



Energy Community Regulatory Board

**Proposal for a Harmonized System of Wholesale
Trade Licensing in the 8th Region**

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1. BACKGROUND

Task Force (TF) 4 of the ECRB Electricity Working Group (EWG) was mandated by the ECRB EWG¹ to work on the **possibilities of establishing a harmonized system of licensing in the 8th region**, the focus being the licensing of wholesale traders, with the inherent need to distinguish between the wholesale trading and the supply activities of the market participants, since supply (like transmission, distribution and generation) is assumed to be of national character and subject to national licensing requirements.

Two workstreams were established in order to make the work of the TF more efficient:

1. The SEE Coordinated Auctions Work Stream (CAO Workstream) and
2. The General Workstream.

Within the CAO Workstream the initial idea was to focus on the developments in the CEE region and the work that has been conducted in this respect in that region. The outcome of the investigation of the TF was a simple one: no licensing issues have been raised in the CEE region and licenses are not a prerequisite for the participation in the allocation mechanism that is conducted presently within the Prague office, nor is it envisaged as a prerequisite for the participation in the allocation scheme that will be conducted by the Freising CAO. However, even in the CEE CAO region, the nominations remain within the competences of the national TSOs, and licensing requirements might be in place for the actual nominations, but this issue has not been investigated by the TF. The TF tried to obtain the views of the TSOs from the 8th region via a questionnaire distributed to the SETSO TF on February 6th 2009 but no response of SETSO TF was received at the moment of writing this paper. However, it is reasonable to assume that the TSOs of the 8th region will follow the concept adopted by their colleagues in the CEE region.

The focus of this paper is only on the General Workstream of the TF. The initial idea was to build on the experiences of the work already conducted under the Licensing and Competition Committee, of ERRA (Energy Regulators Regional Association). The premise of the work of the Committee in the sense of ensuring implementation was that local legislation in all ERRA members should introduce the institution of “wholesaler/traders/suppliers without end-user”² and that local legal acts and laws allow for performing the necessary legislative amendments.

The work of this Committee differed a bit from the mandate of TF4, as it primarily focused on the harmonization of the licensing conditions, in terms of fulfilling certain criteria for obtaining a license, while in terms of the issue of “mutual recognition”, came to a clear and unambiguous conclusion” that the overall situation in ERRA countries is premature to implement this solution.”³

¹ Based on the ECRB Work Programme 2009.

² The last agreed definition was: „Electricity trader without end-user: any natural or legal person who purchases and sells (supplies – in the sense of selling) electricity for the purpose of resale.”

³ More details on the outcomes of the ERRA Licensing and Competition Committee available under III.1

2. INVESTIGATION OF THE WHOLESALE TRADE LICENSING REGIME IN THE ENERGY COMMUNITY (8th Region)

The TF conducted a small **survey/benchmarking exercise on the licensing regimes in the 8th region**. The benchmarking was simple but gave clear answers to the most burning issues related to licensing of wholesale traders and their ability to participate in the individual wholesale markets in the region or just to access the networks of the respective TSOs in the form of a “pure transit” transaction⁴. The questionnaire to which the members of the ECRB EWG provided answers consisted of 4 questions:

1. Does your national framework envisage a special wholesale trading license issued by the Regulator?
2. If your national framework doesn't envisage a special wholesale trading license, what are the prerequisites for performing wholesale trade on your national market? (for example, aside from the ETSO Identification Code (EIC) which is always a prerequisite, is it necessary to obtain another type of license, register with another institution(s) which is not the regulator, is national presence required? who monitors these traders and how? etc.) – please describe.
3. What are the prerequisites for performing a “pure transit” transaction, i.e. a transaction which does not involve any kind of purchase or sale (neither wholesale nor retail) in your country?
4. What are the rights of the regulator to seek data from entities performing wholesale trade?

The results of the inquiry are depicted in the tables in *Annex 1*. Based on the survey results the TF identified **two basic models**:

A) Explicit request for license: here four sub-groups were identified:

1. Explicit request for a license and national presence (for trade and for transit):

1.1 Croatia

1.2 Bosnia (for transit only if the part of the capacity “belonging” to the B&H ISO)

1.3 Serbia

⁴ A “**pure transit**” transaction for the purpose of this benchmarking was defined as one which does not involve any kind of purchase or sale (neither wholesale nor retail) in the respective jurisdiction.

1.4 UNMIK

1.5 Albania

2. Explicit request for license and national presence (just for trade, not for transit)

2.1 Romania

3. Explicit request for license and wider presence than national allowed (just for trade)

3.1 Hungary

4. Explicit request for license just for national companies (for trade and for transit)

4.1 Macedonia⁵

B) No licensing requirements: Under model B) no licensing requests exist, but other specific solutions apply (found in brackets):

1. Austria (BRP6-status approved by Regulator OR member of BRP-no requirements)

2. Italy (Registration with Market Operator and System Operator)

3. Montenegro (public procurement rules of primary interest, no real wholesale market activity as all electricity is bought on the borders,)

4. Slovenia (BRP or member of BRP)

(C) A specific mixed solution was identified for Greece, where a mix of licensing requirements exists with:

(a) national presence requirement (not in the sense of a national legal vehicle, but a simple legal or procedural representative, authorized to accept service of procedural documents) for wholesale trade, while

(b) trading in the wholesale market may be performed by licensed entities as follows:

-supply license holders (for imports and exports)

-production license holders for exports

Additionally, imports may be performed by self-supplying customers -for their own use - but no license is required for such an activity.

⁵ The legal requirements have been interpreted in practice in such a way that licenses are not issued to companies not incorporated in Macedonia (national presence required in practice) which means that this model in practice doesn't differ from model A)1.

⁶ BRP: Balance Responsible Party.

No specific, other than the above mentioned supply license, is required for pure transit transactions⁷.

3. AVAILABLE OPTIONS

3.1 HARMONISATION OF LICENSING PROCEDURES

This option was not considered in detail by the TF, as it was a matter of serious deliberations of the Licensing and Competition Committee of ERRA. The outputs of this Committee were clearly formulated as follows:

There are good chances for harmonization of the license application form, the corpus of commonly required documents, the time frame for authority check and decision, and the principles on which the application and license (supervision) fees were set. On the corpus of commonly required documents, the Committee concluded that the following should be requested: The deed of foundation (ownership, affiliates, parent company, etc.) the company registry excerpt, actual contact person with details, evidence of payment of the application fee, statements on bankruptcy and qualified staff, as well as technical agreements with the TSO on balance responsibility and grid availability (although it was noted that such agreements were not in place in most of the jurisdictions). On the other hand, it was clear that there are quite low possibilities on harmonization on burning issues, predominantly on the requirement to establish a local company (national presence requirement).

However the underlying question behind this approach is: **what would be the potential benefits** of its implementation? Namely, **implementation would require** changes to the individual legal frameworks within the 8th region, which could be lengthy, but at the same time would only give the same “weight” to the issued licenses in procedural terms and in terms of the administrative burden on the applicants, which was anyway defined as low by the involved regulators, given that the requirements were not too burdensome and that the procedure was generally not lengthy (commonly issued within 15 days, but never longer than 60 days).

Legal enforcement of this option would require a Measure of the MC of the Energy Community (Decision or Recommendation) based on the presence of political will and support.

⁷ Defined as the uninterrupted importing and exporting daily electricity flow ordered by a Market participant.

3.2 ABOLITION OF LICENSES

The option of abolishing licenses would certainly be most recommended by the representatives of EFET and traders in general, as it would mean taking this topic off the agenda. However, although it would be a favourable solution for traders, it seems to be rather simplistic as it only covers the aspect of licensing without any reference to the monitoring of the conduct of traders on the market. One way of conducting regulatory oversight over traders (and this is the dominant manner currently applied in the 8th region) is via the administrative relation established between the traders and the regulator by issuing a license on the basis of which data requests towards traders could be made, with the imminent threat of license suspension/revocation or penalties in case of market misconduct.

Although necessary regulatory supervision could also be established by other means, for example through direct authorization via primary legislation (to request data and sanction), **the TF concluded that this would still not be a sufficient means of efficiently ensuring fair market conduct** in itself, and that other complementary means are necessary to this effect. The basis of this conclusion can be found in the experiences of more developed national markets (ex. Italy and Austria), in which such complementary mechanisms are applied⁸.

Legal enforcement of this option would require a Decision of the MC of the Energy Community on abolition would be necessary in order to ensure that all the jurisdictions involved will implement the requirement for abolition. As a minimum, this decision would have to incorporate the empowerment of the national regulators with rights to conduct regulatory oversight over the unlicensed traders, and the right to sanction.

3.3 FADE OUT OF LICENSING IN EACH JURISDICTION COMPLEMENTED WITH OTHER MEASURES ENSURING A LEVEL PLAYING FIELD FOR TRADERS WHILE ENSURING FAIR MARKET CONDUCT

This option encompasses a softer approach to the licensing issue, which follows the models of the more developed markets (ex. Austria and Italy). In its essence it means the **abolition of licenses for wholesale traders, but in a more gradual manner**. It ensures proper conduct from the traders via contracts and other mechanisms, such as bank or other financial guarantees, established between the system (and market) operators on the one hand, and the market participants (including traders), on the other hand. It means that the traders would not be licensed, but their proper market conduct is ensured primarily through contractual and financial responsibility.

⁸ See option 3.3.

It also makes the licenses for traders obsolete under the assumption that **regulatory oversight over traders as important stakeholders on the electricity market is ensured in another manner set out in relevant legislation**, such as the possibility of the regulator to seek the relevant data from the traders themselves (Italy) or the Balance Responsible Party (Austria), and be equipped with the necessary legal instruments to ensure fair market conduct (direct sanctioning, the right to initiate procedures before other relevant bodies such as courts or competition authorities, etc.). **This model, however, in order to be fully set up, assumes that all of the abovementioned mechanisms are fully in place before the final abolition of wholesale trading licenses can take place.**

Legal enforcement of this option would require a two step process:

- 1) Decision of the MC of the Energy Community to set up the necessary mechanisms ensuring proper market conduct of the traders, both in terms of setting up their financial responsibility and their susceptibility to regulatory oversight (as described above), which would be followed by verification of the full implementation in the 8th region.
- 2) Decision of the MC of the Energy Community requesting abolition of wholesale trading licenses.

3.4 ONE LICENSE VALID IN THE REGION

This option is often mentioned as ideal solution, but one that is the **hardest** (if not impossible) **to implement**. Namely, on the very superficial level of analysis, one could argue that a license issued in any jurisdiction of the region which would be valid across the region is the simplest approach, and one that puts the least (or actually none whatsoever) administrative burden on the traders. On the other hand, the problem of such an approach is mainly legal in its nature. Licenses in the 8th region are issued as administrative acts, i.e. decisions granting the right to conduct trading activities within the realm of the administrative jurisdiction of the issuing authority. The **problems lie both in the issuing procedure and the enforcement**. In the issuing phase, in the 8th region, generally speaking, it is not possible to issue a license to a foreign entity as the national regulators do not have the administrative powers over foreign entities⁹.

- This model would as a prerequisite require the absolute same conditions for **issuing a license** and the exact same monitoring rights of all the regulators involved, in order to ensure a level playing field.

⁹ This is not a major issue in the EU (or extended to EEA) as a single EU market framework is in place and freedom of establishment is one of the core principles to be abided by. This principle, as a regional one, has not been set out in the non-EU jurisdictions of the 8th region.

- In the field of **enforcement**, the situation is much more complex. A simple example should be enough to portray the problem:

Regulator from jurisdiction A issues a license to a trader seated in jurisdiction B. Such a license is valid in jurisdictions A-Z. The trader makes an infringement in jurisdiction G, which is so severe that it requires revocation of the trading license. The regulator from jurisdiction G has no administrative powers over the trader which was issued a license by regulator A, and can basically only rely on regulator A to act on good faith and revoke the license. What happens when the good faith is not there? What are the legal instruments of enforcement?

Although one way about resolving this problem would be a very heavy legal requirement to give the possibility for all regulators to sign legally binding multilateral international agreements with other regulators, by which they could regulate the monitoring functions, rights and obligations of the regulators in the “one license valid in the whole region” concept, it would still be a framework agreement, which would need detailed mechanisms to be set up (databases, exchange of information, penalties, etc.). Even with such an agreement in place, it would be voluntary, and a regulator could always opt out of it, giving way to legal uncertainty. An additional problem which cannot be overcome easily (if at all possible) is the fact that there are jurisdictions in the region without licensing requirements (Italy, Austria, Montenegro, Slovenia), and it would be hard to justify their need to (re)introduce licensing requirements for wholesale traders just for the need to make a uniform setting in the region.

Legal enforcement: The TF did not elaborate the potential methods of legal enforcement of this option, as it is of the view that the argument based on the fact that there is nearly no grounds for a sound justification for (re)introduction of licensing requirements in jurisdictions without such requirements, is so predominant, that any discussion on legal enforcement, in the view of the TF, would be a loss of effort and time.

4. RECOMMENDATION

Against the background of the advantages and disadvantages as discussed above and the scope of facilitating trade across borders and reduce the barriers for new market entrants, it is concluded the preferred option that should be pursued in the region should be option 3.3 - **FADE OUT OF LICENSING IN EACH JURISDICTION COMPLEMENTED WITH OTHER MEASURES ENSURING A LEVEL PLAYING FIELD FOR TRADERS WHILE ENSURING FAIR MARKET CONDUCT.**

The recommendations of this report remain open to adjustments to the extent of possible streamlining with related discussions still ongoing on European level in the field of transparency in trading.

Annex – TF4 Survey Results

Question 1:

Does your national framework envisage a special wholesale trading license issued by the Regulator?	YES	NO
ALBANIA		
AUSTRIA		
BOSNIA&HERCEGOVINA		
BULGARIA	NO RESPONSE	NO RESPONSE
CROATIA		
GREECE	*There is a license but not issued by the Regulator, but by the competent Ministry	Importers, exporters and self-supplying customers
HUNGARY		
ITALY		
MACEDONIA		
MONTENEGRO		
ROMANIA		
SERBIA		
SLOVENIA		
TURKMEENISTAN		

Question 2:

If your national framework doesn't envisage a special wholesale trading license, what are the prerequisites for performing wholesale trade on your national market (for example, aside from the ETSO Identification Code (EIC) which is always a prerequisite, is it necessary to obtain another type of license, register with another institution(s) which is not the regulator, is national presence required?, who monitors these traders and how? etc.) – please describe.	N/A (have a wholesale trade license)	SPECIFICITES (where no wholesale licenses exist)	
		Other type of license	Other specific solution
ALBANIA		Trading license	
AUSTRIA			To trade an entity has to be a part of an Austrian Balancing Group - approval by Regulator
BOSNIA&HERCEGOVINA		International Trade License (prerequisite to have a Tier2 supply license)+national presence required	
BULGARIA	NO RESPONSE	NO RESPONSE	NO RESPONSE
CROATIA			
GREECE		Licenses (supply, generation)	Importers/Exports, Self-supplying customers (which can be considered to a certain extent as equivalents of wholesale license holders)
HUNGARY		2 types of licenses give the right to wholesale trade: Full License, Limited License + EU/EEA seat required (with office in Hungary)	
ITALY			Registration with Market Operator (GME) and System Operator (Terna)+bank guarantee
MACEDONIA		****Trading license only issued to companies registered in Macedonia (i.e. foreign traders allowed to trade and do not need a license from the Macedonian regulator)	****Trading license only issued to companies registered in Macedonia (i.e. foreign traders allowed to trade and do not need a license from the Macedonian regulator)
MONTENEGRO			Public procurement rules (?) + no national presence required
ROMANIA		Electricity supply license required	
SERBIA		Trading license	
SLOVENIA			Slovenian Market Operator requirements
UNMIK		Two types of licenses give the right to wholesale trade: Electricity and natural gas trade license & Cross border transmission (import, export, transit) of electricity and natural gas	

Question 3:

What are the prerequisites for performing a "pure transit" transaction, i.e. a transaction which does not involve any kind of purchase or sale (neither wholesale nor retail) in your country?	Any type of license	Other specific solution
ALBANIA	Trading license	Registration with the Market Operator (additional to license)
AUSTRIA		Considered to be a mix of import-export. Balancing Group requirements remain
BOSNIA&HERCEGOVINA	**** International trade license <u>is</u> a prerequisite if a trader uses the part of the cross-border transmission capacity which "belongs" to the TSO (ISO) of BIH.	**** International trade license <u>is not</u> a prerequisite if a trader uses the part of the cross-border transmission capacity which "does not belong" to the TSO (ISO) of BIH.
BULGARIA	NO RESPONSE	NO RESPONSE
CROATIA	Wholesale trading license	
GREECE		A transit transaction is defined as the uninterrupted importing and exporting daily electricity flow ordered by a Market participant. However, there are no prerequisites for pure transit transactions.
HUNGARY		In case of congestion: acquisition of transmission capacity rights on the respective borders; contract with a balance circle responsible (with EIC code) in Hungary for notifying the TSO of the import and export volume of the electricity.
ITALY		Registration with Market Operator (GME) and System Operator (Terna)+bank guarantee+the trader should be a physical transmission rights (PTR) holder with reference to the necessary borders.
MACEDONIA	***Trading license for Macedonian companies	***No license request for foreign companies
MONTENEGRO		
ROMANIA		The entities/companies must have an ETSO Identification Code (EIC) in order to be accepted to take part in auctions organized by the Romanian TSO for cross-border capacities.
SERBIA	Trading license	
SLOVENIA		Such a transaction not aloud per se, but rather considered to be a mix of import-export. Balancing Group requirements remain
UNMIK	Trading license	

Question 4:

What are the rights of the regulator to seek data from entities performing wholesale trade?	All data	Other solutions		
		Only specific data	Specific+Discretion	Other responsible bodies
ALBANIA				
AUSTRIA			From BRPs: Financial statements, ratings, etc. + Balancing schedules	Power Exchange is under the supervision of the so called "Börsekommisar" which is an entity within the Ministry of Economic Affairs
BOSNIA&HERCEGOVINA			Financial and other reports	
BULGARIA	NO RESPONSE	NO RESPONSE	NO RESPONSE	NO RESPONSE
CROATIA		Revenues		
GREECE				
HUNGARY				
ITALY				
MACEDONIA	*Just from Macedonian companies			
MONTENEGRO				
ROMANIA		Defined in license and monitoring rules		
SERBIA				
SLOVENIA				
UNMIK				



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