



The National Energy Regulatory Authority of Moldova

Compliance, Governance, Independence and
Performance

An Energy Community Secretariat Review



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Objective

The present report provides an in-depth assessment of the National Energy Regulatory Agency of the Republic of Moldova, ANRE. The analysis of the legislative framework looks into compliance of its organisational structure, competences and duties with the Energy Community *acquis communautaire* and, in particular, the Third Energy Package. Beyond that, practical performance as well as independence, professionalism and expertise of ANRE are analysed.

The review is performed by the Energy Community Secretariat following a request of the Republic of Moldova aiming to identify gaps and shortcomings in the existing legal set up and practical operation of ANRE and with the scope to adequately address them in the ongoing process of reforming the legal framework of ANRE.

The document provides a list of minimum requirements on improving the *de iure* and *de facto* independence and performance of ANRE.

1. Introduction

1.1. The request for an in-depth review of ANRE

The present report provides an in-depth review of the National Energy Regulatory Agency of the Republic of Moldova (ANRE¹; the 'Agency') as regards its compliance with the obligations stemming from the Energy Community *acquis communautaire* ('acquis'). The analysis of the legislative framework looks into the organisational structure, competences and duties of the Agency. Beyond that, ANRE's practical performance as well as independence, professionalism and expertise are analysed. Both aspects form the basis for concluding on *de iure* and *de facto* compliance with the *acquis*.

The present review is performed by the Energy Community Secretariat ('Secretariat') following a related request by the Republic of Moldova² aiming to identify gaps and shortcomings in the existing legal set up and practical operation of the Agency and with the scope to adequately address them in the ongoing legal reforms.

1.1.1. Scope and methodology

The data collected and analysed for this report consists of national legislation and regulation, national and international media reports and reports and guidelines of international organisations, as well as publications of think tanks and the civil society. Following the review of these sources, the Secretariat prepared tailor-made questionnaires which were sent to the relevant state authorities in Moldova including ANRE, its employees and some former employees, international organisations, think tanks and civil society, academia, consumers and regulated companies. Country missions to Moldova took place on 15 and 18-19 July 2016, when interviews with most of the questionnaire addressees were conducted. Some of the respondents are not identified in this report, since (for various reasons) they chose to mark their contribution as confidential. In all cases unless specifically mentioned otherwise, the information presented displays the point of view of the majority or, at least, recurring topics. However, it should be kept in mind that the present report is based on stakeholder feedback and is not the result of a performance audit.

In terms of legal compliance, the assessment follows the requirements of the *acquis*. The Secretariat's Policy Guidelines on Independence of National Regulatory Authorities³ and the European Commission's on regulatory authorities⁴ provide further guidance as to the essential pre-conditions for regulatory independence. An overview of independence indicators and compliance with them by ANRE is provided in the Annex to this report.

1.2. Relevant Energy Community *acquis*

The legal framework defining regulatory independence and the minimum set of competences that must be granted to National Energy Regulatory Authorities (NRAs) consists of Articles 35-38 Electricity Directive

¹ Agenția Națională pentru Reglementare în Energetică a Republicii Moldova; www.anre.md.

² Letter of Prime Minister Mr Pavel Filip and President of the Parliament Mr Adrian Candu of 20 April 2016. The Secretariat confirmed the performance of the requested in-depth review by letter of 6 July 2016.

³ PG 02/2015 of 28 January 2015.

⁴ Commission Staff Working Paper on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2007/73/EC concerning rules for the internal market in natural gas on the regulatory authorities, dated 22 January 2010.

2009/72/EC and Articles 39-42 Gas Directive 2009/73/EC. Those provisions have been included in the Energy Community acquis by Ministerial Council Decision 2011/02/MC-EnC of 5 October 2011 with a transposition deadline of 1 January 2015. The Republic of Moldova is legally bound by the acquis based on Article 11 of the Energy Community Treaty upon its accession to the Energy Community in May 2010.

1.3. The concept of regulatory independence

Independence of NRAs is essential for successful energy market liberalization and sector reforms. An independent NRA must be isolated not only from the influence of the regulated industry but also from political influence. This is true in particular in countries where the energy sectors suffer from excessive governmental intervention, be it by means of ownership, legal frameworks discouraging new entrants, as the case in many Energy Community Contracting Parties. To promote state stakes and interests in the energy sectors and/or to ensure energy affordability, governments tend to have an interest in controlling NRAs and in particular their decisions related to energy pricing.⁵ For energy market liberalization to be successful, it requires a neutral institution able to take autonomous decisions and balance the interests of all market participants based on sector specific expertise, not political paradigm.⁶

The Third Internal Energy Market Package ('Third Package') includes extensive requirements to ensure independence of NRAs, part of which is also their equipment with sufficient powers to effectively regulate the gas and electricity sector. Formally, these rules are generally well transposed in the Contracting Parties. However, experience teaches that any legislative standard is only as good as its implementation and the sanctions for failure to comply. In that respect, independence granted to NRAs by Energy Community or national legislation does not necessarily translate into practical independence and is even more fragile in countries with limited tradition of independent public institutions.

At the same time it must be noted that even the best legal framework cannot guarantee strength of an institution where ownership of its representatives to actively design a market and promote a truly competitive framework is missing. It remains subject to the commitment of the management and staff to actively design a market. The Secretariat clearly understands independence as a concept going beyond refusal of instructions but including the readiness to pro-actively demand and enforce compliance, even if involving politically sensitive aspects.

2. About ANRE

2.1. History

ANRE was established by Government Decision no 767 dated 11 August 1997.⁷ Mr Anatol Saracuta was the first director general of ANRE, with a mandate spanning from 1997 until 2000.⁸ The other directors general

⁵ For the very reason in Moldova, as in other Contracting Parties, the NRA has e.g. been entrusted with regulating energy prices.

⁶ ECRB, Independence of National Regulators in the Energy Community (June 2015).⁷ Decision no 767 of 11 August 1997.

⁷ Decision no 767 of 11 August 1997.

⁸ Between 2001 and 2004, Mr Saracuta was part of a technical assistance project developed in cooperation with USAID. He returned to ANRE in 2004 when he was appointed as head of the audit department and head of the strategy and regulation policies. Currently, Mr Saracuta no longer works with ANRE. He was one of the interviewees during the Secretariat's mission in Moldova.

of ANRE were Messrs Petru Pasincovschi, Nicolae Triboi, Vasile Carafizi, Anatol Burlacov, Vitalie Iurcu, Vadim Ceban and Victor Parlicov. Mr Sergiu Ciobanu is the interim director general in office.

During 1997-1998, ANRE's internal regulation as well as the Law on Energy No 1525 dated 19 February 1998 ('Energy Law')⁹ as subsequently amended¹⁰ governing the regulator's organisation, was adopted. ANRE's first years were a period of intense activity, learning and capacity building. In the case of Moldova, where state-owned monopolies were the rule in most and prominently the energy sector, the commitment to liberalise the energy market and to create an independent regulator was revolutionary for that time. It was also then when separate laws on electricity¹¹ and natural gas¹² were adopted in Moldova. The legal framework has been subsequently amended in 2009.¹³ At the time when this report is published, Moldova has just adopted new laws on electricity and natural gas,¹⁴ while a new law on energy reforming ANRE's governance is still being debated in the Parliament.

In 2000, ANRE became funding member of the Energy Regulators Regional Association (ERRA).¹⁵ According to representatives of international institutions present in Moldova, in 1997-2000 ANRE was considered to be one of the best performing NRAs in Eastern Europe at the time. This coincides with the legal unbundling of the electricity sector in Moldova and the privatisation of the distribution network which occurred in 2000. ANRE was pushed to appropriately regulate the sector with a private operator, adopt non-discriminatory, objective and transparent rules to ensure investors' confidence. The regulator's competences therefore had to be assimilated fast and a regulatory framework had to be created from scratch and in accordance with best European practices at that time. But this rather fortunate situation did not last for long.

ANRE's attributions expanded over time. In 2001, the Agency became competent for licensing of petroleum products.¹⁶ In 2007, the Renewable Energy Law¹⁷ attributed to ANRE competences related to licensing and support tariff setting for energy production from renewable sources. ANRE's competences were extended to licensing public water supply and sewerage in 2013,¹⁸ as well as to licensing and tariff setting in the thermal energy sector in 2014.¹⁹

A crucial point in ANRE's development was the year 2002, when a partnership between ANRE and the Iowa Utilities Board was launched, supported by NARUC and USAID. Staff and former staff appreciated that the partnership and the exchanges with employees from US regulators were helpful in ANRE's learning process over the years.

ANRE entered into several national and international cooperation agreements, among which with the National Bank of the Republic of Moldova (2010), the Customs Service of the Republic of Moldova (2011), the Moldavian Court of Auditors (2012), the Romanian National Energy Regulatory Authority (2012), the Estonian Competition Authority (2013) and the Public Utilities Commission of Maine (2013).

⁹ Official Gazette of Moldova no 50-51 of 4.6.1998.

¹⁰ Law No 1525 of 19 February 1998.

¹¹ Law No 137 of 17 September 1998.

¹² Law No 136 of 17 September 1998.

¹³ Law on Energy no 107 of 17 December 2009, Law on electricity No 124 of 23 December 2009 and Law on natural gas No 123 of 23 December 2009.

¹⁴ Law No 107 dated 26 May 2016 and Law No 108 dated 26 May 2016.

¹⁵ www.erranet.org.

¹⁶ Law on petroleum products No 461 of 30 July 2001.

¹⁷ No 160-XVI of 12.07.2007.

¹⁸ Law on Public Water Supply and Sewerage no 303 of 13.12.2013.

¹⁹ Law on the promotion of cogeneration heat no 92 of 05.29.2014.

ANRE is also a member of the Energy Community Regulatory Board (ECRB) since Moldova's accession to the Energy Community in 2010. Performance of ANRE in ECRB, however, lacks active involvement. Departing from this, participation increased significantly during the mandate of director general Victor Parlicov both on ECRB Plenary and Working Group level and including chairing an ECRB Customer and Retail Market Working Group's Task Force. Involvement of ANRE in ECRB significantly dropped under the new management appointed after the dismissal of director Parlicov (see chapter 4.1.2) and hit rock bottom in 2015 with complete absence of ANRE in ECRB meetings and reporting activities, a fact that was also critically addressed by the ECRB President.²⁰ It has to be noted though that the lack of participation was a direct result of financial constraints due to missing approval of the regulator's 2015 budget preventing the management to pay staff salaries.²¹ Involvement of ANRE in ECRB was restored in 2016 but without reaching a significant level of activity.

2.2. Legal framework

The organisation of ANRE is governed by the Energy Law. Currently, amendments to the law are being debated in the Moldovan Parliament (the 'Draft Law')²². Competences of ANRE are defined in the sectoral laws on electricity and gas, adopted in May 2016.

ANRE's internal regulation was approved by the Moldavian Parliament on 26 October 2012 ('Regulation')²³.

3. Governance of ANRE

3.1. Organisation

According to Article 4⁽¹⁾(1) of the Energy Law, ANRE is established as the single NRA of Moldova with country-wide regulatory competences for the electricity and gas markets. As regards these sectors the Agency's organisational structure thereby complies with the *acquis*, namely Article 39(1) of Gas Directive 2009/73/EC and Article 35(1) of Electricity Directive 2009/72/EC. Similar requirements do not exist for other sector competences of ANRE.

3.2. The ANRE board of directors

3.2.1. Appointment of directors

ANRE's management structure is defined by Article 4⁽²⁾ of the Energy Law and Articles 12-26 of the Regulation.

ANRE's board consists of five directors. The Parliament, following a proposal from the Commission for Economy, Budget and Finance,²⁴ appoints one of the directors as director general. Directors must be

²⁰ ECRB President Branislav Prelevic, letter of 14 December 2015.

²¹ Email of director general Sergiu Ciobanu of 15 December 2015 in reply to the letter of ECRB President Prelevic of 14 December 2015 (cf fn 20).

²² Latest version available to the Secretariat as provided by the Ministry of Economy on 17 May 2016 and reviewed by the Secretariat against compliance with the Third Package on 24 May 2016.

²³ Decision of the Moldovan Parliament No 238 dated 26 October 2010.

citizens of the Republic of Moldova, hold a university degree in technical, economic or legal fields and have work experience in the respective field, including at least three years in a management position. The term in office is limited to six years for the director general, four years for two of the directors and two years for the other two directors. The overall limit for terms in office is 12 years for all directors; this means that the mandates of all directors (with the exception of the director general) may be renewed more than once. This is not in line with the *acquis*: Article 35(5)(b) of Directive 2009/72/EC and Article 39(5)(b) of Directive 2009/73/EC require the term in office to be renewable only once.

Existing legislation falls short as regards appointment requirements for board members that are only vaguely prescribed by law. Also, a selection committee and/or involvement of neutral experts do not exist: board members are appointed by the parliament upon proposal of a parliamentary commission. The parliament also designates the director general upon the proposal of the chairman of the parliament following the positive opinion of the parliamentary commission.

According to the Draft Law, directors will be appointed on the basis of a competition.²⁵ A notice, to be published on the website of the Parliament and in the national media, shall precede the competition. Apart from three years of experience in a management position, the Draft Law introduces the requirement of minimum ten years of experience in the technical, legal, economic or financial field. Also, candidates may not have been members of a political party for at least one year before they submitted their application for the position of an ANRE director. The Draft Law brings a change also regarding the duration of the mandate: all ANRE directors, including the director general, will be engaged for a mandate of six years.

According to information provided by representatives of the Ministry of Economy, the monthly income of an ANRE director is around EUR 2500-3000. Out of this amount, the actual salary is approximately EUR 1000, the rest represents various bonuses.

3.2.2. Dismissal of directors

According to Article 4⁽²⁾(6) of the Energy Law, the position as a director of ANRE ceases either by resignation or by dismissal. The reasons for dismissal are listed exhaustively and limited to the following cases:

loss of Moldavian citizenship

inability to fulfil the task for health reasons

election for another office

conviction for intentional crimes and / or final confinement sentences

a final finding that the respective director had performed either a legal or an administrative act against the legal provisions regarding the conflict of interests

a final finding of incompatibility lack of compatibility.

Article 19 of the Regulation mirrors the above-mentioned provisions of the Energy Law.

The Draft Law keeps the same six instances in which the ANRE directors can be dismissed, but comes with additional details as to what “incompatibility” means: in order to avoid a situation of incompatibility, ANRE’s

²⁴ The chairman of the Commission for Economy, Budget and Finance is Mr Stefan Creanga, who was one of the interviewees during the Secretariat’s mission in Moldova.

²⁵ Draft Law, Article 10(1)-(4).

directors are prohibited to take up any other remunerated activity, with the exception of scientific and academic activities.²⁶ Beyond that, Article 10(9)(c) of the Draft Law forbids ANRE directors also academic, scientific and research activities to the extent these are funded by regulated companies.

3.2.3. Cooling-off period

Article 4²(9) of the Energy Law and Article 21 of the Regulation contains a so-called cooling-off period according to which, two years after having left his/her position, a director of ANRE cannot hold any position in a regulated company.

The two-year prohibition to be employed by the energy industry after serving on the board of ANRE has been an ever re-occurring theme in the discussions of the Secretariat with various stakeholders. While the Secretariat understands the concern that a cooling-off period might limit interest of highly-qualified people from the industry in applying for a position in ANRE - should an open competition indeed take place - and can be of even bigger relevance in countries with small energy sectors, cooling-off period requirements by all means contribute to independence of management and, also, are highest international standard to avoid incompatibility in various sectors.

3.2.4. Task of directors

Article 24 of the Regulation lists the duties of the ANRE directors: they approve the organisational structure of ANRE, the internal rules and regulations and the annual activity plan; sign the decisions, regulations and any other acts adopted by the ANRE board; coordinate the activity of the subdivisions in ANRE; coordinate drafting of regulations in the field of electricity, natural gas, petroleum products, investments and quality of services supplied in the respective fields; coordinate the preparation of all materials connected to issuing, modifying, suspending and withdrawing licenses; approve investment plans; ensure that the license holders comply with license conditions as well as with service quality and consumer protection standards; and ensure collaboration of ANRE with NGOs with a view to develop strategies and regulatory policies. The list is not exhaustive and further attributions may be added.

3.2.5. The director general

The duties of the director general of ANRE are described in Article 22 of the Regulation, supplemented by certain provisions in the Energy Law, for example, Articles 4⁽²⁾(7) and 4⁽²⁾(10).

The director general of ANRE organises the activity of the ANRE board; appoints and dismisses staff; modifies, suspends and ends the employment agreements of the ANRE staff with the consent of at least one other director; calls for and presides the meetings of the ANRE board; approves the board meeting agenda; issues orders and decisions regarding the activity of ANRE's personnel and oversees their fulfilment; signs financial and banking documents and the reports of ANRE; carries personal liability for the financial and economic activity of ANRE; approves the professional duties of the ANRE employees; orders disciplinary sanctions for the personnel; takes part as needed in meetings of the Government and of the Parliament;

²⁶ Article 12 of the Law on the Status of Public Servants.

presents the regulator's annual report to the Parliament; signs contracts for service supply with experts; represents the interests of ANRE in its relation with Moldovan and foreign legal persons; ensures professional training for employees and availability of required technical equipment. The list is not exhaustive and further attributions may be added.

The Draft Law does not provide for additional attributions of the director general.

3.3. The committee of experts

According to Article 26 of the Regulation, a committee of experts shall be constituted that should act as a consultative body and provide support to the ANRE board in its decision-making process. To date, no such institution has been constituted.

ANRE's legal department presented the Secretariat with a draft regulation regarding the activity of the committee of experts. According to this draft, the committee of experts is a consultative body advising ANRE on issues related to energy and water supply and sanitation. This committee would examine the draft decisions and draft legislation prepared by ANRE, as well as any other materials, draft proposals to modify and complete the respective decisions and legislation and draft opinions and proposals, as well as studies in the fields of energy and water supply and sanitation. Committee members must have at least five years of experience in one of the following areas: energy, water supply and sanitation, technical, economy and legal. The experts may come from academia, NGOs, be representatives of the regulated companies or already act as practicing experts in a relevant field. They would be directly appointed by the ANRE board.

The committee of experts will be removed with the adoption of the Draft Law.

3.4. The Staff

52 employees are currently on the payroll of ANRE.

3.4.1. Appointment of staff

According to Article 22(b) of the Regulation, it is the duty of the director general to appoint staff provided that there is consent of at least one other director. The Secretariat was informed that each ANRE employee has an individual employment agreement. Except for the directors of ANRE, the employees do not have civil servant status and thus their contracts are subject to the provisions of the Moldovan Labour Code.²⁷

Currently, there are six open staff positions in ANRE. They were published on 1 July 2016, and 15 July 2016, respectively.²⁸ Candidates must submit CVs, together with supporting evidence. Pre-selected candidates will be invited for interviews.

Sector-specific knowledge is required for an expert position. Whereas "sufficient knowledge" may sound somehow vague, the Secretariat must hope the ANRE selection committee will make its best efforts to select the most suitable candidates.

²⁷ Labour Code of the Republic of Moldova, no 154 of 28 March 2003.

²⁸ <http://www.anre.md/ro/content/posturi-vacante>.

A formal prohibition for ANRE's staff to hold political positions or have interest in regulated companies including dismissal sanctions in case of incompliance and an explicit prohibition to seek or take political instructions, as foreseen for the management, is not explicitly addressed by legislation.

3.4.2. Professional development of staff

There is no specific provision in the Regulation regarding employees' professional training. However, Article 213 ff of the Moldovan Labour Code lists, as one of the employers' duties, to provide the employees with professional training opportunities and cover related costs.

3.4.3. Payment

Staff salaries are confidential and subject to negotiations between the employee and management. According to the information available to the Secretariat, salaries are ranging from MDL 4300/EUR 190 (for an expert) to MDL 11000/EUR 490 (for top management other than board members). The Secretariat was informed that a system of bonuses and prizes exists as well that it is part of the collective convention signed between the employees' representatives (syndicate) and the ANRE management.

3.4.4. Dismissal of staff

It is the director general who dismisses staff, as per Article 22(b) of the Regulation, provided that there is consent of at least one other director. The provisions of the Moldovan Labour Code are applicable to the dismissal of staff. The exhaustive list of grounds for dismissal is found in Article 86 of the Moldovan Labour Code.

3.5. Secretariat's assessment

Beyond the legal requirements stipulated by the acquis (see chapter 1.2), the Secretariat in its assessment of the legislation regarding ANRE's governance relied on the OECD "Best Practice Principles for Regulatory Policy – The Governance of Regulators".²⁹ The main seven principles identified by OECD are: role clarity, preventing undue influence and maintaining trust, decision making and governing body structure for independent regulators, accountability and transparency, engagement, funding and performance valuation.

With regard to ANRE's governance, the legal framework leaves room for improvement. Whereas the roles of the directors and of the director general are defined in a reasonably clear and detailed manner in the Regulation and the Energy Law, the same cannot be said about their appointment: there is no clear process for the appointment, vacancies are not announced publicly and there is no open competition. The entire responsibility rests with the Commission for Economy, Budget and Finance which makes the proposals, and the Parliament.³⁰ The process of appointing ANRE's directors lacks transparency and safeguards for the reduction of political interference. Stakeholders, taxpayers and civil society are not aware of the appointment

²⁹ Available at <http://www.oecd.org/gov/regulatory-policy/the-governance-of-regulators-9789264209015-en.htm>.

³⁰ The Secretariat notes that changes in the Law in 2009 led to an improvement compared to the previously appointment by the Government.

process until the appointment has become effective. This negatively affects ANRE's image and the trust in its neutrality and competence.

Also, the selection criteria that the Commission for Economy, Budget and Finance should take into account when appointing the ANRE directors are insufficient for the magnitude of the task to be addressed by the management, especially at a time of urgently needed energy sector reform requiring specific knowledge, experience and the highest level of professionalism. The Secretariat notes that there is no specific requirement regarding experience in the energy sector which is a serious obstacle for ANRE's efficiency.

Furthermore, the Secretariat observes the lack of clarity when it comes to the dismissal of the directors. The notions of "conflict of interests" and "lack of compatibility" are not defined nor described in detail. The consequences arising from this are twofold: on the one hand, there is a high risk that directors of ANRE may have held or hold positions or offices which could interfere in the way they conduct their work and make their decisions; on the other hand, the lack of clarity in the conditions of dismissal permits abuses and political interferences in ANRE's activity. As with their appointment, no procedure for the ANRE directors' dismissal is provided in the legislation.

Finally, ANRE management has failed to constitute a committee of experts which should represent the neutral forum the board should turn to for consultations and advice before making decisions.

A majority of the sources interviewed by the Secretariat (with the exception of the ANRE board and staff), including former ANRE staff, complained about the current composition of the ANRE board of directors. Whereas no one questioned the competence of the four directors in their respective fields, the Secretariat has repeatedly been told that at least two directors lack experience and understanding of energy policy and markets. This allegedly leads to numerous delays in ANRE's work and a general lack of efficiency.

According to the information shared with the Secretariat, the current ANRE board has been appointed exclusively based on political criteria and merits. This exposes the ANRE board to powerful political influences. The non-written selection criteria should, in the view of many stakeholders, be replaced by clear and experience-oriented selection requirements and a transparent procedure ensuring compliance.

Currently, there is one vacancy for a director of ANRE. The Secretariat received assurances from Mr Stefan Creanga – chair of the Parliament's Commission for Economy, Budget and Finance in charge of proposing candidates to the Parliament (cf chapter 3.2.1) – that an open competition for the vacant position will take place in October-November 2016. Even though the current legislative framework lacks specific guidelines for a transparent selection procedure Mr Creanga stated that a competitive selection, along the lines of the one recently used for appointing the Governor of the National Bank of Moldova, will take place.³¹ However, during the discussion with Mr Creanga, he unfortunately gave the impression that selecting the new ANRE director is not one of the highest priorities of the Commission for Economy, Budget and Finance. This contradicts previous assurances that the vacant position would be filled as soon as possible. It remains

³¹ The Governor of the National Bank of Moldova was appointed following a competition organised by the Commission for Economy, Budget and Finance of the Moldovan Parliament. The competition was public and so had to be the profiles and CVs of the candidates. Notably, the candidates had to have ten years of experience to qualify for the competition. A committee appointed by the President of the Parliament then examined the applications. Members of the Parliament, as well as academics and representatives of the civil society were part of the committee. No written examination was conducted, and the final decision was taken based on the candidates' profiles and interviews. Mr Sergiu Cioclea was designated as Governor of the National Bank of Moldova and took office in April 2016.

unclear why the position has not been filled until now. The Commission for Economy, Budget and Finance should take its responsibility more seriously in that regard.

The Regulation currently has some gaps also concerning the way of staff selection. The Secretariat welcomes the open competition which has been recently launched for six positions within ANRE. However, it may well be the case that the lack of certainty as regards appointment rules and procedures deters competent individuals from seeking employment with ANRE which clearly stands against ANRE's interest to attract highly motivated and professional staff. The problem will most likely increase in the future, as new tasks will be attributed to ANRE in the course of the pending alignment of the national legislation with the Third Energy Package. At the same time, inserting general rules or guidelines on staff selection competitions will increase the public's trust in the institution. Such guidelines should, for example, address application deadlines, the manner in which the evaluation committee is formed, ways of challenging the results of the competition etc.

The Regulation is not addressing the employees' right to attend trainings and professional development activities. This aspect is of utmost importance for ANRE's evolution into a reliable, efficient and professional institution. Trainings should be part of each employee's schedule. Also, the employees' obligation to remain independent from the regulated companies and from political influences should be part, either of the Regulation, or of their respective employment agreements.

4. Independence

4.1. Organisational independence

Article 4⁽¹⁾(6) of the Energy Law establishes the independence of ANRE as an institution: it must be independent from all participants to the energy markets, as well as from other authorities and legal or natural persons. The Agency has the status of a legal entity and is established by law not by decision of another public institution, which means it also cannot be liquidated by decision of another public body. In the Secretariat's view this is a central aspect of regulatory independence.³² It has to be noted though that a number of structural aspects governing ANRE's organisation are *not* defined by law but only by decision of the Parliament (the Regulation) and thereby falls short of being guaranteed independence from another public body. Namely, functional independence must guarantee the management to autonomously decide on the regulator's internal organisation³³ and duties and powers required by the *acquis* must be granted by law but not deduce from the decision of another public body. More concretely, the following aspects are only defined by the Regulation and not by law. It has to be noted that all of them represent central aspects of regulatory independence:

1. Sanctions for board members in case violating the prohibition to hold political positions or have interest in regulated companies;
2. Immediate legal binding effect of decisions;³⁴

³² Secretariat, Policy Guideline 02/2015 on the independence of national regulatory authorities, chapter 2.1.

³³ Secretariat, Policy Guideline 02/2015 on the independence of national regulatory authorities, chapter 2.1.

³⁴ Immediate legal bindingness means that decisions are not subject to review or consent of any other public body except being subject to juridical review (Secretariat, Policy Guideline 02/2015 on the independence of national regulatory authorities, chapter 2.1.).

3. Requirement to publish decisions.

Article 4⁽¹⁾(6) of the Energy Law as well as Article 2 of the Regulation grant ANRE legal and functional independence from other private or public bodies, including independent decision making. Articles 29 and 31 of the Regulation declare decisions of the Board immediately binding but subject to juridical appeal to the Administrative Court; a specific provision requiring decisions to be reasoned is however missing. With this exception ANRE's legal set up formally complies with the requirements of the *acquis*.

4.1.1. Directors' independence and impartiality

Articles 4⁽²⁾(6c),(8) and (9) of the Law on Energy, as well as Articles 17, 19 and 20 of the Regulation provide the basis for the managements' independence. Accordingly, the directors may not seek or follow political instructions, must act in an independent and objective manner, may not hold any other remunerated positions or own shares in regulated companies, have financial or material gains as a result of their status as an ANRE director, or facilitate their own or other people's employment in regulated companies. A final decision that a conflict of interests exists leads to a director's dismissal (see as well chapter 3.2.2). Furthermore, according to Article 21 of the Regulation and Article 4⁽²⁾(9) of the Energy Law, ANRE's directors are prohibited to work for any of the regulated companies for two years after their mandate ends (see as well chapter 3.2.3).

The directors of ANRE also have the obligation to publish on ANRE's webpage, on a yearly basis, a statement with regard to their income and their assets. This obligation derives from the Government Decision no 188 dated 3 April 2012 with regard to the official web pages of the state administrative authorities.

The Draft Law strengthens the independence of ANRE: Article 9(3) of the Draft Law provides that "no decision or measure taken by the Government, by the central public administration authorities, by any other authorities or state institutions can restrict the functional and financial independence [of ANRE] and cannot prevent the fulfilment, by [ANRE], of its functions established by the current law and the sectoral laws."

4.1.2. Dismissal of directors

The Parlicov dismissal

In 2013, the Parliament's decision to remove Mr Victor Parlicov³⁵ from office³⁶ was argued on political grounds by "inefficient activity, multiple declarations and promises regarding reduction of tariffs, which never came about" of the Agency's director general "causing a prejudice to the institutional image". The Secretariat underlined at various occasions³⁷ that the dismissal of a board member for any other reason than the cases listed in the Law on Energy was not only in evident breach of national legislation but also contradicts the *acquis*; similar concerns were expressed by the European Commission's Directorate-General for Energy. The Parliament's decision was declared illegal by the Constitutional Court.³⁸ The Constitutional Court thereby followed the reasoning of the Secretariat. The reason for the illegality was, in the view of the

³⁵ Mr Parlicov was appointed following the proposal of the Liberal Party. His revocation saga started when the Liberal Party ceased to be part of the ruling coalition in Moldova. He was one of the Secretariat's interviewees.

³⁶ Decision of the Parliament dated 12 July 2013, taken at the initiative of the President of the Parliament.

³⁷ E.g. letter dated 19 July 2013.

³⁸ Decision of the Constitutional Court dated 20 September 2013.

Constitutional Court, that the Energy Law provides an exhaustive list of grounds based on which a director of ANRE can be dismissed but none of those grounds were given in the case of Mr Parlicov. The Constitutional Court further acknowledged that the underlying reason for an exhaustive and limited list of dismissal reasons is the need to secure the independence of the directors, also in relation to those who appointed them.³⁹ This shows that the law on the books regarding dismissal was not being respected and that the Parliament committed a serious abuse of power in removing the director general of ANRE from office.

After having been reinstated by the Constitutional Court, Mr Victor Parlicov was accused of violations of the rules on state secrecy. In February 2014 Mr Parlicov was convicted for not having ensured appropriate storage conditions for secret documents. Mr Parlicov said that it was actually him who asked the Security and Intelligence Service of Moldova for support in finding appropriate solutions for the storage of sensitive and confidential documents, as an operational system on how the storage of such documents should have been done did not exist at that time in ANRE. According to Mr Parlicov, the Intelligence Service of Moldova did not respond to his requests for support in implementing such a system. What is more, the lack of appropriate storage for sensitive and confidential documents was used as an excuse to set him off. The situation is suspicious at best, since – although the lack of an appropriate system for storage of secret documents had always been the case in ANRE – Mr Parlicov is the only ANRE director to have ever been held liable and subsequently dismissed for this reason. Mr Parlicov then challenged his dismissal in court and alleges that he was not allowed to bring relevant evidence and to call key witnesses during the court proceedings. Following the court's verdict, the Parliament finally dismissed Mr Parlicov in July 2014.

These two instances show the strong political will and some very well concerted actions which were employed to dismiss Mr Parlicov. The dismissal of Mr Parlicov was evidently motivated by political reasons and not on the Energy Law, which raises concerns for the respect of the rule of law in Moldova.⁴⁰ It is also unlikely that those political forces stopped acting once Mr Parlicov was dismissed, and it may well be the case that the current ANRE board is facing substantial political pressure as well.

Subsequent illegal dismissals

On 3 December 2015, the Parliament adopted a decision⁴¹ by which it dismissed all ANRE directors.⁴² The Parliament's decision was challenged before the Constitutional Court, which, as in the case of Mr Parlicov, stated that ANRE directors can only be dismissed for the limited grounds to be found in the Law of Energy, and that independence of ANRE should be guaranteed by allowing the ANRE directors to finish their mandate. The decision of the Parliament was found illegal and contravening to the Moldovan Constitution, and the ANRE directors were reinstated. However, this case has again proven the vulnerability of the ANRE board in front of political influences.

Further threats

On 21 April 2015, Mr Adrian Candu, the President of the Moldovan Parliament, requested ANRE to freeze the current tariffs, even though he admitted, at the same time, that a tariff increase would be at least partially

³⁹ Decision of the Constitutional Court dated 20 September 2013, para 67.

⁴⁰ Mr Parlicov also stated that the "political rationale" was not the deepest layer in his dismissal. Behind the political reasons there were, in his view, economic interests, which his decisions as ANRE director were influencing directly.

⁴¹ Decision no 224 dated 3 December 2015.

⁴² It basically cancelled the decisions by which it had previously appointed them.

justified. He announced during an evening talk show that he would press criminal charges against ANRE should he notice “irregularities” in establishing the tariffs.⁴³

4.1.3. Security of directors

In 2012, former director of ANRE Nicolae Raileanu, was the victim of an assault on the evening of 10 April, when his official car exploded the moment when he started the engine. Mr Raileanu suffered minor injuries, but only because people who were in the immediate vicinity intervened and took him out of the enflamed car. At the explosion site of the car remains of a grenade were found by the police. As mentioned in ANRE’s official statement, in Mr Raileanu’s opinion this attack “was strictly related to the service activity and [he did] not exclude that it was concocted by the same people who sent, the previous year, to public institutions and media, several letters denigrating him and other employees of ANRE”.⁴⁴ According to information provided on its website, “ANRE management believed the explosion was part of a broad campaign of intimidation against ANRE directors and other employees of the institution for exercising correctly their job duties”.⁴⁵ To this day the police investigation did not lead to the instigators.

4.1.4. Performance audit by the Court of Accounts

Another case which endangered ANRE’s independence was the so-called performance audit initiated by the Court of Accounts. The audit was commenced by Decision No 156 dated 18 September 2014, by which the President of the Court of Accounts, Mr Serafim Urechean,⁴⁶ ordered an audit mission to take place at ANRE. The decision specifically stated that the audit would start on 23 September 2014 and would address ANRE’s performance.⁴⁷ ANRE’s director general requested the Court of Accounts to suspend the audit. The Court of Accounts refused and ANRE took the case to court. On 13 July 2016, the first instance court ruled that the Court of Accounts exceeded its competences when it decided to audit ANRE (for example, the Court of Accounts cannot conduct a performance audit in ANRE and assess how the tariffs are formed). The first instance court annulled the Court of Account’s decision to commence an audit in ANRE. The decision by the first instance court is not final, and it is expected that the Court of Accounts will challenge it.

4.1.5. Secretariat’s assessment

The general view of interviewed persons is that the ANRE board is acting as dictated by the political forces that appointed them. The political coalition which came into power after 2008 divided the influence over various state authorities between various political parties. Many interviewees stated that, as a matter of practice, before any public meeting of ANRE, another “secret” meeting between the directors takes place, so, at the time when debates start, the directors have already taken their decision.

⁴³ <http://agora.md/stiri/7965/candu-o-sa-merg-la-procuratura-daca-vor-fi-nereguli-la-stabilirea-tarifelor>.

⁴⁴ Quote translated from: <http://www.anre.md/ro/content/directorul-anre,-nicolae-raileanu,-a-fost-victima-unui-atentat>; see as well: <http://www.timpul.md/articol/cine-l-a-vrut-mort-pe-nicolae-raileanu-33267.html>

⁴⁵ See fn 44.

⁴⁶ Mr Serafim Urechean was one of the Secretariat’s interviewees.

⁴⁷ A further decision by the Court of Auditors this time signed by Mr Tudor Soitu, the vice-president, modified the previous decision. According to the new Decision No 39 dated 15 May 2015, the audit would commence on 18 May 2015, and the audit team changed.

According to information available to the Secretariat, attempts to influence ANRE's board have not been without results, as the following examples suggest:

- On 18 July 2015, ANRE, in a move meant to close an infringement case opened by the Secretariat (see below), decided to increase the tariffs for natural gas by approximately 15%⁴⁸ and the electricity tariffs by 37%⁴⁹ to account for currency depreciation. Not only did the media and the stakeholders react to this decision, but also Moldova's Supreme Security Council, which formally requested ANRE to revise its decision.⁵⁰ Former Prime Minister, Mr Valeriu Strelet, public declaration said he officially requested that both the Ministry of Economy and ANRE recalculate the tariffs, particularly those on gas.⁵¹ On 30 September 2015, ANRE suspended its decision to increase the tariffs for 60 days.⁵² ANRE recommended to system operators for electricity and gas to organise, within that period, an external audit by international companies. The audit was supposed to confirm ANRE's calculation, removing the doubts expressed by various stakeholders.⁵³ The report of the audit confirmed the fair application of the tariff methodology and the calculations of adjusted tariffs which included, at over 95%, the costs for electricity purchase that had risen due to considerable depreciation of Leu against the US Dollar.⁵⁴ Contrary to the decision taken in summer and to the conclusions of the audit, on 26 January 2016, ANRE announced the decision to cut the average gas tariff by 10.9% instead of increasing it.⁵⁵ This decision was taken during a closed board meeting only two days after Prime Minister Pavel Filip declared that gas tariffs should be reduced by at least 10%.⁵⁶ Several sources underlined that this decision was taken in a non-transparent manner, the emergency of the closed meeting being unjustified.⁵⁷ ANRE is currently facing a trial over this case.
- A very similar situation happened on 2 March 2016. Prime Minister Pavel Filip made a declaration indirectly indicating his expectation for tariffs on electricity to be reduced by 10%.⁵⁸ Ten days after this declaration ANRE indeed revised the tariffs and announced a 11% decrease for household customers as of 1 April 2016.⁵⁹

In the Secretariat's view, such instances must be seen as clear interventions into the independence of the regulator and its autonomous decision making. It seems that the ANRE directors find themselves at the juncture of various opposing political forces and it is those forces, and their relative strength at a given moment in time, that influence the decision making process. In order to put this situation to an end as soon as possible, far-reaching structural reforms need to be implemented.

⁴⁸ <http://jurnal.md/ro/economic/2015/7/22/anre-a-aprobat-noile-tarife-pentru-gaz-vom-plati-pest-6-500-de-lei-pentru-o-mie-de-metri-cubi-consumati/>.

⁴⁹ http://www.realitatea.md/anre-a-suspendat-deciziile-de-aprobare-a-noilor-tarife-la-energia-electrica-si-gazele-naturale_26148.html.

⁵⁰ <http://ziarulnational.md/anre-despre-solicitarea-consiliului-suprem-de-securitate-de-a-revedea-pretul-la-gazelle-naturale/>.

⁵¹ http://www.realitatea.md/tarifele-la-gaz-ar-putea-fi-revazute-de-anre--strelet-este-cel-mai-vizibil-decalaj-pentru-ca-trimestrial-pretul-a-scazut--video-_24868.html.

⁵² <http://www.anre.md/ro/content/anre-suspendat-deciziile-sale-de-aprobare-noilor-tarife-la-energia-electric%C4%83-%C5%9Fi-gazele>.

⁵³ <http://independent.md/anre-suspendat-decizia-de-majorare-tarifelor-la-energia-electrica-si-gaze-naturale/#.V8YN-JOLRE4>.

⁵⁴ <http://ziarulnational.md/scumpiri-de-la-o-luni-vom-plati-mai-mult-pentru-energia-electrica/>.

⁵⁵ <http://anre.md/ro/content/anre-mic%C8%99orat-tarifele-la-gazele-naturale-livrate-consumatorilor>.

⁵⁶ <http://agora.md/stiri/15870/pavel-filip-avem-premise-pentru-reducerea-cu-10-a-tarifelor-la-gaz>.

⁵⁷ <http://jurnal.md/en/economic/2016/1/26/economic-expert-anre-decided-to-review-the-tariff-for-gas-in-a-non-transparent-way-the-price-had-to-be-reduced-with-over-20-percent/>; <http://www.trm.md/en/economic/tarifele-la-gaze-au-fost-aprobate-intr-un-mod-netransparent-expert-ii/>.

⁵⁸ <http://jurnal.md/en/social/2016/3/2/tariff-for-electricity-could-reduce-with-10/>.

⁵⁹ <http://anre.md/ro/content/anre-actualizat-tarifele-pentru-serviciile-de-distributie-%C8%9Bie-%C8%99i-de-furnizare-energiei-electrice>.

First and foremost, it will be however for the Agency's management to assume responsibility for independent market design and refuse political interventions. In this context the Secretariat positively notes the readiness of the current management to pinpoint to the Secretariat possible infringements of its independence via various communications during 2015 and 2016.

The overwhelming majority of the ANRE employees who responded to the questionnaire stated that they are independent in their activities and are not aware of any interference, political or otherwise, from management and board. The Secretariat has, however, received significantly different echoes from outside ANRE. Professional competences should be the strongest guarantee for the independence of the employees in their activity.

A relevant part of the staff left the institution in 2013, and it seems that there was no transfer of knowledge between the old staff and the new staff.

The Secretariat noticed a general lack of satisfaction regarding the way in which ANRE employees are appointed. Even though open competitions are sometimes organised, there have been numerous complaints that many of the ANRE employees were not hired because of their professional skills but because of various affiliations (personal, political) with older staff. The Secretariat understands that, in the past, appointments were only made on the basis of an interview. Apparently, a clear appointment process used to exist in the past but this is no longer the case after 2013. In any event, a general feeling of mistrust in the way ANRE conducts competitions for vacancies does exist. This makes the call for clear rules and guidelines even more urgent.

In respect of professional development of staff, the Secretariat was again faced with a number of complaints: according to the information received, there seems to be no rule when it comes to trainings abroad and it seems to be sometimes the case that preferential treatment is given to some employees to the detriment of others. While not everyone could and should benefit from the same number and level of trainings, especially when under a tight budget, a transparent set of rules, as well as clear and reasoned decisions, should exist.

International institutions in Moldova warned the Secretariat about the urgent need for an increase of the technical capacity of ANRE staff. Skilled and competent experts seem to be missing.

According to the information available to the Secretariat, salaries in ANRE are quite satisfactory or at least higher than the average salary in Moldova. However, while in the past the salaries of ANRE's employees were mirroring the salaries of their counterparts in the industry, this apparently no longer is the case. The salaries in the industry have been increasing lately, so there should be a correspondent increase in ANRE's salary scheme as well.⁶⁰

The Secretariat is not aware of any cases in which ANRE employees have been dismissed without justified grounds. What seems to have happened though before the mass leave of key staff in 2013, is that "uncomfortable" employees were either transferred to different department, or, when time came for their labour agreements to be renewed, they were renewed for a very short period of time. During the interviews conducted in Moldova, another fact was brought to the attention of the Secretariat, namely that current employees of ANRE avoid meeting the former employees (including former directors) for fear of being seen

⁶⁰ Secretariat, Policy Guideline 02/2015 on the independence of national regulatory authorities, chapter 2.2.

and accused of some kind of disloyalty towards the institution. This may be an indication of the pressure put on the employees and a generally unpleasant work climate in ANRE.

The extraordinary auditing of ANRE by the Court of Accounts was addressed by the Secretariat⁶¹ as an *ultra vires* measure amounting to state control, interfering with ANRE's independence and artificially adding control over the institution. ANRE's accountability should be exclusively required towards the Parliament and not controlled by any other public body. Any impairment of this principle constitutes a breach of the Energy Community *acquis communautaire*, namely Articles 35(4) and (5) of Directive 2009/72/EC and Article 39(4) and (5) of Directive 2009/73/EC. The issue of the audit by the Court of Accounts has been also discussed at large during the Secretariat's country mission in Moldova. The ANRE directors complained about the illegality of the audit and stressed that it would constitute a dangerous precedent and a serious interference in the daily operations of the Agency. Other voices referred to allegedly hidden purposes of the audit, like getting access to confidential information regarding certain regulated companies. The position of the Court of Accounts, on the other hand, pinpointed to the pure interest and intention to obtain legal clarity regarding which institution is, after all, entitled to audit ANRE, without any personal, political or other hidden interests behind their initiative.⁶² The Moldovan legislation (the Regulation, the Energy Law, the Draft Law) does not contain any indication as to which institution may audit ANRE. The representatives of the Court of Accounts mentioned that other institutions, such as the Competition Council or the Audio Visual Coordination Council have themselves requested an audit from the Court of Accounts.

4.2. Financial independence

Article 4⁽³⁾ of the Energy Law contains the budgetary provisions applicable to ANRE according to which the Agency is granted financial independence, at least formally: by 25th November of each year, ANRE must form its budget based on the regulatory payments made by license holders and "other sources, as provided for under the law". ANRE is also deciding on the level of the payments to be made by the license holders and it has autonomy in using its budget. Unused funds are transferred for the next financial year, and budgetary deficits can be recovered in the following budgetary year. A certain limit to financial independence is, however, foreseen by putting an overall budget limit at the level of up to 0.15% of the annual cost of electricity, natural gas supplied to consumers, main petroleum products and liquefied gas imports. This provision is also kept in the Draft Law.⁶³

The budget requires formal approval by the Parliament.⁶⁴ However, a special procedure with clear deadlines that will ensure timely approval of the budget is missing. This has led to delays in practice.

Also, the applicable law does not prevent requests for budget supplementation when the need arises. The Secretariat however understands that, in practice, no such request has been made so far.

Article 14 of the Draft Law provides for increased ANRE's budgetary independence. The significant change compared to the existing Energy Law is that 25th November is no longer the deadline for ANRE to submit its budget proposal, but for the Parliament to approve it; this should indeed grant the regulator with the financial

⁶¹ Letter of 3 August 2015.

⁶² The representatives of the Court of Accounts underlined that the Court of Accounts and ANRE do not have hostile relationships.

⁶³ See Article 14(4) of the Draft Law.

⁶⁴ Before the Energy Law was amended in 2009, the Government was the entity in charge of approving ANRE's budget.

certainty needed for planning its annual activities that is currently missing and has been threatening ANRE's operation in 2015 (see chapter 2.1). The Draft Law further states that, in case the Parliament fails to approve the budget within the deadline, ANRE has the right to decide on regulatory payments according to the previous year's budget.

4.2.1. Procurement

The Moldovan Law on Public Procurement⁶⁵ has been recently modified. The previous version stated that, for the purposes of the law, a contracting authority is an "authority of the public administration." Under this wording, ANRE was excluded from the applicability of the Moldovan Law on Public Procurement. After the legislative change, a contracting authority is defined as "public authorities, public legal persons, associations of public authorities or public legal persons" which makes ANRE in its capacity as "public authority" subject to the Law on Public Procurement. Also according to the Law on Public Procurement, the Public Procurement Agency is the competent state authority in charge of monitoring, assessing and controlling of procurement procedures by contracting authorities, including – after the legislative change – ANRE.

The directors of ANRE raised concerns⁶⁶ related to the newly amended Law on Public Procurement, according to which ANRE's procurement procedures is subject to the control of the Moldovan Public Procurement Agency. The regulator's management claimed that the control of the Public Procurement Agency would undermine their independence, and the assessment of procurement procedures would be yet another instrument to put pressure on ANRE. However, to the Secretariat's knowledge, no such case of abuse from the Public Procurement Agency took place so far. The mere control of how ANRE conducts its procurement procedures does not, in itself, represent an attack to its independence. Independence and transparency can and must coexist.

4.2.2. Secretariat's assessment

Even though guaranteed on paper, ANRE's financial independence has been threatened several times: ANRE's budget for 2015 was only approved at the end of the year, in November 2015.⁶⁷ The approval came after months of parliamentary debates, in which, according to press reports, the most discussed topic were the ANRE's directors' salaries.⁶⁸ This issue needed months of parliamentary debates to be finally agreed upon and, whether justified or not, it seriously endangered ANRE's day to day operations. ANRE had to borrow money in order to be able to pay salaries and failed to meet its duties to cooperate on regional level with other NRAs in ECRB.

⁶⁵ Law 131 dated 3 July 2015.

⁶⁶ ANRE, letter no 03/669 of 29 July 2016 to the Secretariat.

⁶⁷ http://monitorul.fisc.md/editorial/bugetul_anre_pentru_2015_a_fost_aprobat_de_parlament.html.

⁶⁸ <http://agora.md/stiri/10751/bugetul-anre-pentru-2015-a-fost-discutat-in-parlament>.

5. ANRE's competences and performance

5.1. Competences

Moldova has transposed the Third Package in its recently adopted laws on electricity and natural gas. The gas and electricity laws grant ANRE all competences foreseen under the Third Package with the exception of a limitation of regulatory penalties to 1-5% of a licensee's annual turnover in a number of cases, mainly related to incompliance with license conditions and data provisions but not market abuse; this limitation applies only for the first penalising step and can be extended by additional 5% in case of continued incompliance. ANRE's penalty rights in the case of market abuse or related failures are in all cases set at up to 10% of a licensee's annual turnover in line with the Third Package.

Additionally, Article 15 of the Draft Law lists ANRE's competences. According to this provision, the main attributions of ANRE are related to: licensing (issuing, renewing, suspending them) of regulated companies; monitoring compliance with the license conditions; promoting the development of a competitive energy market; promoting security and sustainability; monitoring the activity of the participants in the energy markets (also when it comes to compliance with the sectoral laws); applying sanctions; approving network tariffs and regulated energy prices in accordance with the approved methodologies and monitoring compliance with these methodologies, prices and tariffs; applying and supervising the application of the principle "maximum efficiency at minimum costs" and ensuring that no cross-subsidies exist; promoting protection of the consumers; collaborating with consumer protection organisations and controlling energy companies' customer protection as well as reviewing complaints and issuing decisions thereon.

The description of competences stipulated by Article 15 of the Draft Law provides an overall summary of duties typically attributed to a NRA and as requested by the Third Package. It has to be noted that this rather general listing alone would not be sufficient to meet the detailed list of responsibilities foreseen under the Gas and Electricity Directives. This, however, remains uncritical having in mind that the gas and electricity sector laws include detailed competences.

ANRE is also competent for licensing petroleum products, licensing and support tariff setting for energy production from renewable sources, licensing public water supply and sewerage as well as to licensing and tariff setting in the thermal energy sector in 2014.⁶⁹

5.2. Secretariat's assessment

Despite the legal shortcomings in terms of ANRE's independence discussed in earlier chapters, it has to be noted that the regulator, and in particular its management, still has to undergo a process of significantly improving its commitment to perform as truly independent institution in practical terms. Even the best legal framework remains dead letter if it is not for the dedication of the management and staff to actively design a market. To this extent, regulatory independence must go beyond refusal of instructions but include the readiness to address areas of incompliance. ANRE has not proven such ability in various cases, some of which including very principle market set up as described hereinafter.

⁶⁹ See chapter 2.1.

5.2.1. Approval of tariffs

Despite its legal obligation to approve new tariffs every year until 1 April⁷⁰, ANRE failed to meet this duty. Between May 2012 and July 2015 no new tariffs were approved by ANRE. When ANRE finally approved the new tariffs in July 2015, their application was suspended for 60 days and the regulated companies had to engage an external audit to prove that the increase in the tariffs was justified.

A particularly important situation which has been unfolding in Moldova lately refers to the financial deviations accrued in the electricity sector and their recovery. System operators accumulated significant financial deviations, mainly because of the significant depreciation of the national currency (which happened as a result of the banking crisis in Moldova). As a consequence of the depreciation, a significant gap between the three suppliers' contracts with electricity generators set in US\$ and the retail tariffs set in Moldovan Lei occurred. This led to a huge tariff deficit (equivalent to circa 1.7% of the GDP of the country), increasingly accruing debts in the sector and risk of massive power interruptions. In addition, since 2012 the costs have been increasing constantly, so tariffs were unable to cover costs.⁷¹ At the same time suppliers were unable to pay bills for electricity procured, which put security of supply in Moldova at risk. Gas Natural Fenosa commenced arbitration proceedings against the Republic of Moldova but the parties went for settlement negotiations first. The negotiations took a few months and Deputy Director of the Secretariat, Mr Dirk Buschle, was appointed as facilitator. An agreement was reached on 3 June 2016 in Chisinau.⁷² Later on, on 15 July 2016, a mechanism for the recovery of the tariff deviations for the energy suppliers and the energy distribution network operators was agreed. Hence, the tariff deviations will be recovered starting with 1 January 2017 up until the end of 2020. The envisaged mechanism will bring back financial stability to the energy sector in Moldova. ANRE must now prove consistency and fulfil its commitments, by approving tariffs taking into account the deviations as per the agreement.

On 22 April 2015, the Secretariat opened infringement proceedings against the Republic of Moldova. The case dealt with the failure, by ANRE, to adopt distribution tariffs for all distribution system operators, as follows: the provisional distribution tariffs adopted by ANRE in January 2015 were not applicable to all eligible customers as required by Article 32 of Directive 2009/72/EC; the provisional distribution tariff adopted by ANRE in January 2015 was only applicable to eligible customers seeking access to the distribution network operated by RED Union Fenosa but not the distribution networks operated by the other two distribution system operators, RED Nord and RED Nord Vest, and as a result, system users could not get access to the networks operated by these two system operators. The situation also created a barrier, on the one hand, for supplier switching and, on the other, for independent suppliers which may have wanted to enter the market. In the Secretariat's view, the failure by ANRE to approve distribution tariffs represented a breach of the obligation to grant non-discriminatory third-party access to distribution networks and prevented the electricity market opening and exercising the right of eligibility. The Secretariat concluded that Articles 32(1), 33(1) and 37(1)(a) of Directive 2009/72/EC were violated by the non-adoption of distribution tariffs as of 1 January 2015. Later on that year, ANRE rectified the breaches identified by the Secretariat. New distribution tariffs were adopted by ANRE on 18 July 2015 and entered into force on 9 November 2015. The

⁷⁰ ANRE Decision no 497 dated 20 December 2012 (the Tariff Methodology), p 34.

⁷¹ World Bank Study from October 2015, available at <http://pubdocs.worldbank.org/en/345481446482838320/Study-Tarife-si-Suportabilitate-2015-10-30-FINAL-RO.pdf>.

⁷² https://www.energy-community.org/portal/page/portal/ENC_HOME/NEWS/News_Details?p_new_id=13002.

newly adopted tariffs enable customers and suppliers to access the distribution networks without discrimination. The Secretariat therefore closed the case against Moldova.

According to the information available to the Secretariat, ANRE is currently in the process of approving new tariffs for heating. The Secretariat understands that the approval has been postponed by ANRE despite numerous requests from Termoelectrica over the past years and albeit constantly increasing costs of natural gas. The approval of these tariffs is vital for ensuring the continuity of the World Bank's support (with guarantees and investment projects) in the Moldovan heating system. Appropriate funds shall be made available by the Government through social programmes to support the vulnerable customers whenever is the case.

Similarly, ANRE is late in approving the tariffs for gas transmission and distribution tariffs as well as for water supply and sanitation. The approval of these tariffs is a prerequisite for the implementation of a project funded by ENRD and EIB loans and EU grants.

5.2.2. Electricity and gas market design

So far, ANRE has failed to design effective gas and electricity market structures including lack of: transparent rules for wholesale electricity market operation on forward, day-ahead and intraday markets; rules for imbalance settlement in electricity and gas; certification for electricity and gas transmission; functional unbundling for electricity and gas distribution; removal of subsidies for vulnerable end-customers.

As a consequence of the lack of transparent and objective rules for the electricity wholesale market and procurement of electricity by the national incumbents, annual power purchase contracts, following a rather opaque bidding process, are usually concluded with the State-owned intermediary Energocom and the power generation company MGres. ANRE so far has failed to remedy that situation or to add transparency and fairness by acting as an independent authority.

5.3. Transparency and accountability

ANRE's decision no 374 dated 10 May 2010 further regulates transparency in the decision-making process by ANRE ('Transparency Decision'). To this end, the Transparency Decision names a coordinator of the public consultation process.⁷³ This coordinator should prepare a list of parties which are potentially interested in the ANRE decision-making process.⁷⁴ Chapter III of the Transparency Decision offers details on the consultation process – to this end, any initiative by ANRE to adopt an act should be published 15 days in advance from the respective draft act being examined, and all stakeholders given the chance to have a say in the process.⁷⁵

Also according to the Transparency Decision, ANRE's meetings during which decisions are debated and adopted are public, with the sole exception of cases where confidential information (as defined by the law) is being discussed⁷⁶

⁷³ The Transparency Decision, article 2.

⁷⁴ The Transparency Decision, article 3.

⁷⁵ The Transparency Decision, article 8 ff.

⁷⁶ The Transparency Decision, Article 14 ff.

Each year, the director general of ANRE must present the Annual Report to the Parliament⁷⁷; approval of the Annual Report by any other public body is not required. The Annual Report must be prepared and published on ANRE's website until 31 March of each year (for the previous year) according to Article 32 of the Regulation.

ANRE must also prepare a financial report by 1 March of each year, in which the Agency has to indicate the regulatory payments received, the expenses incurred, as well as any other relevant financial data (such as loans contracted by ANRE)⁷⁸. The financial report must be published in the Official Journal and on ANRE's website.

By the end of the first trimester of each year, ANRE must publish on its website a report regarding transparency in the way in which decisions are prepared and adopted⁷⁹.

According to Article 29 of the Regulation, whenever an ANRE decision has an impact on issues of public interest or refers to energy licenses, it has to be published in the Official Journal.

5.3.1. Secretariat's assessment

When it comes to transparency, the signals received by the Secretariat were not the most positive ones. The Secretariat received complaints that a certain part of the civil society is not invited to ANRE's meetings and debates, although they have regularly expressed their interest to do so. There have also been indications of requests for meetings by the regulated companies (which wanted to obtain some interpretation guidelines for certain ANRE decisions), but such requests were declined.

Other interviewees stated that, although ANRE sometimes organises public debates these are merely a formality. Documents and information are not always circulated in advance, so it is very difficult for experts to form a position on the spot on an issue they had no indication about before the meeting started.

According to the information available to the Secretariat, it also seems difficult for some of the international organisations present in Moldova to develop a serious working relation with ANRE. ANRE is not seen as transparent and open in relation with the international organisations, and trust is missing.

⁷⁷ Article 4⁽²⁾(10) of the Energy Law and Article 32 of the Regulation.

⁷⁸ Article 33 of the Regulation.

⁷⁹ Article 34 of the Regulation.

6. Recommendations

In the Secretariat's view, urgent measures need to be taken in order to strengthen ANRE's independence and improve its performance. The topics listed below must not necessarily be considered exhaustive, but a *minimum* set of improvements to be made both in terms of the *de iure* organisation of the Agency and its *de facto* performance in order to ensure compliance with the *acquis* and transform the regulator into a truly independent and effectively performing authority.

6.1. Legal framework

The following elements need legal revision:

Independence from other public bodies: despite Article 4⁽¹⁾(6) of the Energy Law establishing the independence of ANRE, certain structural aspects governing ANRE's organisation are not defined by law but only by Decision of the Parliament (the Regulation) and thereby fall short of being guaranteed independence from another public body. The related shortcomings listed in chapter 4.1 must be overcome by transferring elements defined by the Regulation into the Law on Energy.

Appointment of directors: open and transparent competitions need to be performed for the appointment of directors and the currently only vaguely described selection requirements need to be replaced by clear criteria and published procedures. It is furthermore vital that the persons involved in the selection process are independent. Politicians should, as much as possible, be excluded but an independent committee of experts should be appointed. An outside institution such as the Secretariat could assist in appointing them and the selection committee could be, e.g., formed of national academia representatives, senior NRA representatives from other countries and reputed international experts in the field of energy. Experience highlighted in the present report (cf chapter 3.5) shows that the current appointment procedures are far from sufficiently guaranteeing independence of ANRE's management from politics and ensuring trust of market participants in the regulator's independent performance.

Dismissal of directors: clear conditions for removal of directors need to be formulated. In particular the vague and unspecified case of "incompatibility" is listed among the reasons for dismissal, which opens a possibility for misuse and political intervention and has already proven to be problematic in praxis by the parliament's suspension of the director general in 2013 and 2014 and an opaque decision by a court of appeal.

Directors' term in office: the possibility to renew directors' term in office must be limited to one time; the current overall limit for terms in office set at a maximum of 12 years leads to a renewable term more than once for board members which is not in line with the *acquis*.

Budget: the Agency needs to be granted the financial certainty it is currently lacking. Legislation must provide a clear timeline for budget approval that allows the regulator to plan and organise its activities well ahead of the next calendar year. This must also include rules on the financial resources available to ANRE in case of lacking in-time budget approval, e.g. by assuming approval after expiry of deadline or, at least, re-installing the previous year's budget limits. Experience made in 2015 (cf chapter 4.2.2) of a significantly delayed budget approval has proven that financial uncertainty significantly exposed the regulator

to an inability of performing its duties. The requirement for approval of ANRE's budget by the parliament is per se not problematic. However, the overall budget limit at the level of up to 0.15% of the annual cost of electricity, natural gas supplied to consumers, main petroleum products and liquefied gas imports represents an undue restriction of ANRE's financial independence which is not in line with the acquis.

Competences of other public authorities: there is an urgent need for a check and balances system regarding ANRE. Independence does not mean an "untouchable" institution which no one can control. ANRE cannot operate in a regulatory vacuum, but *what* can be audited and by *which* institution has to be very clearly specified in legislation to exclude abuses. Experience – be it on the role of the Court of Auditors or the Public Procurement Agency – though showed that the involved authorities, including ANRE, tend to test the limits of their competences under political influence which does not prove adequately clear allocation of competence as to be expected for a country supposed to operate on the rule of law.

6.2. Internal organisation and performance

Transparency: the Transparency Decision needs to be adopted as soon as possible. ANRE should ensure that information relevant for the public hearings are published well before the hearing, so that interested stakeholders are able to analyse it. The civil society should be allowed, without exception, to participate in the public meetings. ANRE also needs to ensure responsiveness to petitions and requests for information in a timely manner, and also that its responses are not formalistic but have the required content.

Committee of experts: such a committee should be appointed as soon as possible. It should be formed of representatives of the major stakeholders and of the international institutions and should be consulted before all major ANRE Board decisions. The Secretariat though notes that the competences of such committee shall not exceed a purely advisory function as to by no means limit the independent decision making of the ANRE Board which would, otherwise, clearly represent a breach of the acquis. To this extent, the committee's composition of neutral experts unbundled from political and/or company interest must remain paramount.

Staff: there is a need for a head of staff position to "formalize" the relations between the directors and the staff. The head of staff should act as an intermediary and would help reduce the political pressure on the staff. A clear system of bonuses and trainings for the employees should be created, as well as clear and transparent conditions for dismissal. At the same time clear and published procedures for staff selection needs to be established and staff salaries should be continuously increased correspondingly to raise of comparable industry salaries to ensure the regulator's ability to attract sufficiently knowledgeable staff able to adequately tackle active market design duties (cf chapter 4.1.5).

Accountability: The signals received by the Secretariat suggest that there is a general lack of trust in ANRE's performance. The situation could be improved by the regulator publicly presenting its priorities and objectives in a public meeting at the beginning of the year as well as presenting the results at the end of the year. Also, a performance audit could be executed on a regular basis by reputed international experts. The signals received by the Secretariat suggest that there is a general lack of trust in a national institution to perform such an audit, mainly because of lack of in-depth expertise and potential political interferences. The Secretariat is therefore considering the request from the President of the Commission for Economy, Budget

and Finance⁸⁰ to sponsor such a performance audit. Further to this, ANRE may consider to annually select a reputed international audit company to perform its financial audit.

Capacity building: ANRE's position must be strengthened so that it regains trust from the regulated companies, international partners and tax payers. As part of the capacity building process, employees should be sent to trainings abroad, and seminars and trainings should be provided at ANRE headquarters in Moldova. A clear capacity building program is to be discussed with other international partners.

Performance: the regulator, and in particular its management, still has to significantly improve its commitment to perform as truly independent institution in practical terms. The Secretariat's assessment (cf chapter 5.2) notes serious shortcomings in this respect.

⁸⁰ The request was made orally on a meeting which took place on 18 July 2016.

Annex

Compliance of ANRE with the independence requirements of the Third Package⁸¹

	Criteria	Reference		Reflection in Moldavian legislation
		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	Art 4 ⁽¹⁾ (1) LoE
	NRA is established by law, i.e. not by decision of another public institution	not a 3rd Package requirement but as general principle an institution needs to be established by law to ensure independence		LoE however, a number of provisions are not part of the LoE but only the DoP
	Legal and functional independence from public and private interest is stipulated by law	Directive 2009/73/EC, Art 39.4(a)	Directive 2009/72/EC, Art 35.4(a)	Article 4 ⁽¹⁾ (6) LoE; item 2 DoP
	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)	Article 4 ⁽²⁾ (6c), (8) LoE; items 17, 19, 20 DoP
	Sanction 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 Guideline on NRA Independence)		Item 19(f) DoP
	Staff has to act independently from market interest / not seeking or taking instructions	Directive 2009/73/EC Art 39 (4b (ii)) and ECS, Policy Guideline on NRA independence	Directive 2009/72/EC Art 35 (4b (ii)) and ECS, Policy Guideline on NRA independence	Implicitly via Article 4 ⁽¹⁾ (6) LoE; item 2 DoP
	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)	Article 4 ⁽¹⁾ (6) LoE; item 2 DoP
	Decisions are immediately legally binding	Directive 2009/73/EC, Art 41(4a)	Directive 2009/72/EC, Art 37(4a)	item 29-31 DoP
	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)	Not explicitly mentioned

⁸¹ Legend: LoE – Law on Energy No 1525-XIII of 19.02.1998; DoP – Decision of the Parliament No 238 of 26.10.2012.

	Criteria	Reference		Reflection in Moldavian legislation
		Gas	Electricity	
Appointment of Board members	Vacancies are announced publically	ECS, Policy Guideline on NRA independence		no
	Selection process is defined by law and includes a selection committee	ECS, Policy Guideline on NRA independence		no
	Selection criteria for Board member are defined by law and are limited to education, experience, neutrality	ECS, Policy Guideline on NRA independence		Article 4 ⁽²⁾ (5) LoE; item 16 DoP
	Top management terms are limited to a fix term of 5-7 years	Directive 2009/73/EC, Art 39(5b)	Directive 2009/72/EC, Art 35(5b)	Article 4 ⁽²⁾ (4) LoE; item 15 DoP
	Top management terms are renewable only once	Directive 2009/73/EC, Art 39(5b)	Directive 2009/72/EC, Art 35(5b)	no
Operation	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)	Article 4 ⁽²⁾ (4) LoE; item 15 DoP
	NRA has sufficient human resources	Directive 2009/73/EC, Art 39(5a)	Directive 2009/72/EC, Art 35(5a)	
	Management has autonomy on internal organisation (work program, statutes) including staff appointment	Directive 2009/73/EC, Art 39(4a); ECS, Policy Guideline	Directive 2009/72/EC, Art 35(4a); ECS, Policy Guideline	Article 4 ⁽²⁾ (7) LoE; item 22 DoP – however within the budgetary limits that requires approval by the Parliament
Financial independence	NRA has a separate annual budget	Directive 2009/73/EC, Art 39(5a)	Directive 2009/72/EC, Art 35(5a)	Article 4 ⁽³⁾ (1) LoE
	The budget is financed from levies	ECS, Policy Guideline on NRA independence	ECS, Policy Guideline on NRA independence	Article 4 ⁽³⁾ (1)(a) LoE
	NRA's budget does not require approval by another public body	ECS, Policy Guideline on NRA independence	ECS, Policy Guideline on NRA independence	No – approval by the Parliament required (Art 4 ⁽³⁾ (4) LoE)
	NRA has certainty on financial resources	ECS, Policy Guideline on NRA independence	ECS, Policy Guideline on NRA independence	Deficits can be covered on the accounts on next year's budget (Art 4 ⁽³⁾ (3) LoE)
	Staff salaries orientate on regulated industry	ECS, Policy Guideline on NRA independence	ECS, Policy Guideline on NRA independence	no
	NRA has autonomy in using its annual budget	Directive 2009/73/EC, Art 39(5a)	Directive 2009/72/EC, Art 35(5a)	Article 4 ⁽³⁾ (3) LoE
	Dismissal	Dismissal reasons are limited to cases of criminal offence or incompliance with independence	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	Gas and Electricity Laws 2016
Accountability	NRA provides an annual activity report	Directive 2009/73/EC, Art 41 (1e)	Directive 2009/72/EC, Art 37 (1e)	Article 4 ⁽²⁾ (10) LoE, item 32 DoP
Transparency	Decisions are published	Directive 2009/73/EC, Art 39(4a)	Directive 2009/72/EC, Art 35(4a)	Item 28, 29 DoP
	Information about the NRA structure and governance is published	Directive 2009/73/EC, Art 39(4a)	Directive 2009/72/EC, Art 35(4a)	Yes - website
	Board meetings are (in general) open to public	adds to transparency (Directive 2009/73/EC, Art 39(4a))	adds to transparency (Directive 2009/72/EC Art 35(4a))	Not explicitly mentioned