



ENFORCEMENT POWERS OF ENERGY REGULATORS IN THE ENERGY COMMUNITY

An Overview

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Introduction

1. About ECRB

The Energy Community Regulatory Board (ECRB) operates based on the Energy Community Treaty. As an institution of the Energy Community¹ the ECRB advises the Energy Community Ministerial Council and Permanent High Level Group on details of statutory, technical and regulatory rules and makes recommendations in the case of cross-border disputes between regulators. ECRB is the independent regional voice of energy regulators in the Energy Community. ECRB's mission builds on three pillars: providing coordinated regulatory positions to energy policy debates, harmonizing regulatory rules across borders as well as sharing regulatory knowledge and experience.

2. Background

The majority of the Energy Community's Contracting Parties has transposed the Third Energy Package (TEP) in to national legislation.² Enrichment of regulatory powers is a central element of the TEP aiming to ensure effective independence of regulators and including mechanisms for regulators to enforce compliance of national undertakings with primary and secondary legislation and regulatory rules. More specifically, pursuant to Article 37(4) of Electricity Directive 2009/72/EC and Article 41(4) of Gas Directive 2009/73/EC, regulatory authorities have the right to carry out investigations on the functioning of the electricity market, to require energy undertakings to provide any information relevant for the fulfillment of the regulator's tasks and to impose effective, proportionate and adequate penalties on energy undertakings not complying with their obligations. As regards the latter, the Energy Community *acquis communautaire* (hereinafter 'acquis') requires national regulators to be equipped with the power to impose penalties of up to 10% of the annual turnover of the transmission operator / vertically integrated undertaking on the transmission operator / vertically integrated undertaking, respectively.

3. Scope

The present survey aims at examining the powers of Energy Community regulators on promoting the implementation of primary and secondary legislation by national energy undertakings and, in particular, their ability to impose penalties or use other sanctioning mechanisms in cases of a violation of obligations laid down in national law and by-laws. The report provides an overview of the powers of the Energy Community regulators and identifies possible obstacles as regards the efficiency of the enforcement powers in place. In doing so, the analysis targets identification of areas of possible improvement needs to ensure effective work of regulatory authorities.

The information provided in the present survey is based on input from the regulatory authorities Albania, Armenia, Austria, Bosnia and Herzegovina, France, Italy, Kosovo*, fYR of Macedonia, Montenegro and Moldova.

¹ www.energy-community.org. The Energy Community comprises the EU and Albania, Bosnia and Herzegovina, fYR of Macedonia, Georgia, Kosovo*, Moldova, Montenegro, Serbia and Ukraine. Armenia, Turkey and Norway are Observer Countries. [Throughout this document the symbol * refers to the following statement: *This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Advisory Opinion on the Kosovo declaration of independence*].

² The exceptions are Bosnia and Herzegovina and fYR of Macedonia. The TEP applies as adopted and adapted for the Contracting Parties by Decision 2011/02/MC-EnC of the Energy Community Ministerial Council.

Findings

1. Enforcement powers of regulators

The following table provides an overview of the enforcement powers of nation regulators in the assessed countries.

Table 1: enforcement powers of regulators

	Gas	Electricity
Albania	✓	✓
Armenia	✓	✓
Austria	✓	✓
Bosnia and Herzegovina	X	✓
France	✓	✓
Italy	✓	✓
Kosovo*	✓	✓
fYR of Macedonia	✓	✓
Montenegro	✓	✓
Moldova	✓	✓

The analysis shows that all regulators covered by the present survey have **enforcement powers** stipulated by national legislation, except for the regulator of Bosnia and Herzegovina for the gas sector.³ Despite the fact that there is still no developed gas market in Albania, Kosovo* and Montenegro, also national legislation in these countries prescribes the possibility for regulators to impose penalties on energy undertakings in the gas sector as well.

2. Nature of enforcement powers

National legislations prescribe a broader range of enforcement rights, namely regulators can impose financial penalties or have the right to withdraw, suspend, terminate and revoke the license. There are different possibilities for regulators to apply sanctions against energy undertakings. The schematic diagram hereinafter shows that the prevailing instrument to punish incompliance is fining compared to suspension or withdrawal of licenses. At the same time license related enforcement powers (withdrawal and suspension) in total prevail financial penalty powers.

³ For the case if Bosnia and Herzegovina legislation for the gas sector does not exist on State level, including lack of competences of the State level regulatory authority.

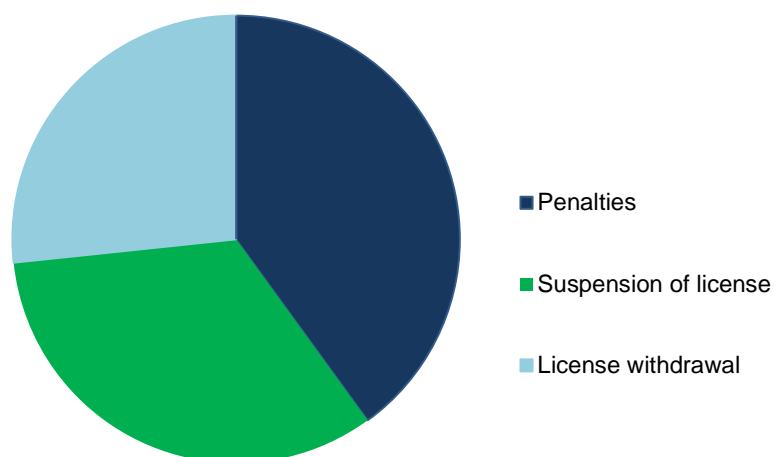


Figure 1 Type of penalties

The table hereinafter provides a more in-depth overview of the relevant regulatory powers on country level.

Table 2: type of enforcement powers of regulators

	Financial Penalties	License Withdrawal	License Suspension	License Termination	License Revocation
Albania ⁴	✓	✓			
Armenia	✓		✓	✓ **	
Austria		✓			
Bosnia and Herzegovina			✓		✓
France	✓				
Italy	✓				
Kosovo*	✓	✓	✓	✓	n.a. ⁵
fYR of Macedonia			✓	✓	✓
Montenegro			✓		✓
Moldova	✓	✓ **	✓ **		

Legend: **court decision [in Moldova on initiative of ANRE; a court decision is not required in case the suspension is requested by the licensee]

⁴ Cf Art. 41 of the Energy Law: ERE may withdraw a license when the licensee: a) does not accomplish the substantial conditions of the license granted according to this law; b) in performing its activity, violates the legal provisions on environmental protection etc...Art 86 of the Energy Law: stipulates provision under which a license may be temporarily suspended (SOLR). Art 38 of the Energy law: termination referring to the license validity term, which cannot be more than 30 (thirty) years for generation, transmission and distribution activities. No difference between withdrawal and revocation.

⁵ No difference between withdrawal and revocation.

The analysis shows that the majority of regulators have the power to impose **financial penalties**, namely the regulators of Albania⁶, Armenia⁷, France, Italy⁸, Kosovo*⁹ and Moldova¹⁰; in Albania¹¹, and Montenegro the maximum level is, however, below the threshold required by the acquis.¹² The regulators of Austria, Bosnia and Herzegovina, fYR of Macedonia and Montenegro have no right to impose financial penalties but this right belongs to the competence of other authorities. It is worth noting that related legal arrangements are in line with the Energy Community law¹³ but they weaken the effectiveness of regulatory enforcement possibilities.

Another tool for sanctioning incompliance is **withdrawal / suspension of licenses**: the regulators of Armenia¹⁴, Bosnia and Herzegovina¹⁵, Kosovo*¹⁶, fYR of Macedonia¹⁷, Montenegro¹⁸ can suspend a license without the approval of any other authority; the same is the case for Albania, Austria¹⁹ and Kosovo*²⁰ for withdrawal of licenses. In Moldova license suspension/withdrawal in case of noncompliance requires a court decision upon request of the regulator.²¹

The *de facto* effectiveness of withdrawal / suspension / revocation of license as a means to enforce compliance with national legal and / or regulatory rules is, however, questionable in particular in countries – as the majority of the analyzed cases – with only one network operator in place, thus, left without the possibility to attribute the tasks of the licensee to another system operator.

Beyond that, the regulators of Austria and France also have a wider range of the enforcement rights, including temporary ban from access to the networks or facilities²², expropriation²³, prohibition of

⁶ Article 106 of the Law 102/2015 “On natural gas sector” and Article 107 of Law 43.2015 “Energy Sector Law”.

⁷ Part 1 of Article 42 of the Energy Law of Armenia.

⁸ Article 2 para 20 (c) of Law no 481/95, Law 689/81, d.lgs 93/11 of Italy.

⁹ Article 57 of the Law on Energy Regulator of Kosovo*.

¹⁰ Article 95 of the Electricity Law no. 107/2016 and Article 113 of the Natural Gas Law no 108/2016 of Moldova.

¹¹ Cf Art. 107 of Energy Law no.43/2015: fines from 0.1% up to 3% of the annual turnover of the licensee for the previous year.

¹² Namely, Article 37(4) litera (d) of the Electricity Directive and Article 41(4) litera (d) of the Gas Directive foresee a penalty threshold of up to 10 % of the annual turnover of the transmission system operator (TSO) to be imposed on a TSO or of up to 10 % of the annual turnover of the vertically integrated undertaking (VIU) to be imposed on a VIU.

¹³ Article 37(4) litera (d) of the Electricity Directive and Article 41(4) litera (d) of the Gas Directive.

¹⁴ Part 1 of Article 42 of the Energy Law of Armenia.

¹⁵ Articles 4(2) and 7(5) of the Law on Transmission of Electric Power, Regulator and System, Operator of Bosnia and Herzegovina.

¹⁶ Article 37 of the Law on Energy Regulator of Kosovo*. A license can be terminated (1) at expiration of its term; (2) at the request of the licensee, provided that the obligations of the licensee will be carried out by another licensee or (3) upon withdrawal of the license by the regulator. The regulator may withdraw a license if (1) the licensee defaults or violates material conditions or obligations covered by the license and does not remedy such default by a deadline set by the regulator; (2) the licensee's operation is terminated by a declaration of insolvency or liquidation; provided, however, that this provision shall not apply to a court-supervised reorganization process if the licensee continues operations during such process; (3) the licensee has presented false information which was used as the basis for granting the license, and such information is material to the proper conduct of licensed activities. The Regulator may temporarily suspend a license in a situation where a suspension is reasonably justified. In such case the licensee shall be given a reasonable time to remedy its action or lack of action, and when the licensee proves that it is capable and willing to such remedy.

¹⁷ Articles 23, 30, 47, 48 and 175 of Energy Law. ERC has no authority to withdrawal the license, i.e. to change the decision on issuing the license. ERC can to terminate the license: 1. at the request of the license holder; 2. after the expiration of the period for which it was issued; and 3. with the termination of the license holder. ERC also has the right to revoke the license if the license holder: 1. does not start performing the activity within the period specified in the license; 2 is not performing the activity in a manner and under conditions regulated by the Energy Law, other laws, regulations and ERC acts; 3. in defined periods does not act on the request of the competent authorities to remove the shortcomings in the working process; or 4. no longer meets the requirements for performing energy activity for which the license was issued.

¹⁷ Article 76 of the Energy Law of Montenegro.

¹⁸ Article 16(4) of Electricity Law 107/2016 and Natural Gas Law no 108/2016 of Moldova.

¹⁹ Article 53, 94 of Natural Gas Act, and Article 86(4) of the Electricity Act of Austria.

²⁰ Article 37 of the Law on Regulator of Kosovo*.

²⁰ Article 57 para 6 Natural Gas Act of Austria.

²¹ Articles 16(4) and 17(2) of Electricity Law 107/206 and Natural Gas Law 108/2016 of Moldova.

²² Namely: France.

²³ Austria (Article 57(6) of the Natural Gas Act).

operation²⁴ etc.

3. Incompliance cases that can be sanctioned

National legislation empowers regulatory authorities to initiate proceedings against energy undertakings in cases of non-compliance with the licensing conditions, the failure to comply with the authority decision, failure to submit data, refusal to access to network and non-performance of the account unbundling. Based on the analysis of responses received, the following schematic diagram shows a comparison of the possibilities of regulators to act in the mentioned cases.

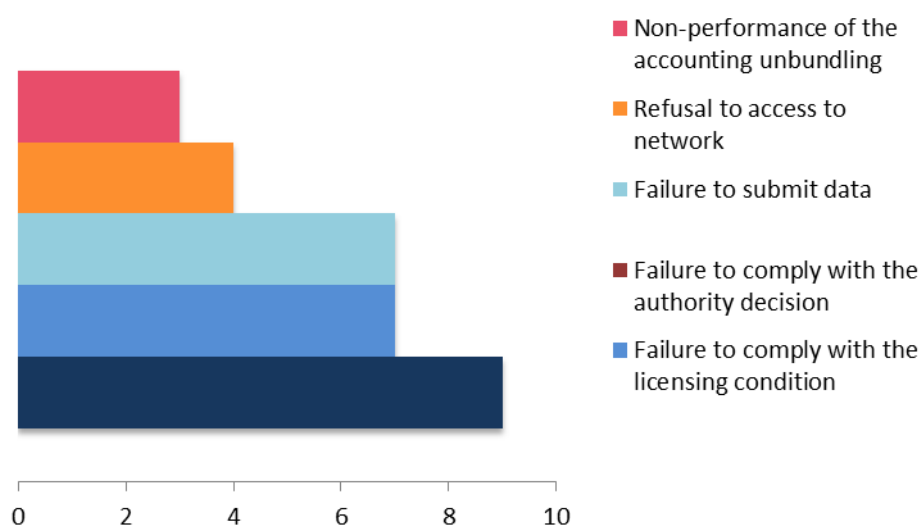


Figure 2: incompliance cases that can be sanctioned

All analyzed regulatory authorities, except for France, impose sanctions in case of non-compliance with the **licensing conditions**. The regulatory authorities of Albania²⁵, Montenegro, France, Italy²⁶, fYR of Macedonia²⁷, Montenegro²⁸ and Moldova²⁹ impose sanctions in case of the failure to comply with **decisions of the regulatory authority**. At the same time, the regulators of Albania³⁰, Armenia³¹, Bosnia and Herzegovina³², Kosovo*,³³ France³⁴, Italy and Moldova³⁵ also impose sanctions in case of the failure to **submit data**. The regulatory authorities of Armenia³⁶, Bosnia and Herzegovina³⁷, France

²⁴ Austria (Article 57(6) of the Natural Gas Act).

²⁵ Article 106(xi) of the Law 102/2015 On Natural Gas.

²⁶ Article 45, paragraph 2, d.lgs. 93/11 of Italy.

²⁷ Article 169 and Article 173 of the Energy Law.

²⁸ Article 76 of the Energy Law of Montenegro.

²⁹ Article 113 Law no. 107 /2016 and Article 95 Law no. 108/2016 (i).

³⁰ Article 106 of the Law 102/2015 “On natural gas sector”, Article 107 of Law 43.2015 “Energy Sector Law”.

³¹ Article 27 of the Energy Law of Armenia.

³² Article 9.3.1 of the Law on Transmission of Electric Power, Regulator and System, Operator of Bosnia and Herzegovina.

³³ Article 57 (2.3) of the Law on Regulator of Kosovo*.

³⁴ Article 8 of REMIT.

³⁵ Article 113 Law no. 107 /2016 and Article 95 Law no. 108/2016 (c) of Moldova.

³⁶ Article 53 of Energy Law of Armenia.

and Kosovo³⁸ impose sanctions in case of a refusal of **access to network**, while the regulators of France, Kosovo³⁹ and Moldova⁴⁰ impose sanctions in case of the non-performance of the **account unbundling**.

4. Types of sanctions imposed by other authorities

National legislations also foresee sanctioning by other bodies than the national regulatory authorities. In the prevailing cases this power is given to courts.

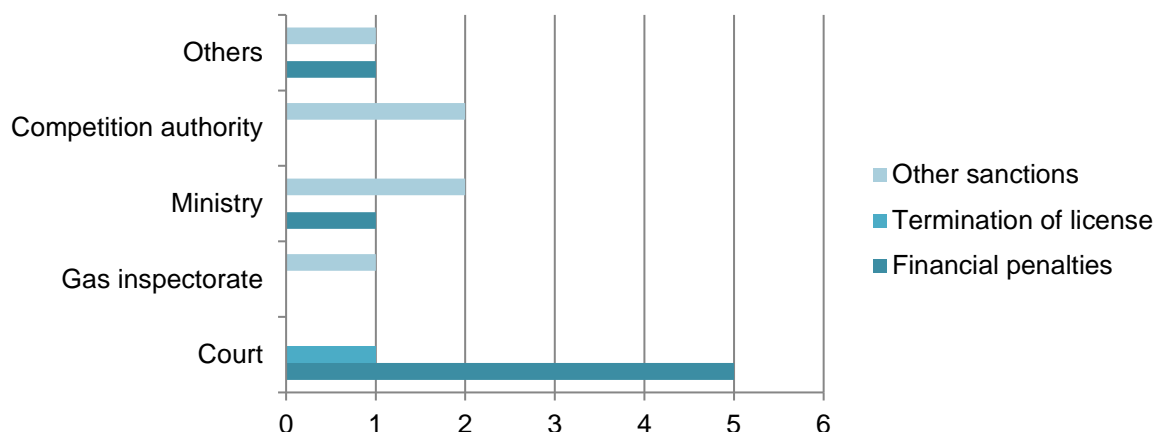


Figure 3: sanctions imposed by other authorities

In most of the cases courts are in charge of imposing financial sanctions. This is a situation in Armenia⁴¹, Austria⁴², Bosnia and Herzegovina⁴³, fYR of Macedonia⁴⁴ and Montenegro⁴⁵. In the case of Austria, Bosnia and Herzegovina, fYR of Macedonia and Montenegro the court is the only authority that has the competence to impose fines. The decisions of the court are obligatory for regulators.

Only in Kosovo⁴⁶ and Italy⁴⁷, the Competition Authority is in charge of imposing sanctions in case of a competition distortion, however in Italy the opinion of the regulator must be taken into account and in Kosovo* both authorities mutually recognize decisions.⁴⁸

Only in Austria⁴⁹ and fYR of Macedonia⁵⁰ also the Ministries have sanctioning powers in addition to the regulator. In fYR of Macedonia the Ministry of Economy has the authority for certain misdemeanors, to conduct a settlement procedure. The procedure is conducted in a manner that the inspector shall issue

³⁷ Article 51(4) of the Licensing Rules of Bosnia and Herzegovina.

³⁸ Article 57 (2.12) of the Law on Regulator of Kosovo*.

³⁹ Article 57 (2.11) of the Law on Regulator of Kosovo*.

⁴⁰ Article 57 (2.11) of the Law on Regulator of Kosovo*.

⁴¹ Article 37 of the Law on Licensing of Armenia.

⁴² Regulation 2009/715/EG; Art 164 Natural Gas Act of Austria.

⁴³ Article 9.3 of the Law on Transmission of Electric Power, Regulator and System, Operator of Bosnia and Herzegovina.

⁴⁴ Articles 176, 177, 179, 180, 185 and 186 of the Energy Law of fYR of Macedonia.

⁴⁵ Articles 231-233 of the Energy Law of Montenegro.

⁴⁶ Articles 56-60 of the Law no 03/I-229 on Protection of Competition of Kosovo*.

⁴⁷ Article 27, para 1 –bis, D.lgs 2096/05 of Italy.

⁴⁸ According to Law on the Energy Regulator and Articles 56-60 of the Law no.03/I –229 on Protection of Competition also the Competition Authority of Kosovo* has the right to impose sanctions in case of distortion of competition. The Law on the Energy Regulator specifies in Article 16 the roles of ERO and the Competition Authority to exchange information and consult each other in energy matters.

⁴⁹ Article 142 of NGA of Austria.

⁵⁰ Article 176, 177, 179, 180, 185 and 186 of the Energy Law of fYR of Macedonia.

a misdemeanor payment order in the amount of 30% of the fine provided for the relevant misdemeanor. The offender must pay the fine within eight days of the admission in the account indicated in the payment order in the amount of 50% of the fine. If the offender does not pay the fine within the specified time, the Ministry of Economy will initiate infringement proceedings before the Criminal Court - Misdemeanor Department.

Only in Albania, the Gas Inspectorate has the right to impose financial sanctions for the gas sector in addition to competences of the regulator: namely, the Ministry exercises its supervisory functions, through its structures and the state inspectorate responsible for gas according to Article 100 of the Gas Law 102/2015 in cases where irregularities and shortcomings are identified in the course of supervision of gas undertakings that perform regulated activities and have not been eliminated within the deadline stipulated, the Ministry may require the Energy Regulatory Authority to initiate proceedings. In electricity sector the only competent authority is the regulatory authority.

Only in Armenia⁵¹, the Administrative Court is empowered to decide on a license termination upon application of the regulatory authority.

⁵¹ Article 37 of the Law on Licensing of Armenia.

Concluding remarks

The survey shows that the regulators in analyzed all countries have some kind of sanction power at hand. The powers differ however: some regulators are equipped with more legal possibilities to act in cases where they identify unlawful performance of energy undertakings and hence have a greater possibility to shape the sector.

In a number of cases the regulators' possibilities to act are reduced to temporary withdrawal of the license followed by its permanent withdrawal. The real term **effectiveness of such regulatory power is questionable** because, in most cases, there is no other undertaking established nationally that could take over the related.

Indeed, the possibility to issue **financial penalties** is a much more efficient way to influence the activities of undertakings but this possibility is not available to all regulators in the countries subject to the present survey. Such arrangements are in line with the Energy Community law but they weaken the effectiveness of regulatory enforcement possibilities. In these cases regulators may only initiate proceedings before other bodies in accordance with the national jurisdiction system to flag incompliances but without further means to track proceedings.

In practical terms, the **experience with financial sanctions** is positive: in cases where regulators either applied financial penalties or such were imposed by other competent bodies following the regulator's intervention, the relevant undertaking fulfilled its obligation and also improved its future market performance and behavior.