/ACER%20Report%20on%20D-Tariff%20Methodologies.pdf](https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Report%20on%20D-Tariff%20Methodologies.pdf)>.

<sup>39</sup> *ibid* 10.

<sup>40</sup> *Commission v Germany* (n 1) para 132.

Electricity Directive stipulates that network charges shall be cost-reflective, transparent, approximated to those of an efficient network operator and be applied in a non-discriminatory manner.<sup>41</sup> However, the Directive does not provide further detail or definition of what the European Commission considers ‘basic principles’ or minimum substantive requirements.<sup>42</sup> AG Pitruzzella only quantitatively limited these principles when saying that NRAs ‘may not introduce new interests or criteria in addition to those already identified by the EU legislature’.<sup>43</sup> The CJEU agreed with the Commission that the relevant EU legal framework is supplemented by various Network Codes established by means of Commission Regulations.<sup>44</sup> These Network Codes are technical in nature and include, inter alia, harmonized rules on transmission tariff structures to ensure cross-border trade among Member States. However, given the differences in the energy infrastructure of individual Member States, these Commission Regulations must leave substantial room for NRAs to adapt to national particularities.

Thus, it is clear from the CJEU’s holdings that the so-called detailed legislative framework is in fact not very detailed at all and must be understood in the broad terms that the EU legal framework stipulates. The exclusive competences of NRAs to execute the tasks entrusted to them requires the utmost guarantees of NRA autonomy and independence. The question remains, however, whether such seemingly technical decisions do not inherently involve political choices, which the following section discusses in more detail.

### B. NRA Independence: Policy-Making through Conflict Resolution?

The findings of the CJEU in *Commission v Germany* have been criticized by legal scholars who claim that the Court fails to acknowledge that the regulatory framework of NRA competences leaves broad discretionary powers to those authorities and highlight the Court’s reluctance to flesh out the regulatory powers of NRAs.<sup>45</sup> The CJEU’s position that EU legislation offers sufficient detail to prevent NRAs from political decision-making is considered an ‘exaggeration’,<sup>46</sup> ‘questionable’<sup>47</sup> and ‘unconvincing’.<sup>48</sup> Prior to the recent wave of judgments, legal scholars had already raised concerns about whether NRA competences, which the CJEU understands as technical assessments, could in fact be separated from policy-making powers. It has

<sup>41</sup> See eg Electricity Directive (n 12) arts 31, 40, 58, 59.

<sup>42</sup> European Commission, Completing the Internal Energy Market, 13 March 2001, COM (2001) 125 final, 71.

<sup>43</sup> *Commission v Germany* (n 1) Opinion of AG Pitruzzella, para 120.

<sup>44</sup> *Commission v Germany* (n 1) para 122; in particular, Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas [2017] OJ L72/29.

<sup>45</sup> See Huhta (n 8) 260; Kaufhold (n 6) 1884.

<sup>46</sup> Kaufhold (n 6) 1884.

<sup>47</sup> Huhta (n 8) 260.

<sup>48</sup> *ibid* 262.

been noted that the range of tasks that are performed by NRAs cannot be easily classified into formalistic categories such as ‘policy-making’ and ‘implementation’.<sup>49</sup> This is based on the reality that the administrative realm is not merely technical but is deeply political and discretionary—if not *de jure* than at least *de facto*.<sup>50</sup> Thus it remains doubtful whether seemingly technical assessments of network efficiencies can be addressed without crossing the boundary between the ‘technical’ and the ‘political’.<sup>51</sup> Moreover, it has been noted that NRAs were established precisely to deny politicians the discretion to define policies and to entrust these tasks to expert regulators.<sup>52</sup>

Another important indicator that political discretion falls within the exclusive competence granted to NRAs is the principle-based approach of the EU Electricity Directive. This grants broad discretions exclusively to NRAs to define and structure the tasks entrusted to them based on the minimum standard requirements established by EU law. Such a principle-based approach is warranted considering the prevailing differences and particularities of national and local energy systems, which make complete harmonization of network charges unsuitable.<sup>53</sup> This may also be the result of a political compromise, with Member States not agreeing to the strengthening of agencies at the EU level but instead agreeing to allow for increasing EU supervision of NRAs.<sup>54</sup>

As previously discussed, the Directive lists several minimum substantive requirements that NRAs must consider, and AG Pitruzzella prevented NRAs from introducing new interests or criteria beyond those identified by EU legislation.<sup>55</sup> However, the basic principles of network tariffs cannot all be pursued simultaneously and often require a weighing of competing concerns. In the telecommunications sector, the CJEU has acknowledged this by highlighting that it is the sole responsibility of NRAs to weigh the various competing interests.<sup>56</sup> While the Electricity Directive requires NRAs to promote ‘a competitive, flexible, secure and environmentally sustainable internal market’ and to help ‘to achieve high standards of universal service’ in electricity,<sup>57</sup> the EU legislator gives no indication on how trade-offs between tariff principles should be made and how prioritization is to occur.

<sup>49</sup> L Hancher and P Larouche, ‘The Coming of Age of EU Regulation on Network Industries and Services of General Economic Interest’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP 2011) 743, 773.

<sup>50</sup> PL Lindseth, *Power and Legitimacy: Reconciling European and the Nation-State* (OUP 2010) xiii, xiv.

<sup>51</sup> S Griller and A Orator, ‘Everything Under Control? The “Way Forward” for European Agencies in the Footsteps of the *Meroni* Doctrine’ (2010) 35(1) ELR 3, 22.

<sup>52</sup> de Somer (n 19) 59.

<sup>53</sup> European Commission (n 42) 71.

<sup>54</sup> See *ibid* 125; de Somer (n 19) 81.

<sup>55</sup> *Commission v Germany* (n 1) Opinion of AG Pitruzzella, para 120.

<sup>56</sup> Case C-424/07 *Commission v Germany* ECLI:EU:C:2009:749, para 53.

<sup>57</sup> Electricity Directive (n 12) arts 58(d) and (h).

Rather, the legislation establishes a series of factors that pull in different directions and NRAs are left with the complex task of prioritizing and balancing the competing interests.<sup>58</sup> These competing interests are not solely technical—the legal mandate of NRAs entails difficult socio-economic choices which touch upon a wide range of social objectives—as further discussed in subsequent sections—and therefore carry political consequences.<sup>59</sup> The preference for certain network tariff methodologies over others may carry a political assessment that includes questions of social justice and public interests.<sup>60</sup> This politicization is exacerbated by the political choices that are inherent in the energy transition, including the phase-out of fossil fuels and the increasing integration of renewable energy sources while safeguarding affordable energy services.

### C. NRA Independence: The Role and Responsibilities of National Governments

It is thus evident that the tasks with which NRAs are entrusted cannot clearly be divided into ‘technical assessments’, which according to the Court’s understanding fall under exclusive NRA competence, and the ‘political’ sphere, which the CJEU does not sufficiently acknowledge. Therefore, the division of competences between Member States and NRAs remains blurred. This section aims to provide more clarity regarding the competence of NRAs by outlining the discretion that remains in the hands of national governments into which NRAs cannot enter.

In 2001, the European Commission established that Member States have the power to issue general policy guidelines which NRAs ultimately must translate into their tariff structure and methodologies.<sup>61</sup> Independence and autonomy only apply to the exclusive competences assigned to NRAs. According to the European Commission, EU law does not hinder Member States from issuing general policy guidelines within the scope of a national policy framework concerning aspects such as security of supply and investments in renewable energy sources.<sup>62</sup> The CJEU adopts this understanding and adds that the national legislator is not precluded from stating its position before the relevant NRA ‘on the way in which it considers that that authority might take the public interest into account’—insofar as such expressions are not binding or amount to the issuing of instructions.<sup>63</sup>

<sup>58</sup> C Graham, *Regulating Public Utilities: A Constitutional Approach* (Hart Publishing 2000) 32.

<sup>59</sup> S Lavrijssen and A Ottow, ‘Independent Supervisory Authorities; a Fragile Concept’ (2012) 39(4) *LIEI* 419, 431–2; J Black, ‘Calling Regulators to Account: Challenges, Capacities and Prospects’ in N Bamforth and P Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013) 354–388, 379.

<sup>60</sup> Lavrijssen and Ottow *ibid* 431–2.

<sup>61</sup> European Commission (n 42) 14.

<sup>62</sup> *ibid* 7.

<sup>63</sup> *Prezident Slovenskej republiky* (n 1) para 63.

However, the Court leaves the scope of ‘general guidelines laid down by the government’ undefined, beyond holding impermissible those guidelines that touch upon the tasks falling under exclusive NRA competence.<sup>64</sup> This includes ‘codes of good conduct’ and ‘technical regulations’ that define operational requirements and the conditions according to which NRAs are expected to perform their tasks.<sup>65</sup> This also applies to a ‘normative pre-structuring’ of how competing interests within the tasks entrusted to NRAs are to be balanced.<sup>66</sup> The Court further held it impermissible to lay down profit margins, depreciation options for network operators or the approval of network methodologies *a posteriori*.<sup>67</sup> The Court’s approach of negatively outlining the discretion of Member States one judgment at a time and its reluctance to define positively the responsibilities that remain with Member States raises considerable difficulties for national legislators and NRAs alike, which will become evident in the following sections.

Another important aspect that has only been briefly touched upon by the CJEU is the possibility for substantive *ex-post* control of NRA decisions by national governments.<sup>68</sup> The European Commission states that NRA independence also requires that NRA decisions are immediately binding and directly applicable without the need for the formal approval or consent of another public authority.<sup>69</sup> Moreover, the Commission establishes that NRA decisions cannot be subject to review, suspension or veto by national governments, while not precluding judicial review and appeal mechanisms in the context of maladministration and or other potential legal infractions.<sup>70</sup> While NRAs are subject to transparency requirements involving disclosure to the European Commission, to the respective national governments and to NRAs of other Member States, these parties cannot exert pressure in instances where they disagree with NRA decisions based on, for instance, matters of increased economic efficiency or public interest.<sup>71</sup>

#### D. Conclusion on NRA Independence

In conclusion, the CJEU has established that NRAs enjoy exclusive competence and autonomy in executing the tasks delegated to them under EU law. The Court, however, classifies NRA responsibilities as technical assessments of factual realities and fails to acknowledge the political discretion that NRAs have when weighing priorities and competing interests, which are inherent in the tasks entrusted to them. Considerable difficulties also arise for national

<sup>64</sup> *Commission v Germany* (n 1) para 110.

<sup>65</sup> *Commission v Belgium* (n 1) paras 93–102.

<sup>66</sup> *Commission v Germany* (n 56) para 93.

<sup>67</sup> Case C-274/08 *Commission v Sweden* ECLI:EU:C:2009:673, para 34; *Commission v Belgium* (n 31) para 28.

<sup>69</sup> European Commission (n 42) 9.

<sup>68</sup> *Commission v Germany* (n 1) para 127.

<sup>70</sup> *ibid.*

<sup>71</sup> See Hancher and Larouche (n 49) 775; Nicolaïdes (n 37) 35.

legislators from the fact that their responsibilities have not been positively defined but are incrementally fleshed out through CJEU case law. This is particularly significant in the context of the energy transition, which requires a complete overhaul of the energy sector and where political guidance is needed, as the following sections will demonstrate.

III. NAVIGATING NETWORK TARIFFS DURING THE ENERGY TRANSITION: EXAMPLES FROM THE DUTCH *ENERGIETRANSITIE*

This section analyses the previously outlined legal framework of NRA independence in the context of their duty to fix or approve network tariffs and examines whether the findings of the Court hold true or whether the critique of legal scholars is justified. It explores the competence of NRAs and the rights reserved to them to set priorities and balance competing interests: (1) within areas of exclusive NRA competence; and in interaction with (2) EU objectives; or with (3) general public interests concerning energy services. This analysis is conducted in the context of the energy transition—including the phasing-out of fossil fuels, integration of renewable energy sources and affordability of energy services—and scrutinizes the robustness of what the CJEU considers to be a clear division of competences between EU law, the national legislator and NRAs.

The Netherlands serves as a case study, where the proposed Energy Act transposing the Electricity Directive has been continually delayed. This is partly due to ongoing amendments concerning NRA independence and the continuing discussion with the Dutch NRA, the ACM.<sup>72</sup> These amendments and discussions are the consequence of recent CJEU case law, which adopted a narrow view of NRA autonomy and broad ministerial powers incompatible with EU law.<sup>73</sup>

Under EU law a core duty of NRAs is to fix or approve network operator tariffs or their methodologies, or both.<sup>74</sup> NRAs are required to establish methodologies according to which network operators calculate their network tariffs or at least scrutinize the network charges that network operators propose in their bi-yearly network development plans.<sup>75</sup> In the case of the Netherlands, the proposed Dutch Energy Act requires the ACM to determine tariff methodologies according to which network operators may calculate their network charges, unless the ACM is of the opinion that it is not appropriate to set uniform tariff rates.<sup>76</sup> In this case, the ACM is required to approve in advance the tariff calculation methods that network operators propose.<sup>77</sup> The responsibility of supervising the charges that network

<sup>72</sup> See also Lavrijsen (n 8) 27.

<sup>73</sup> See *Prezident Slovenskej republiky* (n 1); *Commission v Belgium* (n 1); *Commission v Germany* (n 1). <sup>74</sup> Electricity Directive (n 12) art 59(1)(a). <sup>75</sup> *ibid*, art 32(3).

<sup>76</sup> Dutch Energy Act (n 17) arts 3.105(1) and (2). <sup>77</sup> *idem*.

operators can raise for their services also highlights the importance of the autonomy of the ACM. As network operators are natural monopolies, they have no competitive incentive to increase economic efficiencies such as the prices charged to the network users. This is critical, as costs incurred by network operators, such as those relating to investments or system services, are often directly translated into network charges which are then imposed on households and energy end-consumers.<sup>78</sup>

Network charges constitute a significant cost to network users and, by their very nature, influence consumption behaviour.<sup>79</sup> Appropriate network tariffs must create incentives to drive network services to increasing efficiencies and remedy the lack of incentive for network operators to do so, given that they are natural monopolies. Ideally, network charges act as price signals according to which network users can adapt their consumption behaviour and drive network capacities and overall services towards optimum levels. Consumption levels above the optimal lead to increased overall network costs as the network needs to be expanded; sub-optimal consumption levels also lead to increased overall network costs due to underutilized networks. As a result, the approval of network tariffs and their methodologies have direct consequences on the quality and affordability of energy services for network users. Despite the immediate consequences of network tariffs as price signals, network charges also mirror other factors, such as the integration of renewable energy sources, the phase-out of fossil fuels and the return on investment of active customers. Seemingly technical decisions taken by NRAs therefore represent central aspects of the energy transition which have direct consequences for the promotion of a low-carbon internal energy market that needs to be sufficiently resilient against external pressures.

The Electricity Directive stipulates that network charges shall be cost-reflective, transparent, approximated to those of an efficient network operator and be applied in a non-discriminatory manner.<sup>80</sup> These criteria are based on broader network tariff principles that limit the discretion of NRAs to fix or approve network charges or when establishing the methodologies underlying network tariffs. These minimum substantive requirements also find reflection in a wide range of guidelines of the EU Agency for the Cooperation of Energy Regulators (ACER) and contributions of the Council of European Energy Regulators (CEER).<sup>81</sup> As previously mentioned, NRAs enjoy broad discretion in prioritizing and balancing these competing interests when fixing and approving network tariffs. In this regard, the following sections address the exclusive competence of NRAs, and particularly the ACM, to govern

<sup>78</sup> ACER (n 38) 27.

<sup>79</sup> *ibid* 4.

<sup>80</sup> See eg Electricity Directive (n 12) arts 31, 40, 58, 59.

<sup>81</sup> ACER (n 38); CEER, 'CEER Paper on Electricity Distribution Tariffs Supporting the Energy Transition' (20 April 2020) <<https://www.ceer.eu/documents/104400/-/-/fd5890e1-894e-0a7a-21d9-fa22b6ec9da0>>.

network tariffs and how this autonomy interacts with the overarching objectives of the energy transition.

*A. Within Exclusive NRA Competence: Cost-Reflectivity and Non-Discrimination*

One of the central tariff principle which was introduced during the liberalization of the energy sector is ‘cost-reflectivity’, ie reflecting actual costs. The rationale for doing so was that vertically integrated undertakings, ie undertakings that are involved in both the generation and distribution of energy, gain a discriminatory advantage over non-vertically integrated competitors through excessively high or monopoly tariff pricing.<sup>82</sup> Cost-reflective network tariffs thus derive from the obligation to ensure non-discriminatory access to energy distribution infrastructures, and today remain one of the essential guarantees of network tariffication.<sup>83</sup> This can be seen in the Electricity Directive, which requires network charges to ‘reflect the actual costs incurred’ insofar as these costs are incurred by ‘an efficient and structurally comparable network operator’.<sup>84</sup>

The network tariff principle of cost-reflectivity and the principle of non-discrimination are closely intertwined. Non-discrimination relates to the general principle of non-discriminatory third-party access and tariff setting, which requires that access to the grid is transparent, objective and available to all eligible customers without discrimination.<sup>85</sup> Given the limited capacity of energy grids, this duty also requires the use of objective criteria to prioritise access in cases where not all market participants are able to do so immediately. Recently, the ACM abandoned interpreting the non-discrimination principles as amounting to ‘first come, first served’ by allowing network operators to prioritize grid access for projects that reduce congestion or serve social functions such as housing development or healthcare facilities.<sup>86</sup> While the ACM aims to clarify the way in which network operators are able to prioritize projects,<sup>87</sup> it remains to be seen whether this framework prevents network operators from taking political decisions, such as becoming involved in spatial planning.

The current energy transition further challenges the traditional understanding of the principle of non-discrimination by questioning whether market participants can be excluded on the basis of overarching climate targets. In the Netherlands, the importance of this is evident because of the need to

<sup>82</sup> F Gräper and C Schoser, ‘Third Party Access’ in C Jones (ed), *EU Energy Law, Volume I: The Internal Energy Market*, 4th edn (Claeys and Casteels 2016) para 3.50.

<sup>83</sup> *ibid*, paras 3.50–3.51.

<sup>84</sup> Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast) [2019] QJ L158/54 (Electricity Regulation) art 18(1).

<sup>85</sup> Electricity Directive (n 12) art 6(1).

<sup>86</sup> ACM, ‘ACM Makes it Possible for System Operators to Prioritize Projects with a Social Function’ (2 March 2023) <<https://www.acm.nl/en/publications/acm-makes-it-possible-system-operators-prioritize-projects-social-function>>.

<sup>87</sup> *ibid*.

phase out fossil fuels as the main heating source for households. The Dutch Climate Agreement<sup>88</sup> requires the transitioning of 90 per cent of Dutch households from natural gas to sustainable energy sources by 2050.<sup>89</sup> While in 2020 up to 87 per cent of newly built houses were constructed without a gas connection, only a few thousand existing homes have transitioned to alternative heating sources such as electric heat pumps.<sup>90</sup>

Beyond the significant investment needed to reinforce the electricity grid sufficiently to support increasing loads for heat pumps, solar panels and electric vehicles, which is discussed in the next section, the phasing out of gas also carries substantial costs for network operators and, ultimately, for consumers. With increasing numbers of consumers moving away from natural gas, remaining households must bear the costs of early depreciation and maintenance of the gas grid, as well as the costs of removing now-redundant gas piping, without any direct benefit to the paying consumers.<sup>91</sup> Consequently, network users are not only paying for the cost they incur through their immediate network usage but also the substantial costs of the energy transition away from natural gas. This tension is intensifying because the increasing number of households abandoning the gas grid means that the burden of network costs is left to consumers who cannot afford to do so.

As previously said, both network tariff principles of cost-reflectivity and non-discrimination fall within the exclusive competence of NRAs, with Member States having no room for manoeuvre. Moreover, the balance between and the prioritization of both principles also lies solely in the hands of NRAs. This is also reflected in the Dutch Energy Act, which provides that the Dutch regulatory authority, the ACM, must determine the methods and conditions in accordance with which network operators connect market participants.<sup>92</sup> It also includes the possibility of network operators applying lower tariffs to certain network users as long as these conditions are applied in a non-discriminatory and transparent manner.<sup>93</sup> Consequently, the ACM has already allowed the Dutch network operator Gasunie to reflect the anticipated early depreciation of the gas grid in its current tariffs, and may also allow other network operators to do the same.<sup>94</sup>

The Dutch government, however, has reserved the right to lay down further rules through ministerial regulation regarding approval procedures for the

<sup>88</sup> Klimaatakkoord (Den Haag, 28 June 2019) (Dutch Climate Agreement) <<https://www.klimaatakkoord.nl/documenten/publicaties/2019/06/28/national-climate-agreement-the-netherlands>>.

<sup>89</sup> *ibid* C1 Built Environment; CE Delft, 'The Natural Gas Phase-Out in the Netherlands' (February 2022) 7 <[https://ce.nl/wp-content/uploads/2022/04/CE\\_Delft\\_210381\\_The\\_natural\\_gas\\_phase-out\\_in\\_the\\_Netherlands\\_DEF.pdf](https://ce.nl/wp-content/uploads/2022/04/CE_Delft_210381_The_natural_gas_phase-out_in_the_Netherlands_DEF.pdf)>.

<sup>92</sup> Dutch Energy Act (n 17) para 3.3.3.

<sup>90</sup> Delft *ibid* 14.

<sup>91</sup> *ibid* 27.

<sup>94</sup> ACM, 'ACM: GTS May Charge Costs Earlier in Order to Anticipate the Consequences of the Energy Transition' (1 February 2021) <<https://www.acm.nl/nl/publicaties/acm-gts-mag-kosten-eerder-rekening-brengen-om-te-anticiperen-op-gevolgen-energietransitie>>.

ACM's methods and conditions.<sup>95</sup> It also reserves the right to introduce more detailed rules concerning general tariff principles for distinguishing tariffs and allocating cost categories,<sup>96</sup> to the extent that the Electricity Directive or EU energy law grants it discretion to do so.<sup>97</sup> As previously seen, this is a clear encroachment upon the competences exclusively granted to NRAs and therefore incompatible with EU law and recent CJEU case law. The Dutch legislator may not draft more detailed conditions for tariff structures, nor may it subject the ACM's decisions to ministerial approval.

At the same time, the ACM does not have the competence to disconnect households from the gas network—even in cases where there are extremely low numbers of consumers, and the gas network has become unreasonably expensive. According to the Dutch Climate Agreement, this decision falls under the responsibility of municipalities, which are required to draft a district heat transition vision and implementation plans to determine long-term sustainable heating alternatives to natural gas.<sup>98</sup> It is believed that these local transition plans provide sufficient political guidance to allow network operators and the ACM to anticipate which areas will phase out gas before others. As such, network tariffs can reduce the risk of stranded investments and spread the costs of transition across a larger group of consumers. Without such information, the ACM is either not able to efficiently anticipate such developments and consumers would face unnecessarily high network charges, or the ACM is forced to take political choices in order to fulfil the tasks with which they have been entrusted.

Therefore, the more political guidance the national legislators and municipalities offer NRAs on how the gas phase-out is envisaged—including which areas are expected to be natural gas-free first and in what timeframe—the easier it is for NRAs to incorporate such information into their network tariff designs to ensure that the network regimes align with the overarching objectives of the energy transition. A lack of such political guidance results in higher network costs for consumers and the necessity of increased political decision-making by NRAs. National legislators therefore enjoy significant discretion in informing the decision-making processes of NRAs, without having to turn to more intrusive measures such as ministerial approval that arguably encroach on NRA competences and are incompatible with EU law. The question of the extent to which NRAs are bound to take political guidance into consideration when fixing or approving their network tariffs is discussed in the next section.

<sup>95</sup> Dutch Energy Act (n 17) art 3.106(3).

<sup>96</sup> *ibid*, art 3.106(3).

<sup>97</sup> *ibid*, arts 3.106(3)(a)–(b).

<sup>98</sup> Dutch Climate Agreement (n 88) C1.7 A District-oriented Approach; *Memorie van Toelichting – Klimaataakkoord*, sections 2.3.1–2.3.3 <<https://www.internetconsultatie.nl/co2heffingindustrie/document/5730>>.

*B. NRA Competence versus EU Energy Objective: Cost-Reflectivity and the Integration of Renewable Energy Sources*

Unlike the minimum substantive requirement of ‘cost-reflectivity’, the increased integration of renewable energy sources is not considered a network tariff principle and does not fall under the exclusive competence of NRAs. Nevertheless, it constitutes a crucial objective of the Electricity Directive, which requires NRAs to take ‘all reasonable measures’ in pursuit of an ‘environmentally sustainable internal market for electricity’.<sup>99</sup> Article 1 of the Directive requires Member States, NRAs and network operators to cooperate in increasing the integration of renewable energy sources. The role of NRAs in this regard is to monitor and assess the investment plans of network operators to ensure they are sufficiently integrating electricity generated by renewable energy sources and that they do so ‘in the most cost-effective way’.<sup>100</sup> Network operators are required to submit a transparent five-to-ten-year network development plan to NRAs, which indicate the investment needs that TSOs and DSOs consider necessary to future-proof the network.<sup>101</sup> These plans must not only take into consideration the integration of renewable energy sources but also consider alternatives to network expansion, such as increased use of demand response, and matters such as energy storage facilities.<sup>102</sup> NRAs are not only required to assess and monitor these plans, but they also have the authority to require amendments to them.<sup>103</sup> Such investment costs are often translated to the final consumer through network charges and therefore directly affect the affordability of energy services.<sup>104</sup>

However, the urgency of energy transition and the need to modernize existing infrastructure calls into question the extent to which these costs can be reasonably expected to be carried by the end-consumer. In many Dutch neighbourhoods, electricity grids must be reinforced and expanded to support the additional loads of heat pumps, rooftop solar panels and the charging of electric vehicles.<sup>105</sup> Creating a future-proof infrastructure, which can sufficiently promote the integration of renewable energy sources, comes with substantial investment needs due to ageing networks, increasingly distributed energy generation and grid access to remotely located renewable energy production (wind-parks, for example, are often located in less well-connected regions). The pace of the energy transition and the overall share of renewable energy sources are therefore directly related to the costs and burdens that consumers must bear. The faster and more frequently investment occurs, the more burdensome the costs become to a given generation of energy consumers. While cost-reflectivity requires

<sup>99</sup> Electricity Directive (n 12) art 58(a). <sup>100</sup> *ibid*, arts 32(3), 51(1), 58(d), 59(k) and (l).

<sup>101</sup> For DSOs, *ibid*, art 32; for TSOs, *ibid*, art 51. <sup>102</sup> *ibid*, art 51(3).

<sup>103</sup> *ibid*, arts 32(4), 59(k) and (l).

<sup>104</sup> In line with the network tariff principle of ‘cost-recovery’. <sup>105</sup> Delft (n 89) 8.

consumers to pay for the costs that they impose on the network, the question remains to what extent the costs of the energy system's transition towards renewable energy should be imposed on the current end-consumer.

In this regard, the European Commission grants NRAs significant leeway when assessing investment plans and says that while network tariffs must be cost-reflective in a general sense, this does not require a default preference for cost-reflectivity over other objectives.<sup>106</sup> The latter may include the encouragement of investment or the extension of networks.<sup>107</sup> Contrary to cost-reflectivity, however, the integration of renewable energy sources is a shared effort between NRAs, national governments and network operators, as outlined by the Electricity Directive.<sup>108</sup>

While the Dutch Climate Agreement establishes targets for reducing climate emissions by up to 95 per cent by 2050,<sup>109</sup> these objectives are at most indirectly linked to network tariffs through the responsibilities and investment plans of network operators.<sup>110</sup> It remains unclear to what extent NRAs are required to take national climate targets into account or to promote the integration of renewable energy sources through the approval of investment plans and corresponding network tariffs. While the European Commission has said that NRAs must ultimately translate the general policy guidelines of Member States into their tariff structure and methodologies,<sup>111</sup> the CJEU has held that such guidelines may not be binding or take the form of instructions.<sup>112</sup>

The Dutch Energy Act transposes the Electricity Directive by requiring network operators to submit investment plans to the NRA.<sup>113</sup> The ACM has the responsibility to assess whether a draft investment plan is reasonable and contains all necessary information.<sup>114</sup> However, in the context of TSOs, investment plans must also be submitted to and approved by the Ministry of Economic Affairs and Climate Policy to assess whether the investment plans take sufficient account of the Dutch climate targets.<sup>115</sup> The Dutch government also reserves the right to introduce more detailed regulations concerning the procedure and manner in which draft investment plans are to be assessed by the ACM.<sup>116</sup>

From the perspective of NRA independence, the Dutch Energy Act is problematic for the following reasons. The provisions mentioned above seem to indicate that the ACM is not bound by the national climate plans, but that the Dutch government reserves the right to draft detailed conditions to instruct the ACM on how to realize Dutch climate targets when assessing investment plans. Not only does this encroach on NRA competences, but it

<sup>106</sup> European Commission (n 42); see also Gräper and Schoser (n 82) paras 3.58–3.59.

<sup>107</sup> *ibid.*

<sup>108</sup> Electricity Directive (n 12) art 1.

<sup>109</sup> Dutch Climate Agreement (n 88) B4 Governance.

<sup>110</sup> Dutch Energy Act (n 17) art 3.35.

<sup>111</sup> European Commission (n 42) 14.

<sup>112</sup> *Prezident Slovenskej republiky* (n 1) para 63.

<sup>113</sup> Dutch Energy Act (n 17) art 3.35(3).

<sup>114</sup> *ibid.*, art 3.35(4).

<sup>115</sup> *ibid.*, art 3.35(2).

<sup>116</sup> *ibid.*, art 3.36(1).

also renders the ACM's decisions subject to ministerial approval and impermissible *ex-post* control. It also indicates that the Dutch government has reduced the role of the ACM to ensuring economically sound and complete investment plans, which wrongly assumes that only technical assessments fall under the competence of NRAs. It also raises the question of supremacy in cases of conflict, where TSOs must take both the ministerial assessment and the ACM's decision into account.<sup>117</sup> The Dutch legislator fails to acknowledge the discretion that NRAs enjoy under the EU Electricity Directive, including their responsibility for promoting the integration of renewable energy sources in cooperation with network operators and the national government,<sup>118</sup> and their obligation to take 'all reasonable measures' in pursuit of an 'environmentally sustainable internal market for electricity'.<sup>119</sup>

Whilst the ACM is not bound by instructions and conditions which the government may want to impose, it is bound under EU law to promote the integration of renewable energy sources and to do so in cooperation with network operators and national ministries. Thus, the ACM *is* required to take Dutch climate policy into account, though the national government may not instruct the ACM on how to incorporate climate targets into network tariff design. In the past, this has led to criticism that the ACM has not been sufficiently proactive in stimulating investment in grid expansion, which has resulted in a lack of grid capacity and an inability to integrate renewable energy sources.<sup>120</sup> However, the ACM has repeatedly called on the Minister for Climate and Energy Policy to outline a general prioritization framework that will allow network operators and the ACM to concentrate on grid expansion in certain regions—as not all areas can be expanded simultaneously.<sup>121</sup>

As with the gas phase-out policy, a clear political framework is needed to ensure that NRA decision-making aligns with the overarching objectives of the energy transition, and that investments are prioritized according to spatial planning and political priorities. While NRAs are required to take political guidelines into account when fixing or approving network tariffs or investment plans, the manner in which they do so falls within their discretion. National governments may not subject NRA decisions to ministerial approval or detailed instruction. However, more guidance is required from the EU legislator with regard to the extent to which NRAs must actively promote the integration of renewable energy sources, and the potential reviewability of NRA decisions in cases where they fail to do so.

<sup>117</sup> *ibid.*, art 3.35(4).

<sup>118</sup> Electricity Directive (n 12) art 1.

<sup>119</sup> *ibid.*, art 58(a).

<sup>120</sup> See eg R van Hest and J Kleinnijenhuis, 'Reconstruction: How Regulators Contributed to Power Grid Shortages' (*NOS*, 3 October 2022) <<https://nos.nl/nieuwsuur/artikel/2446934-reconstructie-hoe-toezichthouder-tekorten-op-het-elektriciteitsnet-mede-veroorzaakte>>.

<sup>121</sup> ACM, 'Harder Choices Needed with Regard to Grid Expansions in Order to Meet Objectives of the Energy Transition' (28 March 2022) <<https://www.acm.nl/en/publications/harder-choices-needed-regard-grid-expansions-order-meet-objectives-energy-transition>>.

## C. NRA Competence versus Public Interest: Cost-Reflectivity and Affordability

Issues of affordability are gaining increasing importance in political debate as is the urgency of a just energy transition, including the emerging notion of energy justice. The latter aims to guide energy decision-making towards the creation of a more equitable energy sector, and therefore plays an important role in ensuring that energy transition has socially acceptable outcomes.<sup>122</sup> According to energy justice principles, energy services are considered ‘affordable’ if they constitute a maximum of ten per cent of a consumer’s income.<sup>123</sup> However, the Electricity Directive does not take the affordability of network usage into account, other than in Recital 22, which aims to ensure affordable and transparent costs for consumers.<sup>124</sup> This is also in line with the overall EU energy *acquis communautaire*,<sup>125</sup> which does not safeguard affordability per se. The Commission considers affordability to be a direct consequence of a functioning internal energy market governed by market-based mechanisms.<sup>126</sup>

While affordability neither constitutes a network tariff principle nor an explicit energy objective in EU energy law, the protection of vulnerable consumers is in fact a very prominent and urgent matter, with increasing emphasis on energy poverty<sup>127</sup> and consumer rights.<sup>128</sup> Article 58(h) of the Electricity Directive expressly links consumer protection to the tasks of NRAs by requiring them to help in achieving ‘high standards of universal service’ and ‘public service in electricity supply, contributing to the protection of vulnerable customers’. Legal scholarship also links ‘universal services’ to ‘merit goods’, which are goods or services that should be accessible to all to regardless of income.<sup>129</sup> In the context of network industries, the accessibility and affordability of ‘merit goods’ falls under the responsibility of the State, as the market may not always be able to guarantee it.<sup>130</sup> The Directive clarifies that the responsibility of protecting vulnerable consumers is mainly an obligation of national governments—without any explicit reference to the role of NRAs.<sup>131</sup> The Dutch Climate Agreement requires that energy transition is ‘living-cost neutral’ for consumers,<sup>132</sup> which

<sup>122</sup> L Kaschny, ‘Energy Justice & the Principles of Article 194(1) TFEU Governing EU Energy Policy’ (2023) TEL 1–25.

<sup>123</sup> BK Sovacool and MH Dworkin, ‘Energy Justice: Conceptual Insights and Practical Applications’ (2015) 142(C) *Appl Energy* 435, 440.

<sup>124</sup> Electricity Directive (n 12) recital 22, recital 59 and art 1; Electricity Regulation (n 84) recital 2.

<sup>125</sup> The cumulative body of EU energy regulation.  
<sup>126</sup> European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2020 Report on the State of the Energy Union pursuant to Regulation (EU) 2018/1999 on Governance of the Energy Union and Climate Action, 14 October 2020, COM(2020) 950 final, 8.

<sup>127</sup> Energy poverty is not defined in EU law, but Electricity Directive (n 12) art 29 identifies a set of criteria, according to which Member States are required to define energy poverty in a national context.

<sup>128</sup> See Electricity Directive (n 12) arts 1, 3, 28, 29.  
<sup>129</sup> de Somer (n 19) 33.

<sup>130</sup> *ibid.*  
<sup>131</sup> Electricity Directive (n 12) arts 28, 29.

<sup>132</sup> Dutch Climate Agreement (n 88) C1 Built Environment.

means that the transition to renewable energy sources should not result in higher costs than current solutions.

Energy transition comes with significant expenses. The urgency and challenges of energy transition impose significant investment needs on the network without the possibility of consumers switching to more affordable services. Often, these costs cannot yet be internalized or be fully addressed by market-based mechanisms. Increases in network costs were already running the risk of escalating energy poverty in the EU,<sup>133</sup> even before the steep price rises experienced in 2022–23 following the Russian invasion of Ukraine. As previously outlined, NRAs have a certain leeway in balancing the requirement of cost-reflectivity against other interests. However, affordability is not an objective that is explicitly safeguarded under the Electricity Directive. Consequently, NRAs may not by themselves introduce the issue of affordability as a criterion—other than questions of economic efficiencies. This is also reflected in the chosen wording of the ACM's tariff communications, which aim to ensure that tariffs are 'not higher than necessary'<sup>134</sup> or are not 'unreasonably high',<sup>135</sup> rather than affordable. Also, Member States may not interfere with questions of cost allocations of tariff regimes. While the affordability of energy services is a central aspect of energy policy, NRAs may not introduce affordability measures on their own initiative.

Yet there are still options available to the Dutch government to safeguard a 'living-cost neutral' and affordable energy transition. As previously discussed, the European Commission requires the ACM to take into account general policy guidelines issued by the Dutch government provided these are not binding or in the nature of instructions. Such guidelines may address general expectations concerning the role of consumers in financing the energy transition. This also includes how vulnerable consumers are to be identified under national law and the extent to which they can be reasonably expected to carry (any of) the costs of the modernization of the energy sector. Such guidelines can also give clear indications concerning timeframes and planning policy. Such information allows the ACM to take informed decisions on cost depreciation, investment needs and how to allocate costs to different categories of consumers. Ideally, this should lead to a more equitable balance between the costs and benefits of energy transition. Additionally, the Dutch government can mitigate high network tariffs or energy bills through tax relief or the protection of

<sup>133</sup> In 2022, households paid on average 397 Euros in network costs, which for 2023 is already expected to increase to 513 Euros; see ACM, 'System Operators Expect Tariff Increases as a Result of High Energy Prices and Investments in Connection with the Energy Transition' (6 October 2022) <<https://www.acm.nl/en/publications/system-operators-expect-tariff-increases-result-high-energy-prices-and-investments-connection-energy-transition>>.

<sup>134</sup> ACM, 'ACM Sets New Tariffs for the Transmission of Natural Gas for 2023' (30 May 2022) <<https://www.acm.nl/en/publications/acm-sets-new-tariffs-transmission-natural-gas-2023>>.

<sup>135</sup> ACM (n 133).

vulnerable consumers, which do not encroach on NRA competences and allow the ACM to fix or approve network tariffs autonomously.

Thus, although NRAs may not introduce ‘affordability’ as a network tariff principle and are bound to pursue economic efficiency, Member States can mitigate high network tariffs by creating reasonable expectations concerning how the energy transition is to be conducted. Here, the protection of vulnerable consumers plays a particularly important role and requires clear safeguards under national law. National governments may also turn to subsidies for consumers living in energy poverty or to general tax relief as a way of mitigating the high costs of energy services without encroaching upon NRA competences.

#### IV. CONCLUSION

This article has considered whether the various tasks that fall under exclusive NRA competence can be divided clearly into either ‘technical’ or ‘political’ tasks and has analysed the implications of such a differentiation (or a lack thereof) for the role of NRAs in setting and approving network tariffs. The nature of the responsibilities that fall under NRA competences and those remaining in the hands of the national governments of the Member States have been clarified, delimiting the respective discretions in the context of the challenges that arise from the urgency and pressures of energy transition and in particular in the Dutch *energietransitie*.

The CJEU considers NRA duties to be technical assessments of factual realities without the exercise of political discretion, this rationale being based on the liberalization of the energy sector dating back to the early 1990s. The analysis of the development of CJEU case law and EU legislation also demonstrated an increasing focus on NRA independence and an inclination to grant them broad discretion on matters within their exclusive competence.

However, it was demonstrated that a clear distinction between ‘technical’ and ‘political’ administrative tasks of NRAs is not feasible in practice. The broad discretion that the EU legislator grants NRAs in prioritizing competing interests in fact confirms that NRA competences include political choices and policy-making related to the tasks entrusted to them. NRA decisions are also directly binding and cannot be subjected to *ex-post* ministerial approval provided no legal infractions are involved. The responsibilities remaining in the hands of national governments were then explored. It was concluded that Member States are not prevented from issuing general political guidelines as long as they are not in the nature of instructions to NRAs. However, the CJEU has only adopted an indirect, incremental and selective approach to outlining the responsibilities of national governments in this regard, which adds to the unclear boundaries between NRA and Member State competences.

Section III then explored the interaction of exclusive NRA competences with the responsibilities of national governments in the context of energy transition. This was done by applying the previously outlined legal framework to the

proposed Dutch Energy Act and the role of the Dutch regulatory authority, the ACM. First, the tasks that fall within the exclusive competences of NRAs were analysed, namely the interaction between cost-reflectivity and non-discrimination, which are central network tariff principles. Then, the exclusive competence of NRAs related to those principles was explored and the aim of the Electricity Directive to increase the integration of renewable energy sources considered. Finally, the role of NRAs in promoting overarching public interests was assessed by evaluating the role of cost-reflectivity in ensuring affordable energy services.

The following four conclusions and recommendations can be drawn from this analysis. First, NRAs have broad discretion in fixing and approving network tariffs, and it is the NRA's exclusive responsibility to prioritize some network tariff principles over others—including the societal consequences that such decisions may have. However, matters beyond the scope of fixing or approving network tariffs do not fall under NRA competence. This includes the planning and political governance of phasing out reliance on natural gas, despite its potential to lead to unreasonably high network charges. Secondly, attempts by national governments to rein in NRA competences through the imposition of conditions and the use of ministerial control are incompatible with EU law. The focus should rather be upon establishing sufficient political guidance on how Member States plan to execute energy transition, including spatial planning, the pace of fossil fuel phase-outs, alternative renewable energy sources and the protection of vulnerable consumers. Thirdly, the more political guidance the national legislators and municipalities can offer NRAs, the easier it is for NRAs to incorporate such information into their network tariff designs and to ensure that network regimes align with the overarching objectives of the energy transition. The lack of such political guidance results in higher network costs for consumers or leads to increased political decision-making by NRAs, as they are forced to take political choices without guidance from the government in order to be able to undertake the tasks entrusted to them. However, while NRAs are required to take political guidelines into account when fixing or approving network tariffs or investment plans, the way in which they do so is at their discretion. Fourthly, in addition to political guidance, national governments enjoy significant discretion in mitigating negative effects of high network tariffs without having to turn to more intrusive measures that arguably encroach upon NRA competences. This includes regulatory action to protect vulnerable consumers through subsidy schemes or more general tax relief.

As a result, the CJEU or EU legislator should recognize the political dimension of NRA tasks and further clarify the delimitation of competences between NRAs and Member States. This should include an analysis of which NRA decisions are of an implementing and which of a distributive nature. As such, questions of competence and responsibilities should be clarified, which will allow for legal certainty and consequently lead to a much-needed acceleration in the pace of energy transition.