

The cooperation among national energy regulators in Europe

Alberto Pototschnig, Deputy Director (World of Practice)

International Bar Association
Biennial Conference of the Section on Energy, Environment,
Natural Resources and Infrastructure Law (SEERIL) 2022
Milan, 18 May 2022



A long tradition of cooperation among Energy Regulators in Europe

Where it all started ...



Pippo Ranci Ortigosa
AEEG,, Italy



Jorge Vasconcelos
ERSE, Portugal

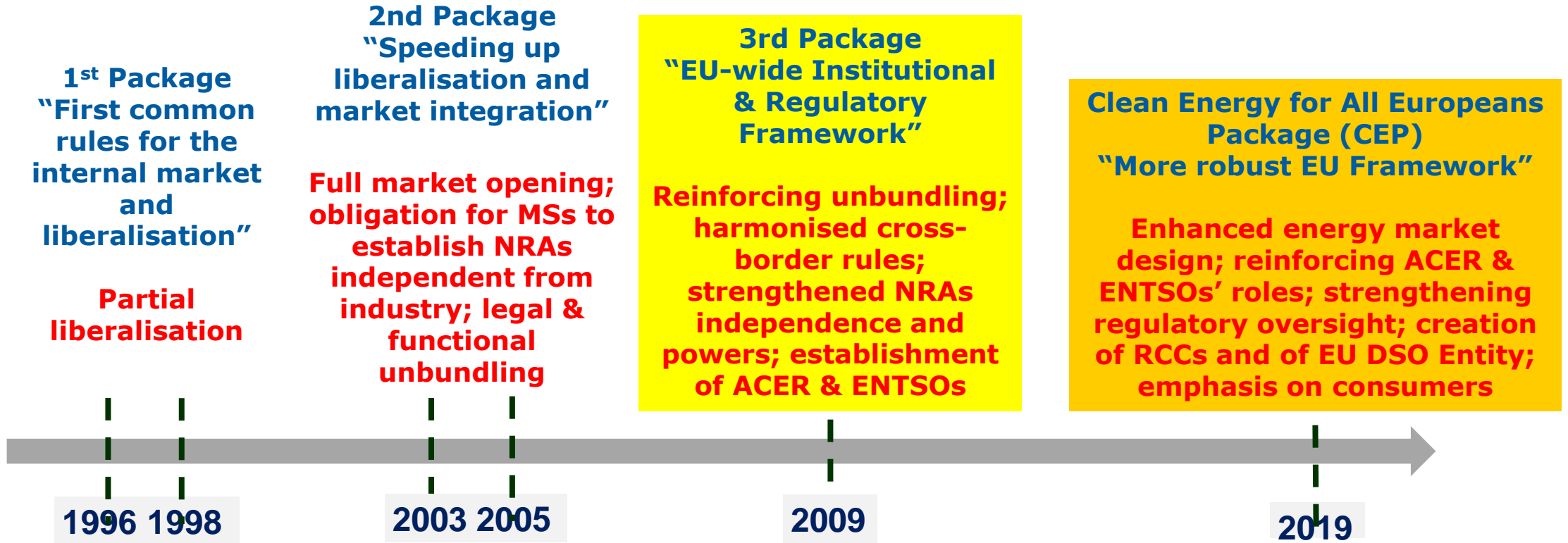


Miguel Ángel Fernández Ordóñez
CNSE, Spain



Seville, Spain, 1997

Regulatory cooperation to support energy market integration in Europe



CEER
ERGEG
ACER

www.eui.eu



The Council of European Energy Regulators (CEER)

- Established in March 2000 by 10 NRAs
- Voluntary organisation of European (EU and EEA) electricity and gas regulatory entities
- Brussels-based Secretariat
- Not-for-profit association status under Belgian law adopted in 2003
- Currently comprising:
 - 30 members: EU Member States, Iceland, Norway and the UK
 - 9 observers: Albania, Bosnia and Herzegovina, Georgia, Kosovo, Moldova, Montenegro, North Macedonia, Serbia and Switzerland

CEER is the ***voice of Europe's national energy regulators*** at EU and international level. Through CEER, the national regulators ***cooperate and exchange best practice.***

- Encourage best regulatory practices
- Champion sound and independent regulation in the public interest
- Share experience & support NRAs in their daily work, e.g. through training and workshops
- Put customers and their protection at the heart of energy policy
- Promote a competitive, secure and environmentally sustainable internal market
- Engage with a variety of stakeholders
- With the establishment of ACER, focus mainly on consumers, distribution, retail, sustainability and international outreach

European Regulators' Group for Electricity and Gas (ERGEG)



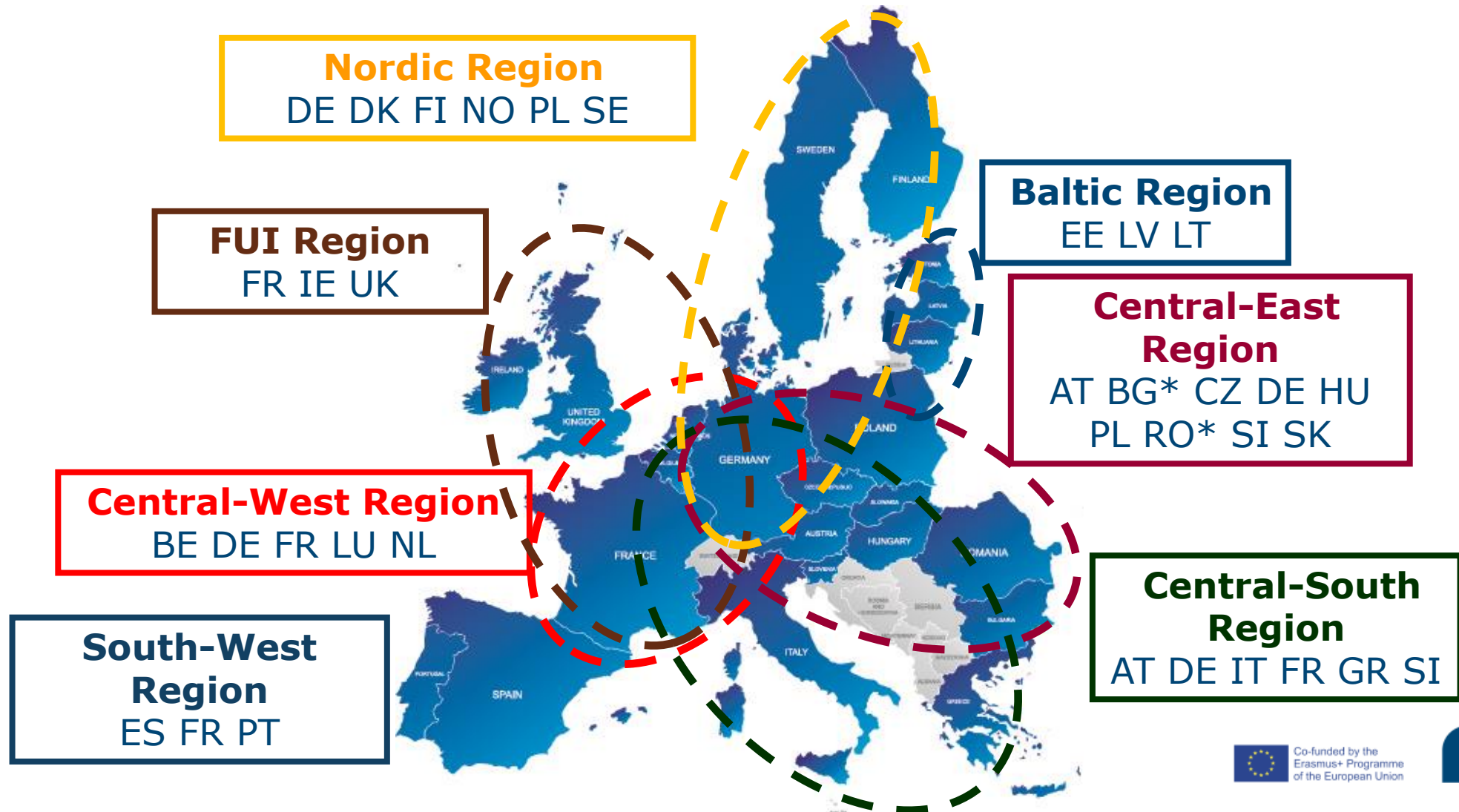
- Established by the European Commission in November 2003 (EC Decision 2003/796/EC)
- Independent advisory group on electricity and gas, composed of EU National Regulatory Authorities
- Advised and assisted the European Commission in the consolidation of the Internal Energy Market
- Dissolved as of 1 July 2011 following the establishment of ACER (EC Decision 2011/280/EU)

The European Regional Initiatives

The Electricity and Gas Regional Initiatives (ERI and GRI)

- were launched by ERGEG in 2006,
- aimed at bringing together national regulatory authorities (NRAs), transmission system operators (TSOs) and other stakeholders in a voluntary process to advance integration at the regional level as a step towards the creation of a well-functioning Internal Energy Market (IEM)
- represented a bottom up approach to the completion of the IEM, in bring all market participants together to test solutions for cross-border issues, carry out early implementation of the EU acquis and come up with pilot-projects which can be exported from one region to the others.

The European Electricity Regional Initiatives



Structural conflicts of interest: a systemic conflict of interest caused by insufficient unbundling

Persistent gaps in the regulatory environment, particularly for cross border issues

A chronic lack of liquidity, both in electricity and gas wholesale markets

A general lack of transparency in market operations



Enhanced powers for independent national energy regulators

Reinforced coordination between national energy regulators

Substantially enhanced consistency of regulation in cross-border issues

Reinforced cooperation between Transmission System Operators

The establishment of ACER

- The identified shortcomings in regulatory consistency and cooperation across the EU led to the establishment of the (European Union) Agency for the Cooperation of Energy Regulators
- ACER initial mission was “to ***assist*** the National Regulatory Authorities (NRAs) in exercising, at Union level, the regulatory tasks performed in the Member States and, where necessary, to ***coordinate*** their action”

ACER was not established as a EU energy Regulator

- ***ACER was established not as a EU Regulator for wholesale markets and “horizontal” networks***, but as a body promoting the cooperation of national regulators
- This was due to a mis-interpretation of the implications of the 1958 judgement of the European Court of Justice (ECJ) on the Meroni case (Meroni vs High Authority, C 9/56)
 - The ***delegation of powers*** by the EU institutions, involving ‘***a degree of latitude which implied a wide margin of discretion***’, shall not be considered compatible with the ‘requirements of the Treaty’.
 - This has been interpreted as ***limiting the delegation of direct regulatory powers to ACER*** (and other decentralised regulatory agencies)

But which were the real legal limits to ACER's powers?

- The 2012 ECJ ruling on the UK vs European Parliament and Council (the ESMA case) clarified the implications of the previous Meroni ruling:
- The Meroni ruling related to the delegation of powers involving a wide margin of discretion to a private entity, not subject to the EU judicial review
- The ECJ clarified that Meroni ruling does not prevent the delegation of powers
 - to decentralised agencies, subject to EU judicial review
 - in an area which requires the deployment of specific technical and professional expertise
 - if these powers are clearly defined and limited by various conditions and criteria

Under the THIRD PACKAGE

To **assist** the National Regulatory Authorities (NRAs) in exercising, at Union level, the regulatory tasks performed in the Member States and, where necessary, to **coordinate** their action

Under the CLEAN ENERGY PACKAGE

To **assist** the National Regulatory Authorities (NRAs) in exercising, at Union level, the regulatory tasks performed in the Member States and, where necessary, to **coordinate** their action

To **mediate and settle disagreements** between NRAs

To **contribute** to the establishment of **high-quality common regulatory and supervisory practices**, thus contributing to the consistent, efficient and effective application of Union legal acts in order to achieve the Union's climate and energy goals

The Clean Energy Package and ACER new powers

Adoption of EU-wide Terms and Conditions or Methodologies for the implementation of existing electricity Guidelines

Network Codes under the Third Energy Package

ACER decides only if NRA fail to agree or upon their joint proposal



Clean Energy Package

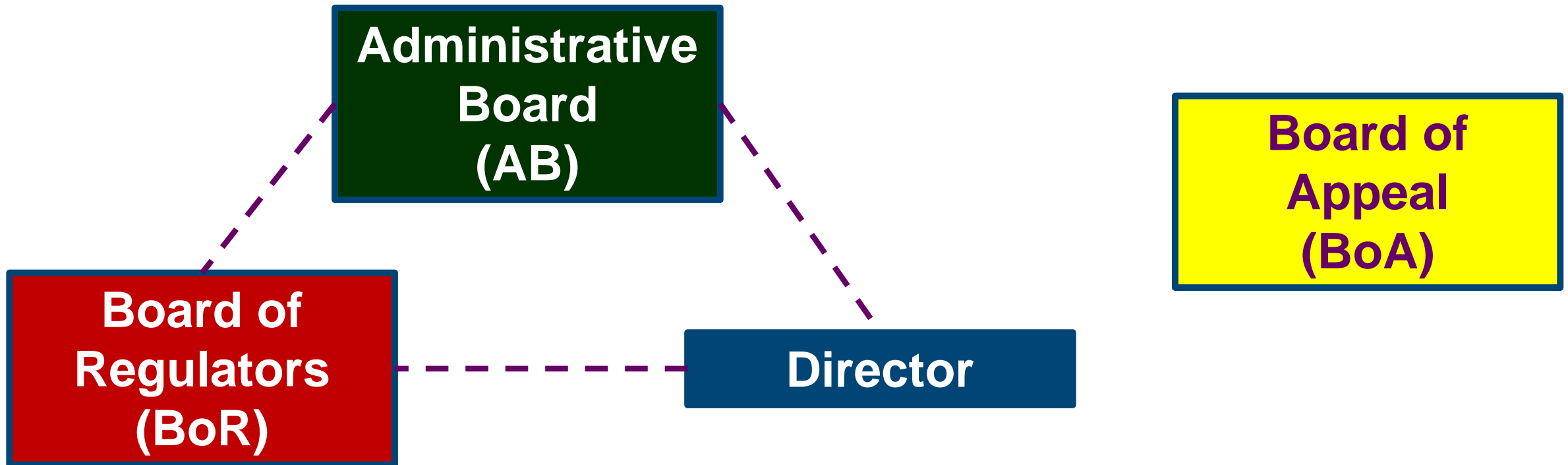
ACER directly decides



NRA and ACER decisions in the Clean Energy Package

ACER decides on:	if provided in ordinary EU legislation; in existing NCs/GLs and their later revisions or in new NCs/GLs adopted as implementing acts	If provided in new NCs/GLs adopted as delegated acts
EU-wide Terms and Conditions or Methodologies	Always	- If NRAs fail to agree (see Art 6(4) Reg 2019/942)
Regional Terms and Conditions or Methodologies	<ul style="list-style-type: none"> - If NRAs fail to agree - Upon NRAs' request - If Dir or BoR so require in case of wider impact 	<ul style="list-style-type: none"> - If NRAs fail to agree (see Art 6(4) Reg 2019/942) - If Dir or BoR so require in case of wider impact
Regulatory issues having effect on cross-border trade or cross-border system security	<ul style="list-style-type: none"> - If NRAs fail to agree - Upon NRAs' request 	<ul style="list-style-type: none"> - Upon a request of 60% of the concerned NRAs (1 NRA if only 2 are concerned)
CBCA Decisions (PCI and Gas SoS); BZ review methodology		<ul style="list-style-type: none"> - If NRAs fail to agree - Upon NRAs' request

ACER Governance



The role of the Board of Regulators in ACER decision-making under the Third Package

Type of Act /Activity	Proposal	Involvement of the BoR	Adoption	Review by the BoA
Opinions and Recommendations (ex art. 5 to 9 Reg. 713/2009)	Director	Formal Opinion	Director	No
Decisions (ex art. 8 and 9 Reg. 713/2009)	Director	Formal Opinion	Director	Yes
REMIT	Director	Consulted	Director	No
Opinions on Regional PCI Lists	Director	Formal Opinion	Director	No
CBCA Decisions	Director	*	Director	Yes
Other Activities	Director	*	Director	No

* No formal involvement envisaged in the Regulations. Practice established.

The role of the Board of Regulators in ACER decision-making under the Clean Energy Package

Type of Act /Activity	Proposal	Involvement of the BoR	Adoption	Review by the BoA
Decisions, opinions and Recommendations (ex art3(1), 4 to 8, 9(1) and (3), 10, 11(c), 13, 15(4), 30 and 43 Reg 2019/942)	Director	Formal Opinion	Director	No
REMIT	Director	Consulted	Director	No
Opinions on Regional PCI Lists	Director	Formal Opinion	Director	No
CBCA Decisions	Director	*	Director	Yes
Other Activities	Director	*	Director	No

* No formal involvement envisaged in the Regulations. Practice established.

for acts requiring the BoR's favourable opinion

- The Director continues to “hold the pen”! ...
- ... BUT, a more convoluted procedure is now foreseen for the involvement of the BoR
 - The Director drafts proposal
 - The Director consults the Working Group “sufficiently in advance”
 - The BoR may provide comments and amendments
 - The Director considers amendments, with written reasoning in case of deviation
 - Director may withdraw the proposal, with written reasoning
 - If the BoR does not give its favourable opinion, the Director may revise the text further without the need for justification
 - (Recital: seek the favourable opinion of the BoR on a new or revised draft text at any stage)
 - BoR favourable opinion
 - Director adopts and publishes the act

Thank you for your attention!