

Assessment of the Application of Community Law in a Third Country

Review of Montenegro



For the purpose of participation of the Montenegrin energy regulatory authority, RAE, in Working Groups of the Agency for the Cooperation of Energy Regulators 713/2009

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1. Introduction

1.1. Scope and context

The present review assesses the compliance of energy sector legislation in Montenegro with the criteria of Article 31 of Regulation (EC) 713/2009 ('ACER Regulation')¹ concerning participation of third countries² in the Agency for the Cooperation of Energy Regulators (ACER). More specifically, the review analyses whether Montenegro is on track to meet the requirements of Article 31 of Regulation (EC) 713/2009 within the next six to twelve months which should trigger the possibility for staff of the Montenegrin energy regulatory authority (RAE; 'the regulator')³ to participate in the Working Groups of ACER (for the relevant criteria in detail see chapter 1.2).

In the light of the requirement of Article 31(1) of the ACER Regulation for a third country to have "adopted and is applying" relevant EU law, the Energy Community Secretariat's ('Secretariat') review looks into transposition *and* implementation of both primary and secondary legislation, including a forecasting perspective for the upcoming six to twelve months. As performed in its previous assessments of other Energy Community Contracting Party regulators⁴, the Secretariat also assesses the organisational structure, competences and performance of RAE. The assessment thereby follows the requirements of Articles 39-42 of Gas Directive 2009/73/EC and Articles 35-38 of Electricity Directive 2009/72/EC, read in conjunction with the Secretariat's *Policy Guidelines on Independence of National Regulatory Authorities*⁵. An overview of the applied criteria is listed in the Annex to this report.

The review was performed by the Secretariat following a request of RAE⁶ in context of the obligations undertaken by Montenegro under the Western Balkan 6 (WB6) process to ensure independence of RAE and RAE to apply for observer status in ACER.⁷

The conclusions and recommendations of the present analysis are without prejudice to the exclusive right of ACER to decide on conceding the participation of a third country's regulator in its working groups and / or substructures.

The assessment is also without prejudice to the competence of the European Commission ('Commission') to analyse compliance of Montenegro with Article 31 of Regulation (EC) 713/2009.

¹ OJ L 211 of 14.8.2009, p 14 et seq.

² I.e. non EU Member States.

³ *Regulatorna agencija za energetiku Crna Gora*: www.regagen.co.me.

⁴ Cf Secretariat, Review of the Republic of Serbia for the purpose of participation of the Serbian energy regulatory authority in Working Groups of the Agency for the Cooperation of Energy Regulators in accordance with Article 31 of Regulation (EC) 713/2009, August 2016; and Secretariat, The National Energy Regulatory Authority of Moldova: Compliance, Governance, Independence and Performance, September 2016.

⁵ PG 02/2015 of 28.1.2015.

⁶ Letter of 25 January 2016.

⁷ Ref. 2015 Summit Addendum, Energy Soft Measures II.4. The WB6 process, also referred to as "Berlin process", kicked off with a conference of Western Balkan States in August 2014, followed by annual summits in Vienna (2015) and Paris (2016). The Secretariat is reporting bimonthly on the progress made by the Western Balkan 6 Contracting Parties (see more at: https://www.energy-community.org/portal/page/portal/ENC_HOME/AREAS_OF_WORK/WB6/Monitoring).

1.2. Relevant legal framework

Articles 13 and 14 of the ACER Regulation limit membership to ACER's formal bodies, *i.e.* the Board of Regulators (BoR) and the Administrative Board (AB), to representatives from EU Member States. Article 31, however, also opens the possibility for participation of third countries in ACER, provided that:

1. The third country has concluded an agreement with the Union (Article 31(1));
2. The third country has adopted and is applying Union law in the field of energy and, if relevant, in the fields of environment and competition (Article 31(1));
3. An institutional framework has been set up in the agreement referred to under (1) to specify, in particular, the nature, scope and procedural aspects of the involvement of the third country including provisions relating to financial contribution and to staff (Article 31(2)).

The Commission by letter of 25 March 2015⁸ clarified that the Energy Community Treaty is to be considered an "agreement" as referred to in Article 31(1); and that the assessment of a third country's compliance with the second requirement of Article 31(1) is to be carried out by the Commission with the support of the Secretariat being welcomed.

The Commission, however, in the same communication also underlined that the above requirements are only relevant for a third country's participation in the BoR and AB, whereas the criteria for and acceptance of their involvement in ACER Working Groups remain at the discretion of the Director of ACER. The Director of ACER, by letters of 26 November 2014⁹ and 24 July 2015¹⁰, expressed his intention to allow participation of National Regulatory Authorities (NRAs) from third countries "as long as their countries are assessed as being on track in meeting the requirements of Article 31 and there being an expectation that this will be achieved within a reasonable period of time (6 to 12 months)". By letter of 24 July 2015, the Director of ACER invited the Secretariat to perform related assessments and inform ACER about its analysis.

The Secretariat's role in assisting ACER in assessing the progress of Contracting Parties (CP) in the transposition and actual implementation of Energy Community law in the field of energy and in evaluating an application for the participation of a CP NRA in Working Groups of ACER and its substructures is further confirmed in Section 4 of the "Administrative Agreement on working modalities in the area of gas and electricity" ('the Agreement')¹¹ signed by the Secretariat and ACER on 2 December 2016. According to the Agreement, this should include, but not be restricted to:

a) the adoption by the CP of all measures necessary for the transposition, as well as their practical implementation;

⁸ Ref. ENER.B2/SZ/el/ener.b2(2015)1198324.

⁹ Ref. ACER-AP-FG-ss-2014-647.

¹⁰ Ref. ACER-AP-FG-ss-2015-390.

¹¹ https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/4462404/44185CEA79367BE3E053C92FA8C00A2C.pdf.

b) the degree of actual independence and the competences of its NRA, taking into consideration, inter alia, the provisions of Articles 35 to 38 of Directive 2009/72/EC and Articles 39 to 42 of Directive 2009/73/EC and the guidance and interpretative notes developed by the European Commission.

1.3. Montenegro under the Energy Community Treaty

Montenegro is Party to the Energy Community Treaty ('Treaty') that was signed in October 2005 in Athens and entered into force in July 2006. Articles 5 and 6 in conjunction with Article 11 of the Treaty commit the signatories to implement the *acquis* as listed in Annex 1 to the Treaty. The *acquis* relevant for the present assessment is listed in the following chapter; implementation and compliance by Montenegro is further discussed in chapter 2.

1.4. Relevant Energy Community *acquis communautaire*

Article 31(1) of the ACER Regulation requires third countries to have adopted and apply Union law "in the field of energy and, if relevant, in the fields of environment and competition" as a pre-condition for their participation in ACER.

ACER currently has four Working Groups¹²:

- Implementation, Monitoring and Procedures Working Group;
- Monitoring, Integrity and Transparency Working Group;
- Electricity Working Group;
- Gas Working Group.

As regards electricity and gas market legislation, relevant EU law in the form of the so-called Third Energy Package – namely Electricity Directive 2009/72/EC, Gas Directive 2009/73/EC, Electricity Regulation (EC) 714/2009 and Gas Regulation (EC) 715/2009 – has been included in the Energy Community *acquis* by Ministerial Council Decision 2001/02/MC-EnC of 5 October 2011¹³.

In addition, compliance with the *acquis* in the fields of competition and environment are also relevant for the present assessment, having in mind that competition and State aid control form the very basis for effective implementation of the gas and electricity *acquis*. At the same time, compliance with the standards established by the Energy Community *acquis* on environment, in particular with regard to the reduction of emissions, may be relevant as well, as it prevents third countries' energy sectors from gaining unfair competitive advantage over those in the EU.

¹² http://www.acer.europa.eu/en/The_agency/Organisation/Working_groups/Pages/default.aspx . Both the Commission and ACER in their related correspondences (cf chapter 1.2) expressed that participation of Energy Community Contracting Parties' NRAs should not be open to Working Groups dealing with the implementation of Regulation 1227/2011 (REMIT), OJ L 326 of 8.12.2011,p 1 et seqq.

¹³ The ACER Regulation is not part of the Energy Community *acquis*.

As regards competition law, the acquis rests on three pillars:

- the prohibition of anti-competitive agreements established by Article 101 of the Treaty on the Functioning of the European Union (“TFEU”);
- the prohibition of abuse of a dominant position provided for in Article 102 TFEU; and
- the prohibition of State aid granted in violation of Article 107 TFEU and the principles of the Treaty.

As regards environmental legislation, the following pieces of EU law have been included in the Energy Community acquis: Directive 2011/92/EU on environmental impact assessment,¹⁴ Directive (EU) 2016/802 on the sulphur content of liquid fuels,¹⁵ Directive 2001/80/EC on the emissions of large combustion plants, Chapter III and Annex V of Directive 2010/75/EU on industrial emissions¹⁶, Article 4(2) of Directive 79/409/EEC on wild birds, Directive 2001/42/EC on strategic environmental assessment¹⁷ and Directive 2004/35/EC on environmental liability¹⁸.

2. State of implementation

The Third Energy Package¹⁹ was transposed for both the electricity and gas sectors into Montenegrin legislation with the adoption of the Energy Law, having entered into force on 28 January 2016²⁰, and the Law on transmission systems for cross-border exchange of electricity and natural gas that entered into force on 19 July 2016²¹.

2.1. Electricity

To complete the legal framework, RAE has to develop comprehensive secondary legislation within the time schedule put in place by the laws. The general deadline for adoption of secondary legislation is January 2017. Overall progress towards achieving the deadlines set in the laws is satisfactory²².

¹⁴ As amended by Decision 2016//12/MC-EnC of the Ministerial Council.

¹⁵ As amended by Decision 2016/15/MC-EnC of the Ministerial Council.

¹⁶ Included by Decision 2013/05/MC-EnC of the Ministerial Council, as amended by Decisions 2015/06/MC-EnC and 2015/07/MC-EnC.

¹⁷ Included by Decision 2016/13/MC-EnC of the Ministerial Council.

¹⁸ Included by Decision 2016/14/MC-EnC of the Ministerial Council.

¹⁹ For the purpose of this document: referring to the version adapted for the Energy Community and adopted by Decision of the Energy Community Ministerial Council 2011/02/MC-EnC.

²⁰ Official Gazette No 5/16. The Energy Law transposed the Third Energy Package's Gas and Electricity Directives. The Energy Law also transposed: Directive 2009/28/EC on the promotion of the use of energy from renewable sources; Directive 2005/89/EC on measures to safeguard security of electricity supply and infrastructure investments; Directive 2012/27/EU on energy efficiency, in the part relating to the energy efficiency in generation, transmission and distribution of electricity; Directive 2009/119/EC on an obligation to maintain minimum stocks of crude oil and/or petroleum products; Council Regulation (EC) No. 659/1999 of 22 March 1999 laying down detail rules for the application of Article 93 of the EC Treaty.

²¹ Official Gazette No 42/16. This Law transposed the Third Energy Package's Gas and Electricity Regulations. This Law also transposed Regulation (EU) No. 838/2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging, certain elements of Regulation (EU) No. 994/2010 concerning measures to safeguard security of gas supply and Regulation (EU) No. 543/2013 on submission and publication of data in electricity markets.

²² See as well: Energy Community Secretariat, Annual Implementation Report 2016, electricity sector Montenegro.

2.1.1 State of compliance

- Unbundling

The Energy Law transposed the unbundling requirements of the Third Energy Package correctly. Certification of the transmission system operator, CGES²³, in line with the Third Package is pending. However, the regulator has been announced that it is to be carried out by end of quarter one 2017²⁴. The necessary rules governing the certification processes have been issued by RAE in August 2016²⁵, *i.e.* before the deadline required by the Energy Law.

Unbundling of the market operator, COTEE²⁶, was finalised in 2010 as required by the Energy Law in force at that time based on a decision of the government of Montenegro of 16 December 2010²⁷.

Legal unbundling of the distribution system operator was completed in June 2016 by establishing a new electricity distribution system company, CEDIS²⁸, that is independent in decision-making from the parent company CGES. CEDIS and CGES have no shared services except IT. Rebranding was done in a compliant manner.

- Third Party Access

The Energy Law requires network operators to grant non-discriminatory access to the transmission and distribution networks unless the provision of public services is endangered. Should the access be denied, the affected party is entitled to file a complaint with RAE. Terms, conditions and fees for access and use of transmission and distribution networks are defined by rules approved by the regulator. RAE has developed new methodologies for transmission and distribution network tariffs²⁹.

- Market opening, eligibility and price regulation

The generation price of electricity is not regulated. All customers are eligible from 1 January 2015. The conditions and procedure for supplier switching are defined in the respective rules developed by the regulator³⁰ as well as rules for electricity supply³¹. In this respect, Montenegro complies with the acquis. All customers, except those connected to high voltage lines, still have access to regulated end-user prices. The Energy Law sets an action plan for market opening and development of competition in the retail market.

²³ www.cges.me.

²⁴ RAE, letter to the Secretariat of 25 January 2016, chapter "other activities in the electricity sector".

²⁵ *Rules on certificates for the Transmission System Operator*, Official Gazette No. 50/2016 of 2.8.2016.

²⁶ www.cotee.me.

²⁷ Decision on the establishment of a limited liability company "Montenegrin Electricity Market Operator" Podgorica, Official Gazette No 76/10.

²⁸ www.cedis.me.

²⁹ *Methodology determining the regulatory allowed revenue and prices for use of transmission system for electricity*, Official Gazette No. 43/16 of 20.07.2016; *Methodology determining the regulatory allowed revenue for use of distribution system for electricity*, Official Gazette No. 43/16 of 20.07.2016; *Methodology setting prices for the use of transmission or distribution which shall be paid by users of a direct line when the direct line is connected to the transmission or distribution system*, Official Gazette No 78/2016 of 31.12.2016.

³⁰ *Rules on switching the supplier of final customers*, Official Gazette No 50/2016 of 3 August 2016.

³¹ *General conditions for electricity supply*, Official Gazette No 70/2016 of 9.11.2016; *Rules for functioning of suppliers that perform the activities of supplier of last resort and vulnerable customers*, Official Gazette No 83/2016 of 31.12.2016; *Methodology determining the prices applied by the supplier of last resort and vulnerable customers*, Official Gazette No 83/2016 of 31.12.2016.

- *Balancing*

The market rules developed by COTEE and approved by RAE define principles for functioning of the balancing market and setting market-based imbalance prices for customers connected to the transmission network. COTEE is responsible for the calculation of imbalances and for ensuring the financial settlements; imbalance settlement is applied to all market participants in a non-discriminatory manner. This system is compliant with the acquis related to provision of balancing services. A national balancing market exists but only with one balancing service provider for the time being. According to the market rules in force, the provision of balancing services and the prices of imbalances are regulated. The balancing model defined by the market rules allows for market-based and non-discriminatory balancing with an inter-transmission system operator model for cross-border exchange of balancing energy. Based on this, the transmission system operators of Serbia and Montenegro developed a model for exchange of balancing energy from a manually activated frequency restoration reserve. As of May 2016, this model is fully implemented. A model for imbalance netting within the control block of Serbia, former Yugoslav Republic of Macedonia and Montenegro is being developed. The cross-border exchange of all balancing services will require deregulation of balancing reserve prices.

2.1.2 *State of secondary legislation developed by RAE*

Following the adoption of the Energy Law, RAE has developed a comprehensive set of secondary legislation. Primary legislation requires the regulator to approve 17 acts within six months and eight acts within twelve months of the law's entry into force. So far, RAE has adopted almost all the acts, namely all those required to be delivered within six months as well as most acts due only within twelve month³². RAE has competences to adopt acts and to approve acts submitted by regulated undertakings. Adopted acts include:

- Methodology determining the regulatory allowed revenue and charge for operation of electricity market operator³³;
- Methodology determining the regulatory allowed revenue and prices for use of transmission system for electricity;
- Methodology determining the regulatory allowed revenue for use of distribution system for electricity;
- Rules for drafting and monitoring of implementation of the ten year development plans for transmission electricity system³⁴;
- Rules for drafting and monitoring of implementation of the ten year development plans for distribution electricity system³⁵;

³² I.e. the rules on certification of transmission system operators for which the obligations of Montenegro undertook under the WB6 initiative foresee a shorter deadline than the one provided by law, i.e. end of December 2016.

³³ Official Gazette No 41/16 of 6.7.2016.

³⁴ Official Gazette No 43/16 of 20.7.2016.

³⁵ Official Gazette No 43/16 of 20.7.2016.

- Methodology determining prices, deadlines and conditions for provision of ancillary services and balancing services for transmission system for electricity³⁶;
- Methodology determining the method for providing funds for the Agency's operation³⁷;
- Rules determining the status of closed electricity distribution systems³⁸ ;
- Regulatory Chart of Accounts³⁹;
- Rules on the manner and detailed conditions for issuance, modification and revocation of licenses⁴⁰;
- Decision on determining the contents of the form for provision of information on consumption⁴¹;
- Rules about conditions and procedure based on which final customers for electricity may switch to another supplier;
- Rules on certification for transmission system operators;
- Rules for settling of differences between justified and actual revenues and determined costs between licensed distribution systems operators⁴²;
- Rules for functioning of suppliers that perform the activities of supplier of last resort and vulnerable customers;
- General conditions for electricity supply;
- Methodology determining the prices applied by the supplier of last resort and vulnerable customers;
- Methodology setting prices for the use of transmission or distribution system that shall be paid by users of a direct line connected to the transmission or distribution system;
- Rules for resolution of disputes by applying rules on arbitration⁴³;
- Rules about requirements for award of permits on the basis of which producers and suppliers of electricity and gas undertakings may supply final customers through a direct line⁴⁴;
- Rules on the contents of the annual report on the realization of the electricity generation plan for the previous year for the privileged producer⁴⁵.

The three pending acts⁴⁶ are under preparation. Rules for change of prices initiated by an energy undertaking, or by the Agency itself and Rules on maintaining confidentiality of commercially

³⁶ Official Gazette No 44/16 of 25.7.2016.

³⁷ Official Gazette No 44/16 of 25.7.2016.

³⁸ Official Gazette No 48/16 of 1.8.2016.

³⁹ Official Gazette No 48/16 of 1.8.2016.

⁴⁰ Official Gazette No. 50/2016 of 3.8.2016.

⁴¹ Official Gazette No. 50/2016 of 3.8.2016.

⁴² Official Gazette No. 50/2016 of 3.8.2016.

⁴³ Official Gazette No 83/2016 of 31.12.2016.

⁴⁴ Official Gazette No 83/2016 of 31.12.2016.

⁴⁵ Official Gazette No 74/2016

⁴⁶ i.e. *Rules for change of prices initiated by an energy undertaking, or by the Agency itself; Rules on maintain confidentiality of commerciality sensitive information used by system operators; and Rules on the minimum quality required for delivery and supply of electricity.* Only the latter requires development of a new document and the other two have already been issued in accordance with the previously applicable law.

sensitive information used by system operators developed in accordance with the previous Energy Law of 2010 are still in force. The draft rules on minimum quality required for delivery and supply of electricity were published for public consultation in 2016 and following summary of the consultation outcome by RAE.

In addition to the acts the regulator has to develop according to primary legislation, there are also 17 other acts that have to be tabled by energy undertakings for regulatory approval. Out of this group, ten⁴⁷ have been already submitted for approval to RAE. Thus far, RAE has approved five, namely: the methodology determining the fee for connection to the distribution system for electricity; the methodology for calculating and charging for unauthorized use of electricity; rules for functioning of the distribution system for electricity; rules for measurement in the distribution system for electricity; and rules for the detection and prevention of unauthorized use of electricity by the distribution system operator.

2.1.3 Performance under the Western Balkan 6 process

Montenegro ranks high⁴⁸ as regards the fulfilment of the three core pillars of the obligations undertaken under the WB6 initiative, namely regional capacity allocation, spot market development and cross-border balancing as well as the relevant cross-cutting measures.

- The national electricity transmission system operator, CGES, is a founding member of the Coordinated Auction Office Southeast Europe (SEE CAO) and since 2014 participates in auctioning of yearly, monthly and daily cross-border capacities.
- The Montenegrin electricity model is a front-runner in terms of market orientation, including already established cross-border cooperation for exchange of balancing energy from a manually activated frequency restoration reserve and cross-border imbalance netting (for details see chapter 2.1.1).
- The primary legislative framework needed for spot market establishment is in place⁴⁹ and the establishment of a power exchange is ongoing.⁵⁰
- Progress on cross-cutting measures, such as unbundling, price deregulation (for details see chapter 2.1.1) and independence of the regulator (for details see chapter 2.3) is in general satisfactory.

⁴⁷ Namely: *Investment plan for distribution and transmission system operators; Program for purchase of DSO infrastructure; Methodology determining the fee for connection to the transmission system for electricity; Rules for functioning of the transmission system for electricity; Market Rules for the electricity market.*

⁴⁸ Cf the latest Secretariat report: https://www.energy-community.org/portal/page/portal/ENC_HOME/AREAS_OF_WORK/WB6/Monitoring.

⁴⁹ The Energy Law and the Law on transmission systems for cross-border exchange of electricity and natural gas set a legal basis for designating a nominated electricity market operator. The Law amending the VAT Law of August 2016 determines that the provision of access to the electricity system shall be taxable at the place where the recipient of service is established.

⁵⁰ The contract on establishing the company as well as its statute are in drafting phase. The market operator COTEE, the transmission system operator CGES and the incumbent utility EPCG were tasked by the Government to sign this contract by June 2016 and to become operational by 1 October 2016. A related signature is still pending.

2.2. Natural Gas

Montenegro has no gas market and / or infrastructure.⁵¹ Nevertheless, Montenegro is obliged to transpose the Third Energy Package in natural gas, which it did in principle via the 2015 Energy Law and 2016 Law on cross-border exchange of electricity and natural gas. This represents a key step forward in terms of the country's compliance with Energy Community law.

2.2.1 State of compliance

In the light of the lack of a gas market in Montenegro, the analysis provided hereinafter is of *de iure* nature.

- *Unbundling*

The Energy Law is compliant with the Third Energy Package unbundling and certification requirements. Montenegro transposed provisions on ownership unbundling correctly, as the only possible model for the country. The unbundling requirements for distribution and storage system operators are in line with Directive 2009/73/EC.

- *Third Party Access*

The general requirements for non-discriminatory access to the transmission and distribution networks, storage facilities and LNG terminals as well as the conditions for refusal of access are aligned with the gas acquis. The only exception is the absence of a provision requiring access refusals to be accompanied by a duly reasoned explanation and narrower rules for exemptions than those stipulated by the Third Energy Package, namely limiting eligibility only to a transmission system operator. The principles of tariff methodologies are compliant with Directive 2009/73/EC and Regulation (EC) 715/2009, which requires establishing a separate tariff for each entry/exit point to/from the transmission grid. In praxis, the tariff systems have not been adopted.

- *Market opening, eligibility and price regulation*

The Energy Law grants eligibility to all final customers. However, the concept of eligibility in Montenegrin legislation does not specify whether wholesale customers (traders) are deemed eligible. Legislation allows for market opening in line with the Third Energy Package. It envisages somewhat vaguely that the regulatory authority approves the market rules "in line with the same conditions as for the electricity market" and allocates the market operator role to the transmission system operator. In praxis, the market rules have not yet been developed.

⁵¹ The Government of Montenegro has launched the preparation of a gas master plan aimed at providing a clear and realistic strategy for gas penetration in Montenegro. The most realistic project for gasification is the construction of the Ionian-Adriatic gas pipeline.

- *Balancing*

Existing legislation requires the transmission system operator to adopt balancing rules. Such balancing rules must be market based as required by Regulation (EC) 715/2009.

2.2.2 State of secondary legislation developed by RAE

Secondary legislation has not been drafted, let alone adopted, by the regulator or where applicable by the Ministry of Economy. This constitutes a breach of the deadlines set by the Laws.

In 2014, the regulator applied for and received a grant from the Kingdom of Norway for development of secondary gas legislation in line with the Third Energy Package. After the adoption of the Energy Law in 2015, RAE in mid-2015 initiated a tender procedure for the selection of experts. The tender process was, however, challenged in court; the case has not been settled so far. In the meantime, the implementation of the IPA⁵² 2012 project started in Montenegro, within which the regulator asked for support in preparing draft secondary legislation for gas.

RAE's efforts to engage consultancy services, whether provided or not, cannot make up for its failure to comply with the legal obligations. Although, as stated before, the gas sector in Montenegro is still non-existent, the lack of a developed regulatory framework will frustrate Montenegrin and European efforts to deliver a gas connection to the country.

2.3. The regulatory authority

2.3.1 Legal set-up

The regulator is established as a single authority for regulating the entire energy sector of Montenegro, as required by the Third Energy Package. RAE is by law set up as an institution legally distinct and functionally independent from any other public entity. The establishment of RAE is solely based on legislation, which means that the regulatory authority cannot be liquidated by act of another public institution.

RAE is headed by a board consisting of two members, a president as well as an executive director and a deputy executive director. In line with the Third Energy Package the term of the board members is limited to a period of five years, renewable once, and a rotation scheme is in place.

After the adoption of the new Energy Law in 2015, RAE ranks among those Contracting Parties' regulators whose organisation complies with all independence criteria and competences stipulated by Directives 2009/72/EC and 2009/73/ EC, with the exception of two obstacles. Firstly, the management is not entirely free to decide on the authority's internal organisation as its statutes are subject to governmental approval. Secondly, the right to impose penalties is not with the regulator but is transferred to a competent court. While this does not represent a breach of the Energy

⁵² *Instrument for Pre-Accession Assistance*, a funding mechanism of the European Union.

Community acquis, it still weakens the ability of the regulator to act effectively in terms of enforcement. A recent change of the Law on Salaries in the Public Sector introduced a link of RAE's salaries to those of civil servants. However, the salary level ranks relatively high in terms of the overall civil service salary scale.

RAE is held accountable for its activities by being obliged to annually present a financial report as well as a report on the situation in the energy sector of Montenegro to the Parliament.

2.3.2 Performance and independence

On the regional level, RAE is one of the most active participants in the Energy Community Regulatory Board (ECRB), including holding the body's Presidency since December 2013 and leadership of several ECRB Task Forces (TF) in core areas of its activities such as: TF co-organising the joint ECRB-CEER workshop on consumer awareness (2014), TF assessing barriers to retail market entry (2015), TF on electricity balancing (2015-2017), TF on independence of regulators (2015), TF coordinating regulatory input to the WB6 and CESEC initiatives (2016), TF on regulatory enforcement (2017) and TF on retail market monitoring (co-leadership 2017).

On the national level, RAE has proven both its expertise and commitment to develop secondary legislation in line with the required deadlines and even ahead of schedule. RAE's performance and independence thus seem well established with regard to technical aspects of market regulation.

As regards regulatory independence, the Secretariat already in its previous assessments⁵³ applied the strictest standards in terms of *de iure* transposition and *de facto* implementation and underlined its conviction that one must expect from a truly independent regulator *active* enforcement of legal obligations including imposition of measures in case of incompliances. In this context, the Secretariat observes a steady increase in RAE's readiness and performance to pro-actively shape its market beyond pure technical development of market rules and tariffs. This observance has proven to be solid in the WB6 process under which RAE took a leading role in defining national measures in a progressive way.

2.4. Competition and State aid

Montenegro has adopted a Competition Law in 2012. Its provisions are to a large extent in line with the acquis on competition. The authority in charge of enforcement is the Agency for Competition Protection (ACP). However, since its establishment, there has been no case of applying competition law to the electricity or gas sector, except for the review of three mergers.

In the area of State aid, the Law on State Aid Control adopted in 2009 and amended in 2011 falls short of complying with the State aid acquis, in particular with regard to the definition of State aid and the independence of the State Aid Control Commission, which is appointed by the government

⁵³ Cf fn 4.

and its work is prepared by the Ministry of Finance. These shortcomings are expected to be addressed in a new Law on State Aid Control currently being drafted.

2.5. Environment

Montenegro has reached a high level of transposition of the Energy Community environmental acquis. With regard to the directives in the case of which the transposition deadline has already passed (Environmental Impact Assessment, Sulphur in Fuels), they have been fully transposed into national law.

As regards the implementation of the Large Combustion Plants Directive, for which the Treaty established the deadline of 31 December 2017, Montenegro submitted an opt-out declaration for its only large combustion plant in 2015 and was granted this implementation alternative by the Ministerial Council⁵⁴.

Currently, there are no infringement procedures open against Montenegro related to the environmental acquis.

3. Forecast – probability to reach full de iure and de facto compliance within the next six to twelve months

As analysed in detail in previous chapters, primary legislation of Montenegro for the gas and electricity sectors is aligned with the Third Energy Package. The minor shortcomings in gas legislation must not be considered of significant relevance having in mind the lack of a gas market in the country. Moreover, Montenegro is not subject to any infringement case in the areas of electricity and gas.⁵⁵

RAE has proven high standards in terms of delivering on time or even ahead of schedule sound and market-orientated regulatory rules as required under primary legislation.

At this moment, based on the evidence available to the Secretariat, the Secretariat considers it reasonable that within the next six to twelve months the regulator adopts the still pending electricity acts and approves the relevant electricity acts of energy undertakings. The Secretariat further considers it justified to assume certification of the national electricity transmission system operator to be completed within this timeframe: RAE defined the target of completing the process by end of the first quarter 2017⁵⁶ and will receive consultancy support under the grant contract between the

⁵⁴ Decision 2016/19/MC-EnC of the Ministerial Council.

⁵⁵ The Secretariat closed the only infringement case opened against Montenegro in the electricity sector, namely Case EnC-05/11 related to lack of participation in a regionally coordinated capacity allocation mechanisms on 13.1.2015 following the successful participation of CGES in the Coordinated Auction Office South East Europe as founding member and in first allocation of annual capacities for 2015.

⁵⁶ Letter of 25 January 2016.

European Commission and the Secretariat for provision of technical assistance to support the development of a regional energy market in the Western Balkans⁵⁷.

As regards the required secondary legislation in the gas sector, the Secretariat considers finalisation within the next six to twelve months possible in principle, subject to consultancy support provided under IPA. At the same time, the Secretariat pinpoints to the relative irrelevance of meeting this deadline having in mind that gas market development is not expected within this timeframe.

The Secretariat considers it justified to assume that the Agency for Competition Protection will commence effectively enforcing competition law in the energy sector and that the new Law on State Aid Control will adequately address the concerns raised.

4. Conclusions

Gas and electricity primary legislation in Montenegro ranks among the most developed among the Energy Community Contracting Parties and is aligned with the Third Energy Package. In the complete absence of a gas market, this statement is naturally limited to transposition only in the area of gas. In the electricity sector, RAE has developed an advanced market model with a high degree of market orientation and continued to be proactive in the implementation of additional reforms envisaged under the WB6 process. It can, thus, be concluded that RAE has proven *de facto* independence and commitment to design the national electricity market already under previous legislation that had a number of significant shortcomings in terms of *de iure* independence. Following the entry into force of the new Energy Law, the regulator has demonstrated its ability to exploit its new competences and level of legal independence.

In the light of this, the Secretariat confirms that Montenegro:

- has adopted and is to a prevailing extent already applying Union law in the field of energy as required by Article 31(1) ACER Regulation; and
- can be expected to fully apply Union law in the field of energy as required by Article 31(1) ACER Regulation within the next six to twelve months.

The Secretariat, thus, respectfully suggests to favourably consider an invitation for RAE to:

- the Implementation, Monitoring and Procedures Working Group of ACER; and
- the Electricity and Gas Working Group of ACER conditional on certification of the relevant national transmission system operator in line with the Third Energy Package, including the related certification Opinion issued by the Secretariat.⁵⁸

⁵⁷ See the technical assistance Work Program (https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/4448414/430EA40557BA72ADE053C92FA8C08D82.pdf), page 21, project no 9.

⁵⁸ Given the absence of REMIT in the Energy Community, the Secretariat abstains from the proposal related to the invitation to the Monitoring, Integrity and Transparency Working Group.

Annex

	Criteria	Reference	
		Gas	Electricity
Legal set-up and impartiality	NRA is established as single regulatory authority with nation-wide competences in gas and electricity	Directive 2009/73/EC, Art 39.1	Directive 2009/72/EC, Art 35.1
	NRA is established by law, <i>i.e.</i> not by decision of another public institution	not a 3rd Package requirement but as a general principle an institution needs to be established by law to ensure independence	
	Legal and functional independence from public and private interests is stipulated by law	Directive 2009/73/EC, Art 39.4(a)	Directive 2009/72/EC, Art 35.4(a)
	Management and staff are prohibited to hold political positions or have interest in regulated companies	Directive 2009/732/EC, Art 39.4(b)	Directive 2009/72/EC, Art 35.4(b)
	Sanctions for violation of the prohibition to hold political positions or have interest in regulated companies exist (dismissal or other)	Directive 2009/72/EC, Art 35.4(b) and Directive 2009/732/EC, Art 39.4(b) require that management and staff are prohibited to hold political positions or have interest in regulated companies - a sanction mechanism in case of violation of this rule additionally supports compliance (ECS, Policy Guidelines on NRA Independence)	
	Staff has to act independently from market interests / not seeking or taking instructions	Directive 2009/73/EC Art 39 (4b (ii)) and ECS, Policy Guidelines on NRA independence	Directive 2009/72/EC Art 35 (4b (ii)) and ECS, Policy Guidelines on NRA independence
	Decision-making is by law defined as autonomous and independent	Directive 2009/73/EC, Art 39.5(a)	Directive 2009/72/EC, Art 35.5(a)
	Decisions are immediately legally binding	Directive 2009/73/EC, Art 41(4a)	Directive 2009/72/EC, Art 37(4a)
	Decisions are required to be duly substantiated and justified to allow for juridical review	Directive 2009/73/EC, Art 41(16)	Directive 2009/72/EC, Art 37(16)
	Appointment of Board members	Vacancies are announced publically	ECS, Policy Guidelines on NRA independence
Selection process is defined by law and includes a selection committee		ECS, Policy Guidelines on NRA independence	
Selection criteria for Board members are defined by law and are limited to education, experience, neutrality		ECS, Policy Guidelines on NRA independence	
Top management terms are limited to a fixed term of 5-7 years		Directive 2009/73/EC, Art 39(5b)	Directive 2009/72/EC, Art 35(5b)
Top management terms are renewable only once		Directive 2009/73/EC, Art 39(5b)	Directive 2009/72/EC, Art 35(5b)
A rotation scheme in the sense of the 3rd Package is in place		Directive 2009/73/EC, Art 39(5b)	Directive 2009/72/EC, Art 35(5b)

	Criteria	Reference	
		Gas	Electricity
Operation	NRA has sufficient human resources	Directive 2009/73/EC, Art 39(5a)	Directive 2009/72/EC, Art 35(5a)
	Management has autonomy over internal organisation (work program, statutes) including staff appointments	Directive 2009/73/EC, Art 39(4a); ECS, Policy Guidelines	Directive 2009/72/EC, Art 35(4a); ECS, Policy Guidelines
Financial independence	NRA has a separate annual budget	Directive 2009/73/EC, Art 39(5a)	Directive 2009/72/EC, Art 35(5a)
	The budget is financed from levies	ECS, Policy Guidelines on NRA independence	ECS, Policy Guidelines on NRA independence
	NRA's budget does not require approval by another public body	ECS, Policy Guidelines on NRA independence	ECS, Policy Guidelines on NRA independence
	NRA has certainty over its financial resources	ECS, Policy Guidelines on NRA independence	ECS, Policy Guidelines on NRA independence
	Staff salaries orientate on regulated industry	ECS, Policy Guidelines on NRA independence	ECS, Policy Guidelines on NRA independence
	NRA has autonomy in using its annual budget	Directive 2009/73/EC, Art 39(5a)	Directive 2009/72/EC, Art 35(5a)
Dismissal	Dismissal reasons are limited to cases of criminal offence or incompliance with independence requirements	Directive 2009/73/EC, Art 39(5b subparagraph 2)	Directive 2009/72/EC, Art 35(5b subparagraph 2)
Competences	NRA is equipped with all 3rd Package competences	Directive 2009/73/EC	Directive 2009/72/EC
Accountability	NRA provides an annual activity report	Directive 2009/73/EC, Art 41 (1e)	Directive 2009/72/EC, Art 37 (1e)
Transparency	Decisions are published	Directive 2009/73/EC, Art 39(4a)	Directive 2009/72/EC, Art 35(4a)
	Information about the NRA's structure and governance is published	Directive 2009/73/EC, Art 39(4a)	Directive 2009/72/EC, Art 35(4a)
	Board meetings are (in general) open to the public	adds to transparency (Directive 2009/73/EC, Art 39(4a))	adds to transparency (Directive 2009/72/EC Art 35(4a))