



**Independence of National Regulators
in the Energy Community**

- A CRITICAL REVIEW -

June 2015

Contents

INTRODUCTION 3

1. About ECRB..... 3

2. The concept of regulatory independence 3

3. Scope of analysis..... 4

FINDINGS 6

1. Political and functional independence 6

1.1. Legal set up: independence from public and private entities..... 6

1.2. Single regulatory authority 7

1.3. Independent and binding decision making 7

1.4. Transparency of NRA decision making 10

1.5. Rules for appointment, dismissal and operation of the top management 11

2. Financial independence 16

2.1. Budget autonomy..... 16

2.2. Human resources..... 18

2.3. Salaries 19

SUMMARY OF FINDINGS AND CONCLUSIONS 23

ANNEX 25

Tables

Table 1: Reporting requirements of NRAs towards other public institutions..... 10

Table 2: Transparency 11

Table 3: Appointment procedures for NRA top management..... 13

Table 4: NRA budget autonomy 17

Table 5: Relation of NRA salaries to those of regulated utilities / public sector.....21

Figures

Figure 1: Prohibition of interest in public or private bodies8

Figure 2: Prohibition of interest in public or private bodies - sanctions in case of in compliance 9

Figure 3: Competence for appointment of NRA top management 12

Figure 4: NRA top management term and rotation scheme 15

Figure 5: Number of employees..... 19

Figure 6: Civil servant status of NRA employees 19

Introduction

1. About ECRB

The Energy Community Regulatory Board (ECRB) operates based on the Energy Community Treaty. As an institution of the Energy Community¹ the ECRB advises the Energy Community Ministerial Council and Permanent High Level Group on details of statutory, technical and regulatory rules and makes recommendations in the case of cross-border disputes between regulators.

ECRB is the independent regional voice of energy regulators in the Energy Community. ECRB's mission builds on three pillars: providing coordinated regulatory positions to energy policy debates, harmonizing regulatory rules across borders as well as sharing regulatory knowledge and experience.

2. The concept of regulatory independence

Regulatory independence is a central pre-condition for successful market liberalization and sector reforms. National regulatory authorities (NRAs) were established to regulate the monopolistic activities in the electricity and the gas industries and to promote market mechanisms in generation and supply activities by controlling the conflict of interest between the executive and state owned utilities.²

The rationale behind the institution of an independent regulatory authority lies in the attempt to isolate regulators not only from influence of the regulated companies but also from political interference³: stable, secure and affordable electricity and gas is of key relevance for the public; governments therefore traditionally have interest in design of the energy sector, investment decisions and energy pricing, in particular when the government has ownership in the utilities and the more economies and populations face financial shortage. However, if market liberalization is supposed to become real, it requires a neutral institution that is able to take autonomous decisions that balance the interest of all market participants and base on sector specific expertise, not political paradigm.

Where regulators are not granted adequate independence, governments can either directly force or indirectly influence regulatory decisions ex ant or ex post, thus constraining their ability to commit to their regulatory policy.

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

² S. De Sommer, The Europeanization of the law on National Independent Regulatory Authorities from a vertical and horizontal perspective, *Review of European Administrative Law*, Vo. 5, No.2, (2012), p. 108.

³ C. Cambini and D. Franzi, Independent regulatory agencies and rules harmonization for the electricity sector and renewables in the Mediterranean region, *Energy Policy*, 60 (2013), p.180.

The Energy Community *acquis communautaire* establishes NRAs as independent institutions. In particular the Third Energy Package puts increased emphasis on regulatory independence. However, experience in effectively implementing legal rules teaches that any legislative standard is only as good as standard-consciousness and standard-injury. To this extent, even independence granted to NRAs by letters does not necessarily have to translate into real term independence and is even more challenging in countries with a limited tradition of independent public institutions and limited regulatory experience and capacity. In emerging market economies the key aspect of independence is independence from government intervention. Although many countries have established institutional framework, it is questionable whether they operate as truly independent regulatory authorities.

3. Scope of analysis

The present report analyses the status of independence of NRAs in the Energy Community. It covers the Energy Community Contracting Parties (CPs) Albania, Bosnia and Herzegovina, FYR of Macedonia, Kosovo*, Montenegro and Serbia as well as the neighboring EU Member States (MSs) Austria, Croatia, Greece and Romania⁴.

The assessment, first, focuses on analyzing whether the **national legal framework** adequately complies with the independence criteria for NRAs as defined by the Energy Community *acquis communautaire*. It has to be explicitly underlined that the present analysis by no means targets a comparison *between* the reviewed regulators but exclusively assesses compliance of the NRAs' set up with the *acquis communautaire* and best practice independence criteria. For this, the independence requirements of the Third Energy Package⁵ as well as the relevant interpretative documents of the European Commission and the Energy Community Secretariat⁶ serve as benchmark basis.

The report does *not* analyze the completeness of regulatory powers stemming from the Third Package; while effectivity of NRAs' performance certainly is a function of adequate powers granted NRAs, the present evaluation focuses purely on the aspects of institutional independence, namely:

- *Functional and political independence*, meaning the NRA's ability to act and take finally binding decisions without any political influence; and
- *Financial independence*, meaning the NRA's ability to autonomously define its annual financial needs (budget), including adequate human resources, as well as uninfluenced use of it.

⁴ Cf. Annex.

⁵ Namely Articles 35-38 of Electricity Directive 2009/72/EC (OJ L 211 of 14.8.2009, p 55 et seq) and Articles 39-42 of Gas Directive 2009/73/EC (OJ L 211 of 14.8.2009, p 94 et seq). The Third Package has been made part of the Energy Community *acquis* by Ministerial Council Decision D/2011/02/MC-EnC (6.10.2010) with an implementation deadline of 1.1.2015.

⁶ Commission Staff Working Paper (22.1.2010; "CSWP 2010"); Energy Community Secretariat Policy Guideline PG 02/2015 (28.1. 2015; "ECS PG 02/2015").

Beyond the legal setting, the present report also looks into the **real term embodiment** of the legal framework in praxis.

The analysis is based on information provided by the NRAs of the analysed markets.

Findings

1. Political and functional independence

Political independence of NRAs benchmarked against the requirements of the Third Energy Package entails the following elements:

- The NRA must be legally distinct and **functionally independent** from any private or public entity⁷;
- NRA staff and top management⁸ shall **act independently**. This means that NRA staff and management shall not seek or take direct instructions from any public or private entity. At the same time this implies the prohibition for anyone to *give* such instructions. This also requires that NRA staff and management shall not hold any position or office with regulated utilities hold shares or have any other related interests or execute a political function⁹;
- The NRA must be empowered to take **autonomous and finally binding decisions**¹⁰, except for judicial review¹¹;
- Transparent rules must exist for appointment, dismissal and operation (term) of the **NRA's top management**¹².

The related assessment for the analyzed markets shows as follows:

1.1. Legal set up: independence from public and private entities

The principle of “distinct and functional independence” requires autonomy of the NRA to determine how it operates and is managed, including staffing-related matters and rules out sub-ordination of the NRA to any public institution as well as NRA establishment and / or liquidation by any public entity; establishment and liquidation of the NRA is an exclusive responsibility of the legislator and must therefore solely origin from legislation¹³.

In all reviewed cases the **independence of the regulator is stipulated by law**¹⁴. Also, distinct and functional independence is granted in all analysed markets; however,

⁷ Article 35 (4) lit a Directive 2009/72/EC and Article 39 (4) lit a Directive 2009/73/EC; ECS PG 02/2015.

⁸ Where the present document refers to “NRA top management” this means the body or persons heading the NRA, e.g its Commissioners / Board of Commissioners, President, Chairman of the Board, CEO and similar.

⁹ Article 35 (4) lit b Directive 2009/72/EC, Article 39 (4) lit b Directive 2009/73/EC; ECS PG 02/2015; CSWP 2010.

¹⁰ Article 35 (5) lit a Directive 2009/72/EC, Article 39 (5) lit a Directive 2009/73/EC; ECS PG 02/2015; CSWP 2010. Also, this in principle does not limit the government in establishing its national energy policy within which the NRA must operate to the extent this does not result in interventions in the NRA's autonomy. Autonomous decision making must be also safeguarded in a broader context: the NRA must be guaranteed autonomous development of its work program without a need for approval or consent of public authorities or any other third parties.

¹¹ Directive 2009/72/EC recital 34 and Article 37 (16, 17); Directive 2009/73/EC recital 30 and Article 41 (16, 17).

¹² Article 35 (5) lit b Directive 2009/72/EC and Article 39 (5) lit b Directive 2009/73/EC.

¹³ ECS PG 02/2015, chapter 2.1.

¹⁴ AT – Law on the Energy Regulator (2000 amdt 2010); AL - Power Sector Law (2015); BiH -Law on Transmission of Electric Power, Regulator and System Operator (2002); FYROM – Energy Law (2003 amdt 2011); GR – Law 4001/2011; HR - Act on the Regulation of Energy Activities (2012); KOS – Law on the Energy Regulatory Office

independence from public institutions is subject to serious intervention related to human resources management in Greece, Kosovo*, Montenegro and Serbia (cf. chapters 1.5. and 2.3).

Distinct and functional independence also requires autonomy of the NRA to define its own **annual work program** without need for approval by any other institution; this is guaranteed in all assessed markets. Further to this, national legislation in all analysed markets¹⁵ stipulates **establishment of the NRA solely based on legislation**, meaning that the NRA cannot be liquidated (and re-established) by act of another public institution.

1.2. Single regulatory authority

Article 35 (1) Directive 2009/72/EC and Article 39 (1) Directive 2009/73/EC requires the establishment of a single regulatory authority equipped with all regulatory competences stipulated by the Third Energy Package on nation-wide level¹⁶. This requirement is met in almost all analysed jurisdictions.

The exemption is *Bosnia and Herzegovina*, where the State Electricity Regulatory Authority is exclusively in charge of electricity transmission on State level. Other competences are covered by NRAs on Entity level. Gas is not under regulatory control at all.¹⁷

1.3. Independent and binding decision making

National legislation or internal rules of the NRA¹⁸ in all analysed markets confirms:

- **Final bindingness of regulatory decisions;**
- **Independence of regulatory decision making** without seeking or taking instructions from other public or private entities. With a view to ensure independent regulatory decision making, *all* reviewed legislations include provisions prohibiting NRA top management and staff to have employment relationships or other undue interest in

(2010) and Statutes of ERO; MNTG – Energy Law (2010); ROM – Law 160/2012 approving Ordinance 33/2007; SRB – Energy Law 145/2014.

¹⁵ AT – Law on the Energy Regulator (2000 amdt 2010); AL - Power Sector Law (2015); BiH -Law on Transmission of Electric Power, Regulator and System Operator (2002) and SERC Code of Ethics; FYROM – Energy Law (2003 amdt 2011); GR – Law 4001/2011; HR - Act on the Regulation of Energy Activities (2012); KOS – Law on the Energy regulatory Office (2010); MNTG – Energy Law (2010); ROM – Law 160/2012 approving Ordinance 33/2007; SRB – Energy Law 145/2014.

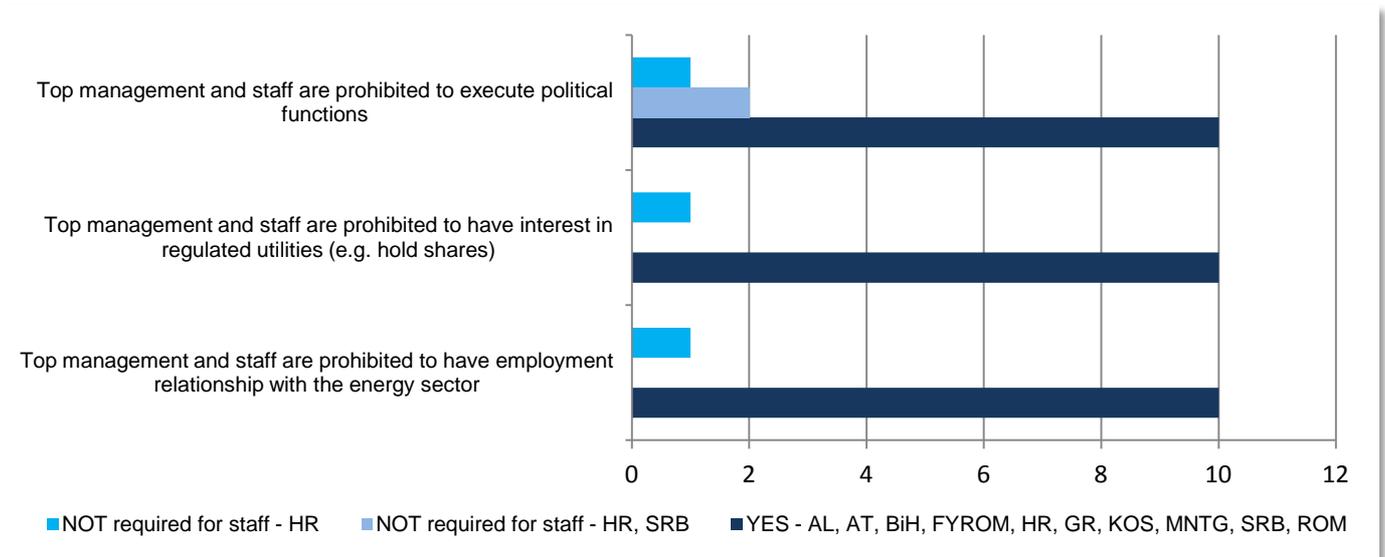
¹⁶ Different from the Second Energy Package it is under the Third Energy Package no longer possible for a CP to designate at national level one regulatory authority to deal with one of the regulatory duties listed in the Electricity and Gas Directives (or Regulations) and a different (regulatory or other) authority to deal with another duty of the regulatory authority. Instead, a single national regulatory authority at national level must be entrusted with all the regulatory duties provided for in the Electricity and Gas Directives. This means that the core duties of the NRA can no longer be split; (CSWD (2010), chapter 2.1).

¹⁷ See as well: ECS, Annual Implementation Report 2014, p 59. As (among others) regards the lack of regulatory competences for the gas sector, an infringement case against BiH is pending with the ECS (CASE ECS 08/11: BH / GAS).

¹⁸ E.g. in Serbia certain safeguards are set in primary legislation for Council Members but not for staff members (please see later in the text).

energy sector stakeholders (e.g. hold shares of regulated utilities) or execute political functions¹⁹.

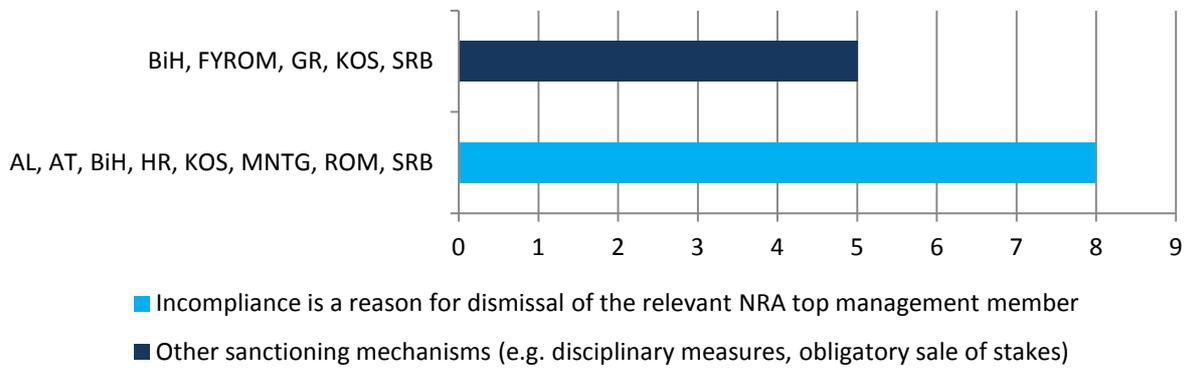
Figure 1: Prohibition of interest in public or private bodies²⁰



¹⁹ Cf. CSWP 2010 page 6 with ref to Article 35 (4) lit b of the Electricity Directive and Article 39 (4) lit b of the Gas Directive; likewise ECS PG 02/2015 chapter 2.1, page 3, para 3. Related provisions are stipulated nationally by the following acts: AT – Law on the Energy Regulator (2000 amdt 2010) and individual employment contracts; AL - Power Sector Law (2009 amdt 2011) and ERE Internal Organisation Rules; BiH -Law on Transmission of Electric Power, Regulator and System Operator (2002) and SERC Code of Ethics; FYROM – Energy Law (2003 amdt 2011) and Code of Conduct; GR – Law 4001/2011; HR - Act on the Regulation of Energy Activities (2012); KOS – Law on the Energy Regulatory Office (2010) and Code on Professional Conduct; MNTG – Energy Law (2010); ROM – Law 160/2012 approving Ordinance 33/2007; SRB – Energy Law 145/2014, Internal Rulebook and individual employment contracts.

²⁰ Staff members of the Greek NRA are, however, entitled to offer teaching services either to universities, other regulatory authorities or non-profit Research Institutes under part time employment regime. For the case of Serbia ownership (e.g. shares) and employment in regulated entities are explicitly prohibited in primary legislation only for Council Members, not for staff. On the other hand, employment contracts prohibits both Council and staff members to have any incomes from regulated entities. Employment relationship with energy sector is prohibited by primary legislation neither for Council members nor staff; however, employment contracts prohibit both Council and staff members to have any incomes from regulated utilities.

Figure 2: Prohibition of interest in public or private bodies - sanctions in case of non-compliance²¹



Regulatory independence from other public institutions can be also indirectly jeopardized by **reporting requirements** to other bodies, to the extent they go beyond formal reporting and include need for approval that can be used for influencing the NRA's decisions. The table hereinafter provides an overview of the reporting requirements of NRAs towards other public institutions:

²¹ Dismissal and other sanctioning mechanisms can apply in parallel. According to Article 10 (8) of Law 4001/2011, members of RAE may for two years after expiry of their term of office not be in any manner of partner, shareholder, board member, technical or other consultant or employee (with or without pay) of a company or undertaking whose activities were subject to direct or indirect control and supervision by RAE during their term of office. The fine to be imposed on them in such a case is equal to fifteen times their total remuneration received as members of RAE during their term of office. According to Article 11 (10) of Law 4001/2011, members of the RAE shall automatically forfeit their position if convicted in a final court judgment during their term of office of an offence which prevents appointment to or results in dismissal from the civil service in accordance with the provisions of the Civil Service and Public Corporation Staff Code (Law 3528/2007, Government Gazette 26A).

Table 1: Reporting requirements of NRAs towards other public institutions

			ALB	AT	BiH	FYROM	GR	HR	KOS	MNTG	ROM	SRB	
Annual report to	Parliament	for approval				x		x		x			
		no approval required	x	x	x		x		x		x	x	
	Court of Audit			x			x ²²						
	Ministry	for approval											
		no approval required		x ²³	x	x	x						
	Government	for approval						x	x ²⁴				
		no approval required				x						x	

In the cases where the NRA's requires approval by another public body, only in Montenegro lack of approval is a reason for dismissal of the REGAGEN's top management. It has to be clearly underlined that such dismissal reason certainly unduly intervenes in regulatory independence²⁵.

Finally, it has to be highlighted that two of the analysed NRAs, namely those of Albania and Montenegro, explicitly reported that social policy expectations of the Government are an influence factor for decision making of their authority²⁶.

1.4. Transparency of NRA decision making

The requirement for NRA decisions to be finally binding²⁷ is exclusively limited by the possibility of judicial review²⁸. This, in return, requires "*decisions taken by regulatory authorities [to] be [...] justified to allow for judicial review*"²⁹. According to Article 35 (4) Directive 2009/72/EC, Article 39 (4) Directive 2009/73/EC NRAs shall exercise their powers **impartially and transparently**. *Impartiality* requires the NRA to act and take decisions in a neutral way, based on objective criteria and methodologies. *Transparency* at minimum requires the NRA to adopt and publish their rules of procedure including at least the decision making procedures; publish information on their organisation and structure; consult

²² Corrective audit of expenditures.

²³ E-Control has to report annually to the Ministry of Economics about its activities (cf Art. 28 para 1 Law on E-Control and Art 37 para 1 (e) Directive 2009/72).

²⁴ Upon request also for periods of less than a year.

²⁵ See as well: ECS, Annual Implementation Report 2014, p 136.

²⁶ In addition to technical (system operation, reliability, quality of supply), commercial, consumer protection and competition related criteria that were also noted by all other reviewed NRAs as drivers for decision making.

²⁷ Article 35 (5) lit a Directive 2009/72/EC, Article 39 (5) lit a Directive 2009/73/EC; ECS PG 02/2015; CSWP 2010.

²⁸ Directive 2009/72/EC recital 34 and Article 37 (16, 17); Directive 2009/73/EC recital 30 and Article 41 (16, 17).

²⁹ Article 37 (16-17) Directive 2009/72/EC and Article 41 (16-17) Directive 2009/73/EC.

stakeholders before taking important decisions³⁰. In this context Article 37 (16) Directive 2009/72/EC and Article 41 (16) Directive 2009/73/EC requires that “*decisions taken by regulatory authorities shall be fully reasoned and justified to allow for judicial review. The decisions shall be available to the public while preserving the confidentiality of commercially sensitive information.*”

The table hereinafter shows that transparency requirements are met by all assessed NRAs.

Table 2: Transparency

	ALB	AT	BiH ³¹	FYROM ³²	GR ³³	HR	KOS ³⁴	MNTG ³⁵	ROM	SRB
NRA decisions are reasoned and justified for juridical review	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Information on NRA decisions are provided on the website	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Stakeholders are consulted before NRA decisions are taken³⁶	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y

1.5. Rules for appointment, dismissal and operation of the top management

According to Article 35 (5) lit b Directive 2009/72/EC and Article 39 (5) lit b Directive 2009/73/EC the regulatory authority’s top management shall be appointed for a fixed term of five to seven years, renewable once. The same legal provisions also require an appropriate rotation scheme for the board or the top management. This means that the end date of the term of office of the board members cannot be the same for all members.

Appointment

The graph hereinafter shows the institutions competent for appointment of NRA top management in the CPs and some additional selected EU countries.

³⁰ ECS PG 02/2015, chapter 2.1; CSWD 2010, chapters 2.2.1 and 2.2.2.

³¹ Rules of Practice and Procedure, Rules of Hearing Procedures and other NRA Rules require detailed announcements on all SERC’s proceedings, Sessions and Decisions are published within SERC’s web site. SERC has established the framework and clear guidelines enabling the receipt of necessary inputs from all interested parties (general public, industry, government, etc)

³² According to the Energy Law (2003 amdt 2011) participation of interested subjects and the public is enabled by means of participation on the preliminary sessions and in another manner stipulated by the NRA.

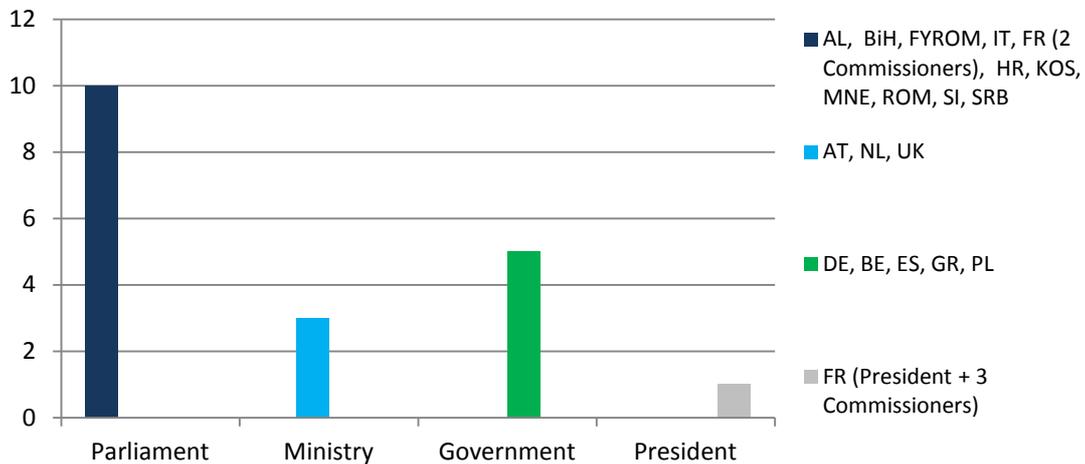
³³ Law 4001/2011.

³⁴ Law on the Energy Regulatory Office (2010).

³⁵ In decision making process on the regulatory allowed revenue (RAR), the Report on the analysis of documentation is published on the web site and there is a deadline for interested legal and natural persons to give their comments and suggestions. Besides, the meeting at which the decision on the RAR is made is open to energy undertakings. The decision on the RAR is published in the Official Gazette of Montenegro and on the web site.

³⁶ By means of public consultation, hearings, consultation workshops or other forms of stakeholder consultation in the course of administrative procedures.

Figure 3: Competence for appointment of NRA top management³⁷



It is however important to see that the final person / body in charge of formal appointment is of lesser relevance as long as a **transparent selection process** takes place beforehand, including public announcement of the vacancy and selection by an independent Committee based on transparent criteria. The appointment of top management shall follow a transparent procedure which is best guaranteed via public vacancy announcement and evaluation of applicants by an independent committee of neutral experts. Direct appointment by the Minister in charge, government or head of state without prior involvement of externals is critical in terms of political independence³⁸.

The table hereinafter shows that principle transparency of the procedure for appointment of top management exists for all analysed NRAs. Certainly, *Montenegro* and *Serbia* have the most objective procedures set in primary legislation among all reviewed jurisdictions in terms of elaborated rules and neutrality of the Selection Committee in charge of short listing candidates. Public hearings are not common although providing large potential for increasing transparency of selection processes. Selection criteria are in all reviewed cases defined by law and to a prevailing and uncritical extent relate to proof of professional expertise, educational background, work experience, neutrality towards the regulated sector and politics (cf. chapter 1.2) and similar. In *FYR of Macedonia*, however, appointment of top management requires passing a “*psychological and integrity test*” – undefined criteria for such test and successfully passing it turn this requirement into an undue limitation of the selection processes’ transparency³⁹.

³⁷ GR: three members to be appointed by Minister of Energy, two by Council of Ministers.

³⁸ ECS PG 02/2015, chapter 2.2.

³⁹ See also: ECS, Annual Implementation Report 2014, p. 97.

Table 3: Appointment procedures for NRA top management

	AL	AT	BiH	FYROM	GR ⁴⁰	HR ⁴¹	KOS ⁴²	MNTG	ROM ⁴³	SRB
Public job announcement	x	x	x	x	x	X		x		x
Selection criteria defined by law	x	x	x	x	x	X	x	x	x	x
Selection Committee	x ⁴⁴		x ⁴⁵		x	Ministry of Energy	x	x ⁴⁶	x	x ⁴⁷
Hearing		x ⁴⁸	x ⁴⁹							

Staff appointment and internal organisation is the sole responsibility of the NRA (management) in most of the analyzed cases. The exceptions are:

- *Montenegro*: the NRA's internal organisation requires approval by Government (Montenegro⁵⁰). It has to be underlined that such requirement limits functional independence from other state authorities (cf. chapter 1.1)⁵¹.
- *Greece*⁵²: the NRA's internal organisation requires approval by the Ministry of Energy; the maximum number of permanent personnel the NRA can hire is set by Law 4001/2011. The same law also sets the different types of personnel that RAE may hire

⁴⁰ Favorable opinion of the Committee on Institutions and Transparency on the proposal of the Minister of Energy required and to be published (ref. Law 4001/2011).

⁴¹ Act on the Regulation of Energy Activities.

⁴² Parliament committee evaluates proposal by Government (ref. Law on the Regulatory Office (2010)).

⁴³ Law 160/2012 approving Ordinance 33/2007.

⁴⁴ Composed of two representatives from the Parliament, respectively the chair of the responsible parliamentary commission on energy and the chair of the responsible parliamentary commission on economy and one representative from the responsible Ministry on energy (ref. Energy Law).

⁴⁵ Committee's short list is submitted to the relevant Entity government which's proposal has to be confirmed by the Entity Parliament. The final proposal is submitted to the Council of Ministers of BiH that proposes appointment to the Parliamentary Assembly of BiH (ref. Law on Ministerial, Government and other Appointments of the Federation BiH; and Republika Srpska respectively).

⁴⁶ Members of the Board of the Agency shall be nominated by the Parliament of Montenegro upon a proposal of the Government. Members of the Board of the Agency shall be elected in a procedure following a public advertisement. Article 28 – Ranking of candidates is carried out by the Commission appointed by the Government and composed of five members proposed by the Government (one member is from the Government, one from the Montenegrin Academy of Science and Arts, two from the University of Montenegro, out of which one is from the Faculty of Electrical Engineering and one representative of the Chamber of Economy of Montenegro). The Commission is supposed to submit a ranking list to the Government with a rationale (ref. Energy Law (2010)).

⁴⁷ Commission for Election of Candidates, established by the Government at the proposal of the Ministry and comprising five members, two representatives of the competent board of the National Assembly and three prominent experts with more than 15 years of work experience in the energy field; a Commission member may not be a person employed with the energy entity (ref. Energy Law 145/2014).

⁴⁸ In Parliament.

⁴⁹ By Selection Committee.

⁵⁰ While legislation in general stipulates regulatory independence, it at the same time foresees necessary consent of the government to REGAGEN's statutes that, among others, stipulate the rights and duties of the management as well as the basics of the internal organization and funding.

⁵¹ Approval of NRA's statutes is also stipulated by law in FYR of Macedonia and Serbia but with – compared to Montenegro – a more general character.

⁵² Ministerial Decision (Law 4203/2013 amending Law 4001/2011).

and the maximum number per type⁵³. The maximum number of temporary personnel and the duration of temporary contracts are also set by law. Other laws enforce the NRA acceptance of superfluous personnel from other parts of the public sector. During the first years of the Greek financial crisis (2010, 2011, 2012) RAE was not allowed to hire new personnel although significant staff reductions had occurred (cf. chapter 2). It is more than obvious that related restrictions do not only unduly limit RAE's ability to attract sufficient and knowledgeable human resources but even influence the NRA's independence on defining its annual priorities (work program; cf. chapter 1.1).

- *Serbia*: according to the Budget Law, employment of additional staff is subject to approval of the Committee for Administrative and Mandate Issues of the National Assembly. Furthermore, the number of new employees is indirectly subject to approval by the national Assembly (via approval of the Annual Financial Plan of AERS).

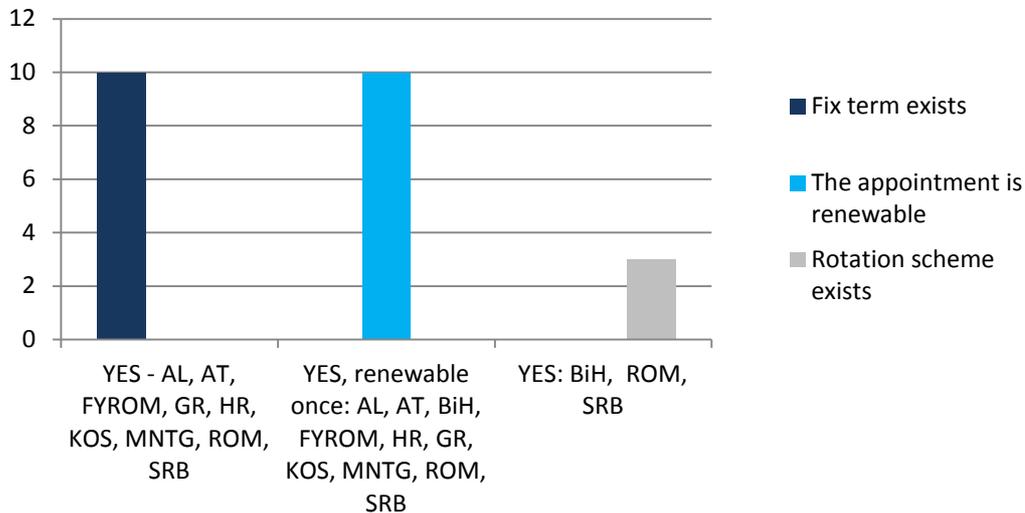
Operation

Appointment of the NRA's top management for a fixed term in combination with limitation of dismissal cases to reasonable cases, such as criminal offense or incompliance with the appointment criteria, are other elements that promote the top management's political independence.

Results show (cf. figure hereinafter) that where **fix terms** for the top management exist, they to a prevailing extent refer to a five years term (Albania, Austria, Bosnia and Herzegovina, FYR of Macedonia, Greece, Kosovo*, Montenegro and Romania); in Serbia different terms between five and seven years are stipulated by law: the President of the Council is appointed for seven years, two members of the Council are elected for six years and two for the period of five years; in Croatia a seven year term is defined. All analysed NRA thereby comply with the relevant Third Energy Package requirement. Also, all reviewed legislations comply with the Third Energy Package's requirement of an only once **renewable term**.

⁵³E.g. 5 secretaries, 3 lawyers, 20 engineers, economists, mathematicians etc.

Figure 4: NRA top management term and rotation scheme



A **rotation scheme** in the understanding of the Third Energy Package only exists in three of the analysed markets, namely Bosnia and Herzegovina, Romania and Serbia. Bosnia and Herzegovina, Croatia and Montenegro have established a system that stipulates rotation of Board Chairmanship among its members⁵⁴; for the cases of Croatia and Montenegro this, however, does not meet the intention of a rotation scheme required by the Third Package, namely that the end date of the term of office of the board members cannot be the same for all members.

Dismissal and expiry of term

As a principle rule reasons for dismissal of NRA top management need to be limited to reasonable cases, such as criminal offense or incompliance with the appointment criteria or political engagement⁵⁵. This rule is largely applied in all reviewed markets; still, a number of dismissal reasons exist that need to be seen critical in terms of objectivity⁵⁶:

- *Bosnia and Herzegovina* Commissioners can be dismissed in case of failure to participate in the NRA's proceedings for more than six weeks; such timing is extremely short, also in comparison to other NRAs⁵⁷. More in general, it has to be noted that even reference to the "failure / inability of performing duties" entails a certain level of uncertainty that can be misused for politically motivated dismissal⁵⁸;

⁵⁴ BiH and HR: annual rotation; MNTG: two year based rotation based on voting among the members of the Commission by secret ballot.

⁵⁵ Article 35 (5) lit b Directive 2009/72/EC and Article 39 (5) lit b Directive 2009/73/EC; CSWD 2010; ECS PG 02/2015, chapter 2.3.

⁵⁶ See as well: ECS, Implementation report 2014.

⁵⁷ AT, HR: more than six months.

⁵⁸ Related experience has been, e.g., made in HR in 2010.

- *FYR of Macedonia*: Board members can be dismissed in case he/she “performs the office in an unconscious and unprofessional manner”; criteria for meeting this assumption are not defined by Law;
- *Montenegro*: vague grounds for dismissal of Board members exist with the cases of “misrepresentation of qualification” and “incapability of performing duties”, further to this REGAGEN is the only of the reviewed NRAs whose top management can be dismissed because of lack of approval of its annual report. It has to be clearly underlined that such dismissal reason certainly unduly intervenes in regulatory independence⁵⁹.

Independence of the NRA, finally, is at risk where after the **expiry of a board member’s term** this post is for a longer time either not filled or filled by the previous board member without renewal of mandate. The first case negatively tightens the NRA’s decision making procedures in relation to voting majority requirements. The (legitimate) interest of Board members for renewal of their expired term, on the other hand, carries the risk of increased exposure to political intervention; this problem is of course less valid the more transparent, neutral and uncoupled the management appointment procedure is.⁶⁰ Lack of timely (or at all) replacement or re-appointment of Board members whose term expired has been reported for Bosnia and Herzegovina, Kosovo*, Montenegro and Serbia⁶¹.

2. Financial independence

2.1. Budget autonomy

According to the Third Energy Package NRAs must have a **separate annual budget** with autonomy in its implementation⁶². Approval of the NRA’s annual budget by the Parliament does not necessarily constitute an obstacle, provided this is not influencing the NRA’s priorities or else how entailing intervening into the powers and duties of the NRA⁶³. The role of the National Parliament in approving NRA’s budget is to grant a global financial allocation to the NRA, but only the NRA can decide how the allocated budget is spent; in other words, the NRA may neither seek nor receive any instruction on its budget spending, including those from Government, Ministries or the National Parliament⁶⁴. Powers going beyond formal approval and allowing for cutting the proposed NRA budget represent an undue limitation of the NRA’s financial independence unless duly justified by public notice. In any case the NRA needs to be granted certainty on its annual financial resources. Where national legislation

⁵⁹ See as well: ECS, Annual Implementation Report 2014, p 136; cf. also chapter 1.2.

⁶⁰ ECS PG 02/2015, chapter 2.3.

⁶¹ See as well: ECS, Annual Implementation Report 2014, p 59, 79 and 136.

⁶² Article 35 (5) lit a Directive 2009/72/EC and Article 39 (5) lit a Directive 2009/73/EC. This does in principle not exclude that the NRA’s budget is part of the state budget to the extent there is a clear separate annual budget line for the NRA. Certainly, a more clear-cut approach would entail funding of the NRA’s budget from levies. A solution combining both approaches would include the NRA’s budget in the state budget but finance it from levies collected by the NRA based on autonomous calculation of its budgetary needs (ECS PG 02/2015; CSWP 2010).

⁶³ Directive 2009/72/EC recital 34; Directive 2009/73/EC recital 30.

⁶⁴ CSWP 2010, pages 9-10; likewise ECS PG 02/2015, chapter 2.2

requires approval of the NRA budget, such needs to be provided well in advance of start of the NRA's budgetary year; a minimum lead period of two months seems adequate to allow the NRA for resource planning. After expiry of a reasonable review period lack of in-time approval should lead to automatic acceptance of the budget⁶⁵.

In general **budget of all CP NRAs is financed from license fees**. The analysed NRAs did not report budgetary constraints, however restrictions realiter exist related to NRA salary levels (cf. chapter 2.3).

Table 4: NRA budget autonomy

NRA	NRA has a separate budget ⁶⁶	NRA defines the level of its budget autonomously	But		
			Approval is needed by...	cutting of proposed costs is possible	restrictions exist due to
AL	Y	Y			
AT	Y	Y	Supervisory Board	Y	
BiH	Y	Y			salary levels are limited to those of civil servants ⁶⁷
FYROM	Y	Y	Parliament		
GR	Y ⁶⁸	Y	Parliament	Y	Salary levels defined by Minister of Finance and Minister of Energy ⁶⁹

⁶⁵ ECS PG 02/2015, chapter 2.2.

⁶⁶ A separate budget can also be guaranteed if the NRA's budget is part of the State Budget to the extent the State Budget provides a separate budget / accounting line for the NRA .

⁶⁷ In defining and implementing the budget, NRA has to ensure that the salaries of Commissioners and other employees are in line with general principles of the Law on Salaries and Allowances in the Institutions of Bosnia and Herzegovina ("Official Gazette of BiH", No 50/08, 35/09, 75/09, 32/12, 42/12, 50/12 and 32/13) and the Decision of Council of Ministers of BiH determining the base for salaries calculation.

⁶⁸ According to Art. 6 of Law 4001/2011, RAE has administrative and financial independence and its own budget, for the implementation of which RAE has full autonomy. However, the implementation of the budget is also subject to specific rules laid down in Chapter IV of the Presidential Decree No. 139 (Government's Gazette A' 121/18.06.2001), while it is also the State Annual Accounts and State Budget Monitoring Committee, as stipulated in Parliament's Rules of Procedure monitoring the implementation of the budget, parallel to the Court of Auditors carrying out a corrective audit of RAE expenditure. More in detail as regards the autonomy of the regulator when implementing the allocated budget, it is important to note that following the amendment of Law 4001/2011 via the more recent Law 4203/2013 (Government's Gazette A' 235/1.11.2013) it is possible to transfer funds within the budget under the condition that the final sum is not changed. This allows for some autonomy which is considered as necessary so as to adapt to the needs of the authority more effectively.

⁶⁹ According to Art. 10 para 6 of Law 4001/2011, "Any kind of remuneration paid to members of the RAE shall be stipulated by joint decision of the Minister for Finance and the Minister for Environmental Affairs, Energy and Climate Change." Furthermore, Art. 43, referring to the Secretariat staff remuneration and compensation, includes the following provisions: „Remuneration, which shall include salaries, bonuses and overtime, and all manner of expenditure relating to additional compensation and travel expenses for staff working for the RAE under any employment relationship or retainer, including the five (5) special associates working in the Chairman's Office, shall be stipulated by joint decision of the Minister for Finance and the Minister for Environmental Affairs, Energy and

NRA	NRA has a separate budget ⁷⁰	NRA defines the level of its budget autonomously	But		
			Approval is needed by...	cutting of proposed costs is possible	restrictions exist due to
HR	Y	Y	Government upon Ministry proposal		
KOS	N	N	Parliament upon Government proposal	Y ⁷¹	Salary levels Law on Budget transfer between budget lines
MNTG	Y	Y	Parliament		Obligatory approval of the budget by Parliament salaries
ROM	Y	Y			Some civil servant rules are applied
SRB	Y	Y	Parliament		Obligatory approval of the budget by Parliament salaries: certain civil servant rules concerning salaries are applied

2.2. Human resources

Article 35 (5) lit a Directive 2009/72/EC and Article 39 (5) lit a Directive 2009/73/EC requires Contracting Parties to equip the NRA with adequate **human and financial resources** that allow the NRA to carry out its duties and exercise its powers in an efficient and effective manner. In this context, independence also needs to be perceived in terms of NRA **staff appointment**. It needs to be the right of the board to freely decide on staff hiring and dismissal as well as on the number of staff required for performing the regulatory duties (*cf.* chapter 1.4).

Analysis shows that the number of employees is similar in the CPs but significantly higher for the EU NRAs. In this context it has to be noted that the additional NRA competences stemming from the Third Energy Package are not yet in force in the CPs, except Serbia. With the implementation of the Third Energy Package additional human resources will be pivotal for the CP NRAs' ability to fulfill the extensive new competences⁷².

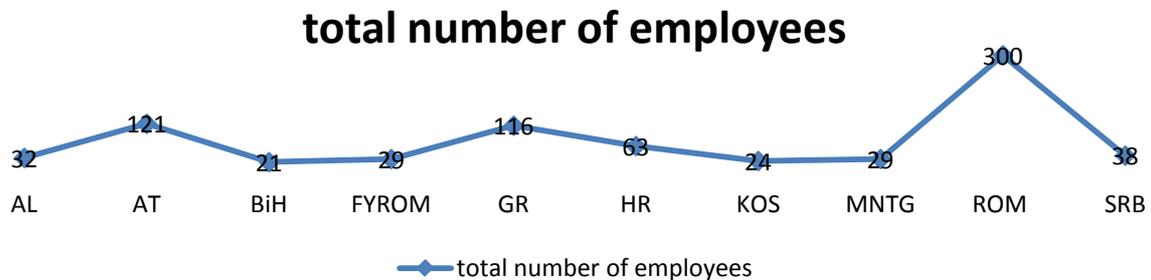
Climate Change". For both cases described in art. 10 para 6 and art. 43 of the same law, the expenditure generated from the application of these provisions shall be charged in its entirety to the RAE budget.

⁷⁰ A separate budget can also be guaranteed if the NRA's budget is part of the State Budget to the extent the State Budget provides a separate budget / accounting line for the NRA .

⁷¹ The Government of Kosovo* by Decision nr 07/172 dated 27.02.2014 decided to cut the budget of all budgetary entities by 15 %. Such decision was applicable to ERO as well even though the Law on Management of Public Finance and Accountability does not allow the reduction of the budget for independent authority by the Government.

⁷² Likewise: ECS, Annual Implementation Report 2014.

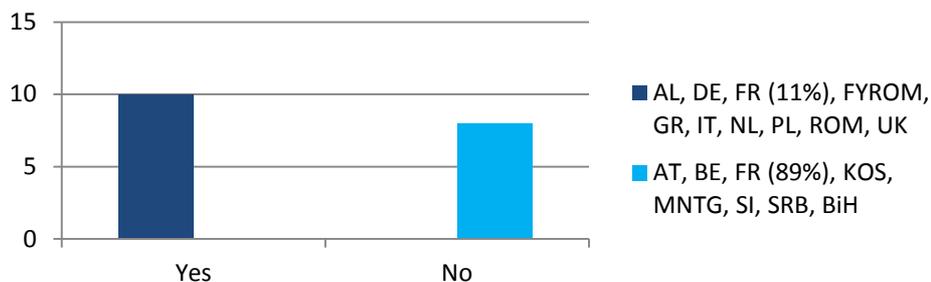
Figure 5: Number of employees⁷³



2.3. Salaries

NRAs must be able to attract sufficiently qualified staff to execute its responsibilities in a meaningful way. This can only be guaranteed if also salary levels are sufficiently attractive. Meeting this criterion can be put in limits in case NRA staff has **civil servant status**. The status of staff members (civil servant or not) varies among the EU and EnC countries.

Figure 6: Civil servant status of NRA employees⁷⁴



It has to be noted though that the status per se is less relevant, only salary limitations stemming from a civil servant status are a barrier to regulatory independence in terms of the ability of the regulator to attract knowledgeable staff. Civil servants' salaries are typically lower

⁷³ Staff and Board members; full time employees.

⁷⁴ In the case of Serbia, the staff members do not have a civil servant status; however, certain civil servant rules limiting the amount of salaries are applicable also for the NRA (cf table 4 and later in this chapter). The figure for Austria shall be read as total number of employees. This number differs from the number of full time employees. Source: E-Control Annual Report 2014, page 152 (http://www.e-control.at/portal/page/portal/medienbibliothek/publikationen/dokumente/pdfs/eControl_TB14_17.02_END.pdf).

than those in industry, i.e. the labour market. If the regulator cannot pay salaries comparable to industry level, sector experts will either not be attracted or lured away. Inadequate availability of knowledge expertise weakens the regulator as much as insufficient financial resources do.

NRA staff salaries should consequently orientate on those of the regulated industry. It derives from the NRAs' independence in using its budget that the Board must be free in deciding on staff salaries. Evidently, the Board members' salaries should not be defined and approved by the Board itself; an independent institution, e.g. the Parliament, should be involved in the process. Board member salaries may be linked to comparable (independent) public bodies (e.g. central banks or supreme courts) or, in case top management salary levels in the regulated business are higher, on those. In terms of equality it is recommendable that salaries of all Board members are the same, with the possibility of a higher salary for the chairperson.⁷⁵

The table and figures hereinafter show a comparison of staff and top management members in selected countries and their relation to the salaries of the regulated utilities / public sector.

⁷⁵ ECS PG 02/2015, chapter 2.2

Table 5: Relation of NRA salaries to those of regulated utilities / public sector

		AL ⁷⁶	AT	BiH ⁷⁷	FYROM ⁷⁸	GR ⁷⁹	HR ⁸⁰	KOS ⁸¹	MNTG ⁸²	ROM ⁸³	SRB
Top management	Compared to civil servants	Higher (Chairman 60% / Board members 45% of ALB President ⁸⁴)	Higher (set by Supervisory Board)	Comparable to high government officials	Comparable to high government officials	Comparable to Ministry Secretary General	Comparable	Higher	Comparable to government officials	Comparable	Higher compared to government officials mid range compared to other independent bodies ⁸⁵
	Compared to regulated industry	Not know	Comparable (set by Supervisory Board)	Comparable	Lower		Lower	70-90% lower	Lower	Comparable	Comparable to public companies lower than private companies
staff	Compared to civil servants	Equal but without special benefits (e.g. supplementary pension)	Higher (set by NRA)	Slightly higher	Slightly higher	Equal ⁸⁶	Comparable	Comparable data not available	Higher	Comparable	Higher compared to government officials mid range compared to other independent bodies
	Compared to regulated industry	At least two times lower	Comparable (set by NRA)	Comparable	Comparable to high government officials		Lower	60-90% lower	Lower	Comparable	Comparable to public companies lower than private companies

⁷⁶ Law 9584/2006 "On salaries, remuneration and structures of independent constitutional institutions and other independent institutions". Note: comparison relates to salaries before reform of the Power Sector Law in May 2015 that introduced the right of the Board to set salaries on a level comparable to those in of the regulated industry.

⁷⁷ SERC Rules on Salaries and Allowances which follow the general principles of the Law on Salaries and Allowances in the Institutions of Bosnia and Herzegovina.

⁷⁸ Set by the NRA.

⁷⁹ Law 4001/2011 and Law 4024/2011 introducing the single payroll for civil servants.

⁸⁰ Defined by acts of HERA.

⁸¹ Law on Energy regulator.

⁸² Salaries are set by decree of the NRA (Rulebook on Salaries) based on Labor Law but also recommendations of the government and Parliament.

⁸³ Set by ANRE based on comparison of civil servants' and industry officers' salaries.

⁸⁴ More or less equal to General Secretary of Ministries.

⁸⁵ E.g. Commission for competition protection, Ombudsman, Commissioner for Information of Public Importance and Personal Data Protection, National Bank of Serbia, Regulatory Agency for Electronic Communications and Postal Services etc.). It should be noted that certain of those IRA are not subject to civil service salary rules.

⁸⁶ Salaries of staff members are determined based on their status as scientific staff and lawyers, administrative staff and staff on a fixed term contract. Distinct Ministerial Decisions apply for each of the three categories of staff, parallel to the single payroll for civil servants rules as provided in Law 4024/2011 and to the general provisions of the sector specific national legislation.

For the case of *Serbia* it has to be noted that competitiveness of AERS' salaries decreased from originally, salaries comparable to private industry and higher than those of the public sector due to the conservative policy of salary increase in comparison to the sector average rate, as well as introduction of certain civil service salary rules⁸⁷. Similarly, salaries of NRA employees in *Montenegro* – originally, about 20% higher than salaries in the regulated energy sector – have been reduced by decision of the Parliament. Both cases have to be seen particularly critical since staff of both these NRAs do not have civil servant status and, in principle, are granted autonomy on the use of their budget (cf. table 4). In Montenegro, (legally required⁸⁸) approval of the NRA's budget by the Parliament is, also via intervention of the Government, made subject to reduction of salaries. Related practice clearly has to be considered undue intervention in the regulators financial independence with strong impact – the lack of approval of the NRA's annual budget is a strong weapon for enforcing political requirements and adds another element of dependence, namely uncertainty about financial resources. At the same time, a law on salaries in the public sector is under discussion in Montenegro that would reduce salaries of NRA employees to those of the public sector and, thereby, to a level significantly lower than in the regulated utilities.

In *Greece* salary levels have since 2011 faced serious cuts between 40-60%⁸⁹ which lead to significant brain drain with 14% of employees leaving RAE in 2012 and 16% in 2014 compared to only 3% in 2010. Also, it is not possible for RAE to hire new personnel under permanent or temporary contracts, or renew temporary contracts, unless a special provision is made by law. Salaries are not determined by RAE's decision but by a joint Ministerial Decision. Since the beginning of summer of 2014, RAE cannot even credit the bank accounts of RAE's board members and personnel with their monthly salaries; instead, the regulator is obliged to transfer money from its own account to another authority, the so-called Common Payments Authority carrying out the actual salary payments to all public sector personnel.

⁸⁷ Law on maximal level of salaries in the public sector and Law on decreasing net income of employees in the public sector.

⁸⁸ Energy Law (2009).

⁸⁹ Law 4024/2011.

Summary of Findings and Conclusions

The present report analyses whether the national legal framework adequately complies with the independence criteria for NRAs as defined by the Energy Community *acquis communautaire*. It is worth noting that the analysis by no means targets a comparison *between* the reviewed regulators but exclusively assesses compliance of the NRAs' set up with the *acquis communautaire* and best practice independence criteria. For this, the independence requirements of the Third Energy Package⁹⁰ as well as the relevant interpretative documents of the European Commission and the Energy Community Secretariat⁹¹ serve as benchmark basis. To this extent, the assessment prevalingly piles up *de iure* compliance and provides only limited information on *de facto* independence of the reviewed regulators. In this context it has to be noted that real term independence remains function of NRAs living up to the competences granted by law and actively making use of their powers. Real independence proves its quality where NRAs resist attempts to influence their decision making.

The analysis shows **compliance with the independence criteria** of the *acquis communautaire* with respect to a number of central elements:

- In all reviewed cases the independence of the regulator is stipulated by law.
- All reviewed NRAs can autonomously define their annual work program without need for approval by any other institution.
- National legislation in all analysed markets stipulates establishment of the NRA solely based on legislation, meaning that the NRA cannot be liquidated (and re-established) by act of another public institution.
- Almost all analyzed NRAs are established as single regulatory authority with nation-wide competences; the exception is Bosnia and Herzegovina.
- In all reviewed cases NRA top management is prohibited to have employment relationships or other undue interest in energy sector stakeholders (e.g. hold shares of regulated utilities) or execute political functions; the same restrictions prevalingly apply for staff members with the exemption of Croatia and Serbia.
- Top management of all analyzed NRAs' has a fixed term. Also, all reviewed legislations comply with the Third Energy Package's requirement of an only once renewable term.

However, **restrictions to regulatory independence exist** stemming from powers of other public bodies that influence NRAs' room for manoeuvre indirectly:

- In Montenegro lack of approval of the annual report is a reason for dismissal of the NRA's top management. In general some *dismissal reasons* existing for the NRAs of Bosnia and Herzegovina, FYR of Macedonia and Montenegro that need to be seen critical in terms of objectivity

⁹⁰Namely Articles 35-38 of Electricity Directive 2009/72/EC (OJ L 211 of 14.8.2009, p 55 et seq) and Articles 39-42 of Gas Directive 2009/73/EC (OJ L 211 of 14.8.2009, p 94 et seq).

⁹¹CSWP 2010; ECS PG 02/2015.

- In Montenegro the NRA's internal organisation - among others stipulating the rights and duties of the management as well as the basics of the internal organization and funding - requires approval by the Government⁹².
- In Greece the NRA's internal organisation requires approval by the Ministry of Energy; the maximum number of permanent personnel the NRA can hire is set by law as well as the different types of personnel that the NRA may hire and the maximum number per type.
- Lack of in time (or at all) *replacement or re-appointment of Board members* whose term expired has been reported for Bosnia and Herzegovina, Kosovo*, Montenegro and Serbia. This negatively tightens the NRA's decision making procedures in relation to voting majority requirements.
- *Financial independence* remains the main weakness: while in all reviewed cases, except Kosovo*, the regulators have their own budget and can define it autonomously, budgetary independence is de facto disturbed by restrictions on salary levels directly or indirectly imposed on NRAs, in particular Greece, Kosovo*, Montenegro and Serbia.

Improvements need to be made in relation to:

- *Appointment of NRAs' top management*: principle transparency of the procedure for appointment of top management exists for all analysed NRAs. However, elaborated rules and a Selection Committee in charge of short listing candidates only exist in Montenegro and Serbia. Public hearings are not common although providing large potential for increasing transparency of the selection processes. Selection criteria are in all reviewed cases defined by law and to a prevailing and uncritical extent relate to proof of professional expertise, educational background, work experience, neutrality towards the regulated sector and politics and similar. In FYR of Macedonia, however, appointment of top management requires passing a "*psychological and integrity test*" – undefined criteria for such test and requirements for successfully passing it turn this requirement into an undue limitation of the selection processes' transparency.
- A *rotation scheme* in the understanding of the Third Energy Package only exists in three of the analysed markets, namely Bosnia and Herzegovina, Romania and Serbia. Bosnia and Herzegovina, Croatia and Montenegro have established a system that stipulates rotation of Board Chairmanship among its members; for the cases of Croatia and Montenegro this, however, does not meet the intention of a rotation scheme required by the Third Package, namely that the end date of the term of office of the board members cannot be the same for all members.
- With the implementation of the Third Energy Package *additional human resources* will be pivotal for the CP NRAs' ability to fulfill the extensive new competences.

⁹² Approval of NRA's statutes is also stipulated by law in FYR of Macedonia and Serbia but with – compared to Montenegro – a more general character.

Annex

List of NRAs referred to in the present report:

Austria: Energie-Control Austria (E-Control); www.e-control.at

Albania: Enti Rregullator i Energjise / Energy Regulatory Agency (ERE); www.ere.gov.al

Bosnia and Herzegovina: Državna regulatorna komisija za električnu energiju / State Electricity Regulatory Commission (DERK / SERC); www.derk.ba

Croatia: Hrvatska energetska regulatorna agencija / Croatian energy regulatory agency (HERA); www.hera.hr

FYR of Macedonia: Energy Regulatory Commission of Macedonia (ERC); www.erc.org.mk

Greece: Ρυθμιστική Αρχή Ενέργειας / Regulatory Authority for Energy (PAE / RAE); www.rae.gr

Kosovo:* Energy Regulatory Office (ERO); www.ero-ks.org

Montenegro: Regulatorna agencija za energetiku / Energy Regulatory Agency (RAE); www.regagen.co.me

Romania: Autoritatea Nationala de Reglementare in domeniul Energiei/Romanian Energy Regulatory Authority (ANRE); www.anre.ro

Serbia: Агенција за енергетику Републике Србије / Energy Agency of the Republic of Serbia (AERS); www.aers.rs