

Energy Community Regulatory Board
**Survey of independence of national regulatory
authorities in the Energy Community**

2024

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INTRODUCTION

About ECRB

The Energy Community Regulatory Board ('ECRB') is the independent regional body of energy regulators in the Energy Community and beyond. Competencies of ECRB are defined in the Treaty Establishing the Energy Community (hereinafter: the Treaty¹). Over time the ECRB gained a number of new competences to foster integration of Contracting Parties' energy markets in the internal EU electricity and natural gas markets.

ECRB promotes the development of a competitive, efficient and sustainable regional and pan-European energy market that works in public interest. A harmonised and reliable regulatory framework is essential for building trust of investors and customers. ECRB mission is to facilitate this process for the benefit of the Energy Community citizens.

Background and scope

Regulatory independence is a central pre-condition for the proper functioning of internal electricity and gas markets. Therefore the Energy Community *acquis communautaire* establishes regulatory authorities ('NRAs') as independent institutions. In particular the Electricity² and Gas³ Directives increased emphasis on regulatory independence. However, even independence granted to NRAs by the law does not necessarily have to translate into real term independence. The purpose of this report is to examine not only the national legal frameworks safeguarding regulatory independence, but to provide insights into their implementation and some obstacles as perceived by the NRAs themselves.

The present report analyses the status of independence of NRAs in the Energy Community based on the request of the ECRB at the 56th meeting, organized on 19th December 2023. It focuses on the Energy Community Contracting Parties (CPs): Albania, Bosnia and Herzegovina, Georgia, Kosovo*, Montenegro, North Macedonia, Serbia and Ukraine. One Observer country - Armenia - and one participant - Austria⁴ - are also included for broader comparison.

The report is structured predominantly around the requirements of Article 57 of the Electricity Directive.

The survey is based on information provided by the NRAs of the involved countries.

¹ <https://www.energy-community.org/legal/treaty.html>

² <https://www.energy-community.org/dam/jcr:4dd35c70-91d7-4219-8396-7637a0cef7c7/EnC%20LF%205.0%20VOLUME%202%202019944.pdf>

³ https://www.energy-community.org/dam/jcr:004b3ca7-fa52-4633-875e-8ac1b2cea021/Directive_2009_73_GAS.pdf

⁴ The full list of NRAs covered by this report is in the ANNEX.

LEGAL DISTINCTION AND AREAS OF REGULATION

In accordance with Article 57 (1) of the Electricity Directive, Contracting Parties are required to designate a single national regulatory authority. Furthermore, in accordance with Article 57 (4a) of the Electricity Directive Contracting Parties must guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. They shall ensure that the regulatory authority is legally distinct and functionally independent from other public or private entities.

Most of the NRAs in the Energy Community are established in accordance with primary legislation enacted by the Parliaments of Contracting Parties. Primary laws defined NRAs as independent authorities with a specific mandate in the energy sector. In the cases of Kosovo* and Armenia, the establishment of such authority is also outlined in their respective constitutions. In Moldova, the NRA is established through a specific government decision, whereas in Ukraine, it is established through a Presidential decree which remained in force until primary legislation on the NRA was enacted.

NRAs in the Energy Community are established as non-profit institutions with the status of public legal entity vested with executive powers in the energy sector, and in some cases, other sectors as well.

Laws define the NRAs as authorities or agencies independent from public or private interest. The principles of impartiality, transparency and non-discrimination apply to both the Board and the staff of the NRA. In Ukraine, as explicitly stated in the legislation, any attempt, whether verbal or written, by any authority, organization, or individual to impede the performance of the NRA is deemed unlawful.

Law provisions guaranteeing funding from their own budgets, sourced primarily from regulatory fees, further enhance the independence of the NRAs in the Energy Community.

Austria, Ukraine and Kosovo* have dedicated Laws on powers and functions of the NRA. Additional duties and responsibilities of the NRAs are outlined in primary legislation concerning the energy sector. In other Contracting Parties, the powers and functions of the NRAs are typically incorporated into a set of laws pertaining to the energy sector. Nevertheless, various aspects of NRA operations are also integrated into laws governing general aspects of civil services, public administration, licensing, and related domains.

The authority to liquidate, reorganize or amend the powers of the NRAs rests with the national parliaments of the Contracting Parties. They can enact such changes through amendments to the primary legal framework. In many of the Contracting Parties, the national parliament appoints and has the authority to dismiss the board members based on certain criteria.

In Ukraine, NRA has a legal status of central executive power body and therefore subordinates to the Cabinet of Ministers (CMU) based on general law. This general law that doesn't contain any explicit exemptions regarding CMU's power over NRA. At the same time, a specialized law on NRA is in place detailing its functionality, tasks, responsibilities and decision-making process. E-Control of Austria, as an institution, is attached to the energy ministry, which enables the energy minister to seek information from it but not to interfere with or give instructions to E-Control in exercising its regulatory duties.

NRAs of the Contracting Parties, Armenia and Austria are accountable to and report to their respective national parliaments. In the case of Georgia, GNERC also reports to the President. However, this does not preclude the NRAs from being accountable to other public authorities such as anti-corruption authorities and state auditors.

Electricity and natural gas sector

All analyzed NRAs have similar powers in electricity and natural gas sector encompassing, but not limited to, the following areas:

- ✓ Licensing entities operating in the electricity and gas sector,
- ✓ Regulating activities of the network operators and approving network tariffs,
- ✓ Approving regulatory acts on market and system operation,
- ✓ Monitoring the market and services,
- ✓ Imposing certain sanctions in case of breaches,
- ✓ Regulating conditions for electricity and gas supply,
- ✓ Consumer protection, etc.

NRA of Bosnia and Hercegovina is the only authority that does not cover natural gas. sector.

District heating sector

NRAs from North Macedonia, Montenegro, Kosovo*, Moldova, Ukraine, and Armenia also regulate the district heating sector. They have similar powers in encompassing, but not limited to, the following areas:

- ✓ Licensing entities operating in the district heating sector,
- ✓ Approving regulatory acts on thermal energy and network,
- ✓ Setting tariffs,
- ✓ Monitoring services provision,
- ✓ Consumer protection, etc.

Water sector

NRAs from Georgia, North Macedonia, Montenegro, Moldova, Ukraine, and Armenia also regulate the water sector. They have similar powers in encompassing the following areas:

- ✓ Licensing entities operating in the water sector,
- ✓ Approving regulatory acts,
- ✓ Setting tariffs for services,
- ✓ Monitoring services provision,
- ✓ Consumer protection.

Sewage and waste sectors

NRAs from North Macedonia, Montenegro, Moldova, and Armenia also regulate the sewage and waste sectors. NRA from Ukraine regulates the sewage sector. They have similar powers in encompassing the following areas:

- ✓ Approving regulatory acts regarding the sewage and waste sectors,
- ✓ Setting tariffs for service.

Other competences of NRAs in the Energy Community

1. Competences of NRAs related to Guarantees of Origin

NRAs from Albania, Georgia, Montenegro, Kosovo*, Serbia, Moldova, Ukraine and Austria have specific competences related to Guarantees of Origin (GoO). In all these Contracting Parties, the respective NRAs establish the regulatory framework on GoOs, monitor the GoOs market, and approve the fees for the register. In Austria, the NRA administers the GoO database for Austria. Additionally, NRAs in Austria, Albania, Kosovo*, Moldova and Ukraine also serve as the issuing body for the GoOs.

2. Competences of NRAs related to energy efficiency support scheme

NRAs from Contracting Parties do not have competence in relation to energy efficiency support scheme. However, NRAs from Georgia and North Macedonia reported that they can introduce incentive measures to the TSOs and DSOs to promote and encourage energy efficiency. On the other side, NRA in Austria acts as an energy efficiency monitoring board (e.g. provides market information, maintains the list of energy auditors and advisers etc.).

3. Competences of NRAs related to public service obligation

The primary legislation in Albania, Bosnia and Herzegovina, Georgia, Kosovo*, Moldova, North Macedonia, Ukraine and Austria delineates powers of NRAs in defining, establishing and monitoring public service obligations, which impose certain requirements on energy entities. Such roles of NRA, for example, range from consumer protection when it comes to connection/disconnection by E-Control to price regulation for certain customer categories by ANRE.

4. Competences of NRAs related to renewables support scheme

NRAs of Contracting Parties have varied competencies related to renewables support scheme. Some examples are:

- ✓ NRAs in Albania, Kosovo*, and Ukraine define renewable obligations in the retail tariff and approve feed-in tariff for small renewable producers.
- ✓ NRA in North Macedonia establishes the rule book for renewable producers utilizing feed-in tariffs.
- ✓ NRA in Moldova approves the renewable support scheme, defines renewable obligations in the retail tariff and approve feed-in tariffs.
- ✓ NRA of Austria publishes the applicable market price for feed-in tariff calculation.

INDEPENDENCE IN DECISION-MAKING

Article 57(4b) of the Electricity Directive clearly designates that the regulatory authority acts independently from any market interest, does not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. Further, Article 57 (5a) of the same Directive requires that the regulatory authority can take autonomous decisions, independently from any political body.

All analyzed NRAs confirmed that they do not receive any instructions or tasks from the Government, other political or state bodies, on their regulatory tasks. National legislative basis in the Contracting Parties in many cases directly designates that NRAs shall operate independently and not seek any instructions from the authorities and other parties. These provisions, however, are without prejudice to cooperation with the Government and public authorities. In some cases, such as in Georgia, Kosovo* and Ukraine, interference in regulator's decision making is explicitly prohibited by relevant legislation.

In most cases, the NRAs of the Contracting Parties do not have a long-term strategy, but operate under yearly work plans. Only in the case of Moldova, the long-term strategy is in place. In Bosnia and Herzegovina and Austria, the NRAs follow the long-term strategy determined by the Government for energy sector. In Kosovo* and Armenia, in addition to annual work plans, regulatory authorities follow the long-term strategy defined by either the Parliament (Kosovo*) or

Government (Armenia). In the case of Ukraine, the NRA performs only certain tasks stemming from the Energy Strategy by 2050 approved by the Government.

The decisions of all NRAs of the Contracting Parties and Austria apply directly. In Ukraine, however, some types of decisions prior to final adoption by the NRA, require approval by the national antitrust authority – the Antimonopoly committee. In case of Armenia, while decisions also have direct application, some decrees require consent from other state authorities.

While the NRAs of the Contracting Parties do not experience actions by other state bodies or private entities trying to influence regulatory decision making, the following cases have taken place. In Bosnia and Herzegovina in 2020, another government institution adopted Instruction on approval of maximum capacity for the integration of variable energy sources. This bylaw intended to force the regulatory authority SERC to make an affirmative decision and approve the amount of maximum capacity for the integration of variable energy sources, as determined by the Independent System Operator (ISO), without SERC's own analysis and critical review of submitted ISO's proposal. Regardless of the adopted Instruction, SERC's decision was made independently.

Another case is in Montenegro, where the Parliament has not been approving REGAGEN's energy sector and activity reports for the past three years, without providing any reasoning of such a decision or suggestion for improvement of reports. As these reports aim to describe processes and developments in the energy sector, continuous rejection could be perceived as a sign of political pressure.

In most cases, the decisions of regulatory authorities of the Contracting Parties, Armenia and Austria enter into force following their publication either in the official gazette or journal, via NRA's website or a combination of both. In Georgia, individual administrative acts enter into force upon announcement during NRA's public hearing, while the normative administrative acts come into force upon publication in the Legislative Herald of Georgia. In Kosovo* and Ukraine, decisions are published on regulator's website. In Albania and North Macedonia both publication methods apply, which in the latter case depends on a type of regulatory decision.

The decisions of the NRAs of the Contracting Parties, Armenia and Austria are subject to judicial appeal in courts.

As a rule, the decisions of the NRAs may not be overruled by bodies and authorities other than court. In Serbia, as the Ministry of Energy acts as a second instance in licensing procedure, it may overrule regulator's decision on this matter only.

ENFORCEMENT OF DECISIONS

Article 59 (3) of Electricity Directive explicitly designates that the regulatory authorities shall have at least the following powers:

- to issue binding decisions on electricity undertakings,
- to carry out investigations into the functioning of the electricity markets, and to decide upon and impose any necessary and proportionate measures to promote effective competition and ensure the proper functioning of the market,
- to require any information from electricity undertakings relevant for the fulfilment of its tasks,
- to impose effective, proportionate and dissuasive penalties on electricity undertakings, or to propose that a competent court do so,

- appropriate rights of investigation and relevant powers of instruction for dispute settlement under.

NRA tasks are further defined in Article 59 (6) of Directive 944, while Article 60 (7) requires that NRA decisions are fully reasoned and justified to allow for judicial review.

The table below summarizes powers granted to the NRAs of the Contracting Parties, Austria and Armenia in order to carry out their functions in an efficient and expeditious manner. In case of Moldova, Kosovo*, Georgia and Ukraine key duties are fully envisioned by relevant legislation. However, certain limitations apply in other Contracting Parties and Armenia. In Serbia, Bosnia and Herzegovina, North Macedonia, Albania, Montenegro and Austria, the regulator has no powers to impose administrative penalties on individuals. In Serbia, the regulator has no authority to carry out physical inspections of functioning of the electricity/gas undertakings, except when requiring to inspect unbundling of accounts of regulated companies. Also in Serbia, appropriate rights of investigation and relevant NRA resolution powers of instruction for dispute settlement apply only related to connection and system access disputes but also, in cases of pleas submitted to NRA in case of infringement of market participant obligations.

In Bosnia and Herzegovina, Montenegro and Austria, the NRAs do not have the power to impose effective, proportionate and dissuasive penalties on electricity/gas undertakings. However, E-Control of Austria may alert the competition authority or the courts when needed. In Bosnia and Herzegovina, Albania, Montenegro and Armenia, the regulators have no powers to initiate legal proceedings in court.

In Montenegro, the role of NRA is further endangered due to the Decision of the High Court for Misdemeanours stating that the NRA does not have the right to submit requests for the initiation of misdemeanour proceedings before the court for the breaches of the Energy Law. The Court stated that this right belongs to the inspectors and the Energy Ministry.

Table 1 Enforcement powers of the NRAs

Enforcement	AL	BA	GE	XK*	MD	ME	MK	RS	UA	AR	AT
to issue binding decisions on electricity/gas undertakings	√	√	√	√	√	√	√	√	√	√	√
to carry out investigations into the functioning of the electricity/gas markets	√	√	√	√	√	√	√	√	√	√	√
to carry out inspections of functioning of the electricity/gas undertakings	√	√	√	√	√	√	√		√	√	√ ⁵
to require any information from electricity/gas undertakings relevant for the fulfilment of NRA's tasks	√	√	√	√	√	√	√	√	√	√	√
to impose effective, proportionate and dissuasive penalties on electricity/gas undertakings	√		√	√	√		√	√	√	√	
to revoke the licenses or certifications	√	√	√	√	√	√	√	√	√	√	√
to impose administrative penalties e.g. on individuals			√	√	√			√	√	√	
appropriate rights of investigation and relevant powers of instruction for dispute settlement	√	√	√	√	√	√	√	√	√	√	√
to initiate of legal proceedings at a court			√	√	√		√	√	√		√
other enforcement competences (if any)								√	√	√	

⁵ Without on-site inspections, but including the requests for documents.

BOARD MEMBERS

Article 57(d)–(h) of the Electricity Directive prescribe the rules for appointment, selection, rotation, dismissal and termination of the NRA top management or members of the board.

In all Contracting Parties, Armenia and Austria, the term in office for head of regulator and board members is from 5 to 7 years. In Bosnia and Herzegovina, North Macedonia, Albania, Kosovo*, Montenegro, Armenia and Austria, this term is 5 years. In Moldova, Georgia and Ukraine term in office is 6 years, while in Serbia differentiated terms from 5 to 7 years apply.

Appointment of NRA board members in most of the Contracting Parties is done by the Parliament following a selection procedure implemented by a specially designated selection commission or the Government. In Albania, the selection commission is formed by the Parliament. In Kosovo*, the ministry in charge of energy directs the selection procedure for candidates, proposes those to the Government, which then directs to Parliament for decision in a secret voting. In Ukraine, appointment of board members is within the authority of the Cabinet of Ministers following open competition among candidates implemented by a selection commission. In Georgia, by a recommendation of the Government, the President, with the co-signature of the Prime Minister, submits the candidate to the Parliament for approval. In Austria, there is a public call for interest initiated by the energy minister, afterwards a hearing before the competent committee of the National Council is held and, finally, the energy minister appoints the members of the Executive Board.

Open and public selection procedure of candidates to the positions of board members applies in all Contracting Parties and Austria. In Armenia, while appointment procedure is similar to that of some Contracting Parties – appointment by the Parliament upon Government nomination – the open competition of candidates is not in place.

While the procedure for selection and appointment of the regulator's head is the same to that of board members in the Contracting Parties, Austria and Armenia, specific features apply in some Contracting Parties. In Bosnia and Herzegovina, in particular, the position of head rotates annually on an equal basis between the three board members. In Georgia, the head is elected by a majority of the board members by a secret ballot, with the recommendation of at least two board members, for a term of three years. Similar procedure applies in Ukraine, term in office of head is two years, four votes are necessary regardless of the number of serving board members.

The key principles for a procedure and conditions for dismissal of NRA board members are similar in the analyzed countries. However, the exact procedures and conditions, including for early termination, differ. In most cases, the decision on dismissal is by the appointing authority – the Parliament or Cabinet of Ministers.

Dismissal by Parliament applies in Serbia, Moldova, Bosnia and Herzegovina, North Macedonia, Albania, Kosovo*, Georgia (for selected reasons), Montenegro of Contracting Parties and Armenia. In Montenegro, the Government or 1/3 of members of Parliament may initiate dismissal. Only in Ukraine, dismissal of board members is a responsibility of the Cabinet of Ministers.

Reasons for termination, including early dismissal, such as expiration of term in office, voluntarily resignation, loss of national citizenship, health failure or death, non-performance of duties, absenteeism, violation of code of ethics or of anti-corruption legislation, conflict of interest provisions, entry into force of court decisions on conviction of criminal offence or imprisonment, submission of false information during selection and reaching pension age (in some cases), are in place in most of Contracting Parties.

In North Macedonia, inter alia, reason for early dismissal is abuse by a board member of the function contrary to the law. In Albania, only two reasons apply, such as non-compliance with independency and punishment for a criminal crime, while in Kosovo*, early termination is possible under several reasons, such as criminal offense, health condition, ethics code breach and continuous absence from board meetings. In Georgia, termination of a board member may also be automatic in case of recognition as missing, death, loss of citizenship or retirement in addition to decision by Parliament for other reasons. In Ukraine, reasons for early termination, inter alia, include violation of the requirements of the laws in the spheres of energy and utilities and failure to not being a member of a political party. In Armenia, one of the reasons for early termination is recognition of a board member as incompetent.

While the procedure for dismissal of NRA's head is mostly the same as that of board members in most Contracting Parties, certain specific features apply. In Georgia, dismissal of the head of the Board can be done by the 4/5 majority of board members. This issue may be raised by not less than two commissioners through a joint, substantiated written request. The board shall be obliged to consider the issue of the early dismissal of a chair and vote on it within 10 calendar days upon request receipt. If the decision is not made, the issue of early dismissal may not be raised within the next three months. In Ukraine four out of seven board members can initiate re-election of the head.

Independence of regulatory authorities is strengthened, among other, by the legal requirement that conflict of interest provisions are in place. In all Contracting Parties and Austria such provisions are applied for board members and, in almost all the cases, also for other staff members⁶. In five Contracting Parties- Georgia, Kosovo*, Moldova, Montenegro and North Macedonia as well as in Armenia, there is a further provision enforcing the absence of conflict of interest: a requirement to have the "cooling-off" period of one year for the board members. This means that the board members should not be employed in the regulated industry after expiry of their terms in the regulatory authorities for one year. In Ukraine, the requirement to have a one-year "cooling-off" period exists also for staff members.

⁶ The exception is Serbia, where for staff members there are no conflict of interest provisions.

HUMAN RESOURCES

In order to protect the independence of the regulatory authorities, Article 57 (5b) of the Electricity Directive requires that NRAs are equipped with necessary human and financial resources to carry out their duties and exercise their powers in an effective and efficient manner. This chapter provides an overview of the availability, status and employment procedures of human resources in the NRAs of the Contracting Parties, Austria and Armenia.

Number and status of regulators' staff members

Although the NRAs in the Energy Community have been entrusted with many new tasks over the past several years, the number of employees performing the regulation of electricity and gas markets remained stable overall. While additional responsibilities in terms of adding new regulated sectors were mainly recognized by increasing number of staff in these fields (heating, water, waste), the new tasks in the energy sector, such as adoption of REMIT, did not result in a substantial increase of employees. Table below provides details on number of employees (headcount) in the Contracting Parties, Armenia and Austria.

Table 2 Number of staff members in the NRAs

	2022		2023		2024 ⁷	
	Total number	Staff dedicated to energy regulation (electricity/gas)	Total number	Staff dedicated to energy regulation (electricity/gas)	Total number	Staff dedicated to energy regulation (electricity/gas)
ERE	63	42	63	42	63	42
SERC	16	12	16	12	16	12
GNERC	139	28	142	30	149	30
ERO	26	11	23	11	23	11
ANRE	157	49	157	50	153	49
REGAGEN	38	10	41	10	42	10
ERC	34	15	34	15	33	14
AERS	45	34	47	36	48	36
NEURC	585	529	585	529	585	529
E-Control	123	123	128	128	n.a.	n.a.

⁷ Status April 2024

PSRC	109	n.a.	105	n.a.	106	n.a.
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It is recommended to the NRAs to assess the need for additional employees as well as for relevant training and capacity building for existing staff members, to accommodate the present and forthcoming activities. Not only REMIT implementation requires the specific experience and expertise, but the new regulatory tasks will also be introduced after the Electricity Integration Package is transposed. The Governments of the Contracting Parties are invited to remove any obstacles in this respect.

The cases, such as the refusals of the relevant ministries to approve ERO's and NEURC's requests for staff increase, should be avoided. Kosovo* and North Macedonia are the only Contracting Parties where any change to organizational structure including number of employees requires positive opinion of ministries. In Ukraine, the number of employees in the NRA is determined and approved by another state body. According to the Decree of the Cabinet of Ministers of Ukraine No. 85 of April 5, 2014, titled "Some issues of approval of the maximum number of employees of the apparatus and territorial bodies of central executive bodies, other state bodies", the maximum number of NEURC staff is set at 600 employees.

The status of staff members of the NRAs is regulated by different laws, such as those defining rules on labour, energy sector and/or the regulator itself, but sometimes also the laws on civil servants⁸. The status of civil servants applies to the staff members of the regulators in Kosovo*, North Macedonia, Ukraine and Armenia. While this status is not *per se* incompliant with the Energy Community legislation, certain provisions of the applicable laws, especially regarding the salaries, may disincentivize experienced and highly specialized experts to continue or start working for the regulator. Revisiting applicability of such rules, or even completely abandoning application of laws on civil servants for the energy regulatory authorities, is therefore strongly recommended.

Staff recruitment

The staff recruitment procedure is determined solely by the NRAs only in Albania and Georgia. In other Contracting Parties and Armenia, relevant national legislation should be considered, in several cases strict procedures must be followed. The application of general labour rules in Bosnia and Herzegovina and Austria, including the obligations to publicly advertise certain vacant positions⁹, general requirements in term of content and deadlines for advertisements, is a good example of well-regulated recruitment procedure for regulators. This is because the basic transparency is established via broader legislation, with regulator having the autonomy to decide on the process itself. On the other side, involvement of other government agencies (e.g. ministries, platforms), as applied in Kosovo* and North Macedonia, may be a burden and represent an unnecessary involvement in regulatory process. Similarly, the obligation of the NRA in Serbia to obtain the consent of a Parliament body before commencing the recruitment procedure is also redundant.

The requirements for candidates applying for the position in the regulatory authority are defined by the regulator itself in the great majority of the Contracting Parties. The selection committees comprise only the representatives of regulatory authorities in six Contracting Parties (Albania, Georgia, Moldova, Montenegro, Serbia and Ukraine) and Austria, while in Kosovo*, Bosnia and Herzegovina also outside experts are engaged. In North Macedonia, the regulator has only one representative in the committee established by the Agency for Administration. For cases where it is already not established so, it is recommended that the

⁸ Different terminology applied, such as administrative staff, public officials etc.

⁹ E-Control is obliged to publicly advertise certain vacant positions, however not all of them.

regulatory authority has the crucial role and autonomy in defining criteria and selecting the staff members transparently and based on needs.

The length of recruiting procedures varies between 30 days in Moldova, Montenegro and Serbia to three months in Georgia and North Macedonia. In Armenia, the procedure may even take up to four months.

FINANCIAL INDEPENDENCE

In addition to the requirement to have necessary financial resources to carry out their duties, the NRAs should have a separate annual budget allocation and autonomy in the implementation of the allocated budget, according to the Article 57 (5c) of the Electricity Directive. This chapter explores the financing sources of the regulators on one side as well as their autonomy in its implementation.

Financing regulatory authorities

The NRAs source finance for their activities mainly by the so-called regulatory fees imposed on network industry, specific fees issued for licensing of energy activities, other charges and, rarely, from the state budget. The table below summarizes the information on financing sources of the regulators in the Contracting Parties, Armenia and Austria.

Table 3 Sources of finance for regulatory authorities

	Regulatory fees ¹⁰	License fees ¹¹	Other fees	State budget
ERE	√	√		
SERC	√			
GNERC	√			
ERO	√	√	√	
ANRE	√			
REGAGEN		√	√	
ERC	√	√	√	
AERS	√	√	√	
NEURC	√			
PSRC	√			
E-Control	√			√

¹⁰ For the purpose of this report, a regulatory fee is the share of annual revenue of regulated industry used for financing regulatory activities.

¹¹ For the purpose of this report, a licensing fee is the fee charged for issuing license.

All NRAs of the Contracting Parties, Armenia and Austria use regulatory fees as the main source of financing. Although named differently, also the Montenegrin regulator uses annual fees for using licenses¹² that are similar in form to the regulatory fees established elsewhere. The regulatory fees are imposed on network industry entities, but sometimes also on other energy subjects such as producers and suppliers. Some examples of other fees applied are:

- Taxes on issuance of guarantees of origin (ERO),
- Taxes for resolving disputes (ERO, REGAGEN)
- Fees on non-energy regulated industry (ERC, REGAGEN).

Only in Austria, the state budget provides a part of financing for the NRA, but only for the so called non- regulatory tasks¹³.

In Ukraine, the regulatory contributions are credited to the revenues of the special fund of the State Budget of Ukraine, are not subject to withdrawal and are used for their intended purpose to finance the activities of the NRA.

The table below provides information on the annual budgets of the regulators in the Contracting Parties, Armenia and Austria.

Table 4 Annual budgets in the period 2022-2024 (in EUR)

	2022	2023	2024
ERE	2,640,564	3,125,581	n.a.
SERC	1,174,437	1,295,613	1,405,030
GNERC	15,430,418	9,353,324	7,829,122
ERO	953,660	799,855	898,761
ANRE	4,786,497	6,412,848	7,550,224
REGAGEN	1,803,470	1,875,149	1,950,009
ERC	1,491,751	1,678,372	3,743,470
AERS	2,008,000	2,370,000	n.a.
NEURC	23,360,000	21,770,000	20,260,000
PSRC	1,979,798	2,550,014	2,568,007

In the majority of the countries, the annual budgets increased over the period 2022-2024, partly due to the increase of regulated revenues caused by raising energy prices and inflation in general, but also due the competences being extended to other sectors (ERC,

¹² Determined as monetary unit per energy produced/transmitted/distributed/delivered.

¹³ These tasks are stipulated in Section 5, para.4 of the E-Control Act and refer, for example, to Green Electricity Act, Energy Efficiency Act, CHP Act and Alternative Fuels Infrastructure Act.

ANRE, REGAGEN). In Georgia, the annual budgets of 2023 and 2024 are substantially lower than in 2022 because GNERC purchased its building in 2022. In Ukraine, the NRA budget remained unchanged in the national currency i.e. the recorded decrease is due to the exchange rate variation.

The annual budgets were approved by the Parliaments in the amounts proposed by the regulators in all Contracting Parties. Nevertheless, ERO saw problems with the budget planning system of the Ministry of finance imposing difficulties in the approval process. On the other side, ERC faced delays in budget adoption triggering usage of temporary and limited finance not covering current costs. The ECRB invites all relevant institutions to enable regulators to perform their tasks by adopting their annual budgets in the necessary amounts and in time.

All regulators in the Contracting Parties are independent in terms of budget allocation, i.e. they are free to decide how to spend their budgets. Only in Ukraine, since regulatory fees are collected by the special fund of the State Budget of Ukraine, NEURC must comply with the limits for use of state funds, in particular for maximum prices for procurement of vehicles, computers, office equipment, furniture, as well as maximum prices for accommodation and daily expenses.

In case re-allocation of budget is needed, almost all of NRAs may decide how to do so within the approved total amount. There are certain preconditions to be met in some of NRAs, e.g. in Georgia, the NRA must perform public hearing before re-allocating the budget or, in North Macedonia, the re-allocation must be justified and may be done only within the maximum budget item change of 25%. In Ukraine, the central executive body that ensures the formation of the state budget policy, upon a reasonable request of the NRA, approves amendments to the budget estimates and plan of the special budget fund and, if necessary, makes appropriate changes to the state budget schedule.

If the annual budget is not entirely spent in one year, the underspending is added to the next year's budget, consequently reducing the regulatory fees for industry. Only ERO and PSRC must transfer the non-spent amounts to the state budget. In Ukraine, the NRA has the right to use the funds remaining in the accounts of this special fund from the previous period during the current year. However, this is not feasible in practice, as under the Budget Code of Ukraine the budgetary funds remaining from the previous period may only be reallocated after the revenues scheduled for the current year are collected. Therefore currently, NEURC allots the unused remaining funds to the needs of the Armed Forces of Ukraine. The approach comprising the reduction of regulatory fees in the following year enhances transparency and is fairer towards regulated companies. Finally, financial reports of the regulators are regularly revised by independent auditors.

An important aspect of financial independence is determination of staff salaries. This is strongly linked with the requirement to have adequate human resources for fulfilling the increasing regulatory tasks. The regulators should be able to attract and keep highly specialized experts, which means that they must have autonomy to assess the needs and decide on the salary amounts.

Nevertheless, several regulatory authorities of the Contracting Parties and Armenia have no such autonomy. As mentioned in the chapter on human resources, the regulatory staff has the status of civil servants in Kosovo*, North Macedonia, Ukraine and Armenia, with the salary levels regulated or affected by non-energy related legislation¹⁴. For example, the salaries of Board and staff members in REGAGEN and ERO are substantially lower than those in the regulated energy industry and the agencies are already facing a "brain drain" and have difficulties in ensuring sufficient human resources for carrying out their regulatory tasks. In Kosovo*, ERO appealed in Constitutional Court the Law on Salaries in

¹⁴ ERC of North Macedonia has certain autonomy in determining the salaries, however there is a requirement that they should be comparable to the salaries and compensations in the energy companies. Also in Bosnia and Herzegovina the salaries must be determined in line with the Law on salaries and other remunerations in the public institutions of BiH. In Ukraine, the salaries of the staff members, although having the civil servant status, are determined in line with the Law on the regulator.

Public Sector, with the result that the law had been returned to the Parliament for improving certain provisions.

Finally, in two Contracting Parties (Georgia and North Macedonia) there are ongoing initiatives aiming at unifying and/or lowering the salary levels of regulatory staff. Taking all this into account, the ECRB invites the relevant institutions to ensure the regulatory independence and enable regulatory authorities to have enough human and financial resource to meet their legal obligations for the benefit of energy market reforms and green transition.

CONCLUSIONS AND RECOMMENDATIONS

The present report analyzed national legal frameworks safeguarding independence of regulatory authorities in the Energy Community and provided insights into their implementation. The independence requirements of Electricity Directive served as a basis for assessing legal compliance.

The analysis shows compliance with the independence criteria of the Energy Community legislation, but also restrictions to regulatory independence in the following areas:

- ✓ The regulatory authorities are legally and functionally independent from other entities. Nevertheless, Ukrainian NRA has a legal status of central executive power body and therefore subordinates to the Cabinet of Ministers based on the general law, although the specific law on the regulatory framework provides for its functional independence.
- ✓ All analyzed NRAs operate independently and do not seek any instructions from the authorities and other parties. The decisions of all NRAs apply directly. Only in Ukraine and Armenia, some types of decisions require approval by other authorities prior to final adoption by the NRA. The NRA of Bosnia and Herzegovina saw the interference in performing the task of approving the maximum capacity for the integration of variable energy sources, when the government adopted the related instruction. Another case is in Montenegro, where the Parliament has not been approving REGAGEN's energy sector and activity reports for the past three years, without providing any reasoning of such a decision or suggestion for improvement of reports. Considering the fact that these reports aim to describe processes and developments in the energy sector, continuous rejection could be perceived as a sort of political pressure.
- ✓ In all analyzed cases, the board members have fixed terms of office. Open and public selection procedure of candidates to the positions of board members applies in all Contracting Parties. In Armenia, the open competition of candidates is not in place. Conflict of interest provisions are in place for board members in all Contracting Parties. The key principles and conditions for dismissal of board members are transparently provided by the relevant legislation.
- ✓ Although the NRAs in the Energy Community have been entrusted with many new tasks over the past several years, the number of employees performing the regulation of electricity and gas markets remained stable overall. This points out to the fact that the respective NRAs may not be equipped with all the necessary human resources to carry out their tasks and exercise their powers in an effective and efficient manner.
- ✓ All NRAs have a separate annual budget allocation, but some of them - ERO and ERC - saw difficulties in the budget approval processes. The regulators are also independent in terms of budget allocation in all analyzed countries, except Ukraine where NEURC must comply with certain limits for use of state funds.
- ✓ Several regulatory authorities of the Contracting Parties (ERO, REGAGEN, ERC, NEURC) and Armenia have no full autonomy to determine staff salaries. There are even regular attempts by other institutions to lower staff salaries. Consequently, these NRAs

face continuous difficulties in attracting and keeping highly specialized experts that they need for fulfilling the increasing regulatory tasks.

Considering the above conclusions, the **ECRB recommends the NRAs of Contracting Parties and Armenia** the following:

- ✓ Regulatory authorities in the Energy Community shall have the powers as prescribed in the Energy Community legislation to facilitate development of a competitive, flexible, secure and environmentally sustainable internal energy market. It is recommended to revise national legislation to remove present gaps, where those exist.
- ✓ The NRAs should have freedom in decision making within sphere of their competences without influence of other parties, be it government institutions, political or state bodies or market interests. These provisions shall be without prejudice to cooperation as envisaged by national legislation. The decisions of the NRAs shall take effect immediately upon adoption.
- ✓ Presence of and adherence by NRAs to a long-term regulatory strategy, a dedicated NRA strategy or as a part of the overall energy strategy, is an important tool to ensure transparency and predictability in national energy markets functioning. Such regulatory strategy would foster regional integration, investments and green transition. It is therefore recommended to NRAs to consider the development and publication of such strategies.
- ✓ Taking into account the increasing number of regulatory tasks, it is recommended to the NRAs to assess the need for additional employees as well as for relevant training and capacity building for existing staff members. Cases, such as the refusals of the relevant ministry to approve requests for a staff increase, should be avoided.
- ✓ The application of the civil servant status for the NRA staff should be considered with care. While this status per se is not incompliant with the Energy Community legislation and can bring some benefits, such as job certainty, certain provisions of the applicable laws, especially regarding the salaries, may disincentivize experienced and highly specialized experts to continue or start working for the NRA.
- ✓ The staff recruitment procedure should be done by the NRAs independently and transparently. If certain other national legislation contributes to transparency, it should be considered. Any involvement of Government agencies or a Parliament body in the NRA staff recruitment process may be a burden and represent an unnecessary involvement in regulatory process. The NRAs should also have the crucial role and autonomy in defining criteria for selecting the staff members.
- ✓ The annual budgets of the NRAs should be adopted in time and in the amount needed for fulfilling the tasks entrusted to them by the legislation. The NRAs must also be independent in terms of budget allocation.
- ✓ ECRB invites the relevant institutions to ensure the regulatory independence and enable regulatory authorities to have enough human and financial resource to meet their legal obligations for the benefit of energy market reforms and green transition.

ANNEX - List of NRAs

NRAs in Contracting Parties of the Energy Community:

Albania (AL) - ERE

Bosnia and Hercegovina (BA) – SERC

Georgia (GE) – GNERC

Kosovo* (XK*) - ERO

Moldova (MD) - ANRE

Montenegro (ME) - REGAGEN

North Macedonia (MK) – ERC

Serbia (RS) – AERS

Ukraine (UA) – NEURC

Other NRAs covered in this survey:

Armenia (AR) – PSCR

Austria (AT) – E-Control