

CEER WG SOUTH EAST EUROPEAN ELECTRICITY REGULATION

Discussion Paper on the South East European Regulators Board for Electricity and Gas

Final Version

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1 Scope

In the conclusions of the last 4th Athens Forum during which the Tirana Declaration establishing the SEE Regulators Board for electricity and gas (hereafter referred to as the “Regulators Board”) was presented by the European Commission, the CEER Working Group on South East Europe Energy Regulation had raised some issues on the overall role of the Regulators Board and the need to clarify in detail its competences. In this context, the CEER WG SEEER was invited by the last Forum to draft and present a detailed paper on the role and competences of the Regulators Board.

Building on the Tirana Declaration which has already been approved by the Permanent High Level Group (PHLG) and which will be formally adopted by the Ministerial Council by the end of this year, taking also into account the current evolutions on the ECSEE Treaty which are presented in detail hereinafter and which will certainly describe in detail all the core duties and competences to be entrusted to the Regulators Board, this document represents the regulatory input to the discussions towards the ECSEE Treaty on the role of the SEE Regulatory Board.

This paper is divided in two parts. The first part outlines the major principles applying to the overall role and competences of the Regulators Board in the context of the ECSEE Treaty and is based on all the relative documents as referred to hereinafter which have dealt with the competences of the Regulators Board. In this context, the first part addresses the overall regulatory approach to be pursued in the region in order to ensure an effective and consistent regulatory process and with the view to identify with clarity the interrelation between the different institutions and their smooth co-operation. This part addresses furthermore the appropriate mechanisms that need to be put in place with the view to ensure the independent operation of the Regulators Board and its smooth functioning. The second part which is presented as an annex to the overall description of the core duties of the Regulators Board, provides a preliminary, indicative list of the issues to be treated under each of the core competences of the Board, as examples. These issues do not represent an

exhaustive list of all the matters that need to be addressed. However, they do represent a concrete basis for fruitful discussion, and have been identified through the main documents that have been circulated in the context of the ECSEE initiative.

2 Background

The Tirana Declaration provides for the establishment of the “South East European Regulators Board for Electricity and Gas”, and is expected to be adopted by the Ministerial Council by the end of 2004. With respect to the tasks of the Regulators Board, the Tirana Declaration provides that the Regulators Board shall advise and assist the European Commission when proposing detailed rules with respect to the regional energy market, and that it shall also facilitate consultation, co-ordination and co-operation of competent regulatory authorities on issues relevant to the regional energy market. In this framework, the ambit of responsibilities of the Regulators Board as provided for in the Tirana Declaration is divided firstly to advisory tasks vis-a-vis the European Commission, as well as to tasks related to a mechanism for encouraging co-operation and co-ordination between national regulatory authorities. These competences of the Regulators Board aim at promoting the development of the ECSEE market and at contributing to a consistent application by all parties of the Community acquis, as well as of the regional energy regulatory framework.

Furthermore, the Council of the European Union decided on May 2004 to authorise the European Commission to open negotiations on behalf of the European Community on an agreement for the Treaty on the Energy Community in South East Europe. This Decision of the Council - hereinafter referred to as the “mandate” - provides that the Regulators Board is one of the Institutions to be put in place in the context of the Energy Community Treaty and furthermore spells out that the Regulators Board shall set the detailed statutory, technical and regulatory rules in the region, and monitor them in order to ensure their implementation. In this context, it lays down that detailed technical, and regulatory Decisions could be delegated to the Regulators Board by the Ministerial Council. It also lays down that the Regulators Board shall report to the Ministerial Council.

During the last Athens Forum in June 2004, the CEER WG SEEER was invited to propose a paper on the detailed competences and the overall role of the Regulators Board. In addition, during the same Forum the European Commission presented a consultative note as an indicative strategy for the region¹. Though detailed comments on the issues addressed by the European Commission's note do not fall within the scope of this paper, it should be noted that with respect to the Regulators Board the European Commission's note spelled out that it shall address issues related to the functioning of the regional market, to the achievement of a level playing field in the regional market, to the setting of detailed, statutory, technical and regulatory rules in the region and the monitoring of their implementation, together with some executive powers in certain limited areas consistent with the special situation in SEE. Furthermore, pursuant to the Commission's note other duties were foreseen for the Regulators Board related to the overseeing of procurement rules, to transmission and distribution system unbundling, to the criteria on investment across the region, to the minimum criteria for license awards etc. Lastly, the European Commission has already launched on October 13th 2004 the first round of the negotiations for the ECSEE Treaty which evidently addresses among other issues the overall role and competences of the Regulators Board.

On the basis of the aforementioned developments, it appears therefore appropriate to develop a consistent proposal on the overall role and functions of the SEE Regulators Board.

3 The Role of the Regulators Board

3.1. Basic Principles

The regulatory approach proposed hereinafter applies strictly to issues with a regional dimension. On this basis, the core competences and the overall role of the Regulators Board should not interfere with the issues which fall within the competence of national

¹ EC Discussion and Consultation note on "The Regional Energy Market in South East Europe and its Integration into the European Community's Internal Energy Market" – The Athens Forum 3-4 June 2004.

regulators or national authorities which should be treated under their responsibility. Thus, the competences of the Regulators Board as analysed in detail in the next chapters, relate only to issues which have regional elements.

The regulatory approach proposed herein focuses on the overall role of the Regulators Board and its co-operation with the other regional institutions within the development and implementation of the overall regional energy regulatory framework, on the role of the Regulators Board with respect to the monitoring of the consistency of the regional energy regulatory framework with national arrangements, as well as on its tasks as regards the functioning of the regional market as such. In this line, this paper envisages a distinction to a five level regulatory approach to be pursued in the region in order to address the peculiarities of the different issues under each level and thereby to achieve an effective and consistent regulatory process as well as with the view to identify with clarity the interrelation between the different institutions at regional level and their smooth co-operation.

Levels 1 and 2 relate to the role of the Regulators Board with respect to the development and implementation of the regional energy regulatory framework, while level 3 deals with the delegation of executive powers to the Regulators Board, Level 4 outlines the role of the Regulators Board with respect to the monitoring of the functioning of the regional energy regulatory framework and level 5 relates to certain adjudicatory tasks of the Regulators Board with respect to disputes with a regional dimension.

In particular, Level 1 consists of the development of the overall regional energy regulatory framework, accompanied with the appropriate regional mechanisms for long-distanced transportation of energy, public service guarantees, harmonization and safeguard measures. Under this level, the Ministerial Council is responsible for adopting the relevant Decisions following the opinion of the Regulators Board. In this context, the Regulators Board is entrusted with an advisory role vis-a-vis the Ministerial Council and the members of the Regulatory Board with respect to the development of the regional energy regulatory framework for the region, including the consistency of the regional energy regulatory framework with the arrangements at the national energy markets and a certain extent of harmonisation. The same advisory

role of the Regulators Board is proposed for the appropriate accompanying regional mechanisms which relate to infrastructure issues, public service obligations, and institutional building.

Level 2, relates to the implementation of the overall regional energy regulatory framework decided under level 1. This includes the adoption of detailed statutory, technical and regulatory rules for electricity and gas necessary for the operation of the regional market in line with the overall regional energy regulatory framework agreed by the Council. These implementing measures aim to bring into force the strategic decisions, the overall technical, legislative and regulatory framework, and the general policy orientations to be decided by the Ministerial Council. Under this level, the Ministerial Council evidently is responsible for adopting the relevant Decisions, and it is envisaged that the Regulators Board can be entrusted with the right of initiative. Consequently, the Regulators Board can table proposals to the Ministerial Council and/or the Permanent High Level Group (PHLG) for the adoption of these measures. Again the decision making power lies with the Ministerial Council and/or the PHLG. Nevertheless, the right of initiative of the Regulators Board ensures its more active participation during the decision-making process, which can end up either with the adoption of the act or its withdrawal by the Regulators Board. The Council/PHLG can always accept or reject the proposal of the Regulators Board.

Level 3, relates to the execution of decision making powers by the Regulators Board. The delegation of executive powers by the Ministerial Council and the Permanent High Level Group to the Regulators Board should address mainly the technical details of the operation of the market. In this context, the technical detailed rules / measures relating to the daily operation of the market need to be decided and implemented in a rapid way, with the view to allow the regional market to operate smoothly and effectively. These technical measures will be decided by the Regulators Board and will be used to ensure that technical provisions can be kept up to date with market and supervisory developments, while ensuring that technical adaptations are brought about without delays. In addition to technical measures, the Ministerial Council may delegate executive powers to the Regulators Board on other issues as well, where the Council considers that this is appropriate for the implementation of the regional

energy regulatory framework. The execution of decision making powers by the Regulators Board following the authorisation of the Ministerial Council shall be undertaken pursuant to its internal statutes and procedures.

Level 4 addresses the monitoring tasks of the Regulators Board. The Regulators Board will foster and review common and uniform day to day implementation and application of all statutory, technical and regulatory rules and report directly to the Ministerial Council on this. To this respect, the Regulators Board will develop effective and efficient mechanisms to enhance day to day consistent supervision, development and enforcement of the regional energy regulatory framework in line with the “Energy Community” Treaty framework. To this end, the Regulators Board should ensure a level playing field in the regional market and may issue recommendations to the competent Institutions. It shall also identify inconsistencies between the regional energy regulatory framework arrangements and national legislation in the countries. In this context, the market monitoring must focus on identifying factors that contribute to economic inefficiency and have an impact on the security of energy supply and the functioning of the regional market.

Level 5 relates to certain adjudicatory powers of the Regulators Board with respect to dispute settlement strictly at a regional level. It should be underlined that pursuant to Directive 2003/54/EC in the event of cross border disputes, the deciding regulatory authority shall be the regulatory authority which has jurisdiction in respect of the system operator which refuses use of or access to the system. In this line, the duties of the Regulators Board should not interfere with the competences of national regulators on those issues. Nevertheless, in the event of disputes involving more than one countries, the Regulators Board can issue recommendations as regards identifying the competent national regulator. In any event, the Regulators Board could act as the dispute settlement authority at a secondary level itself, at the request of the competent national regulatory authorities. The details of the dispute settlement mechanism will be defined by the Regulators Board.

3.2. Interrelation with other Institutions

The core responsibilities of the Regulators Board as described in the previous chapter, envisage to ensure its effective contribution to the successful functioning of the Energy Community, as well as its consistent co-operation with the other Institutions to be established within the ECSEE. Evidently, the interaction of the Regulators Board with the PHLG as well as with the Ministerial Council appears clear enough. With respect to the interaction and co-operation of the Regulators Board with other Institutions such as the Secretariat to be established for the technical support of the ECSEE, it has to be highlighted that their responsibilities and tasks which will be specified under the Treaty or any other act, need to be clearly defined in advance and specified in detail so as to ensure that both bodies act independently, impartially, and within their ambit of responsibilities.

Furthermore, with respect to the overall role of the Regulators Board and the role of the European Commission, it has to be highlighted that similarly with the EU practice, the monitoring role of the Regulators Board is envisaged with the aim to identify bottlenecks in the functioning of the regional market and to propose remedial actions from a regulatory point of view and to assist thereby the European Commission to act as the co-coordinator of the ECSEE activities and as the watchdog of the EU Treaty. It should be underlined that, in any case, the European Community will be represented in the Regulators Board.

3.3. Operation and Statutes of the Regulators Board

The basic principles and the core duties to be entrusted to the Regulators Board has been outlined in the previous chapter. Nevertheless, to be able to undertake these duties the Regulators Board needs to be supported by the appropriate means. To this end, the Regulators Board should be entrusted with all appropriate resources, in terms of staff as well as financial means to carry out its functions efficiently. Consequently, the Regulators Board should have its own budget even at a minimum level, to undertake its core duties in an effective and independent manner. Furthermore, its support by the appropriate human resources is also essential taken that its tasks entail an essential amount of preparatory work in the region.

With respect to the Organization of the Regulators Board, following its formal establishment, the Regulators Board shall adopt its own rules of procedure. In this line, the detailed statutes of the Regulators Board have to address all the details of its organization, the formation of working groups, the decision making procedure for the adoption of measures and for the formation of its positions etc.

4 Conclusions

The CEER invites the Forum to endorse the aforementioned principles regarding the competences of the Regulators Board as well as its sufficient resources, which would allow the Board to accomplish its role in the ECSEE Process.

The CEER WG SEER commits itself to further reflect and elaborate on the development of the competencies of the Regulators Board, and on the appropriate means to ensure its independent operation, in close collaboration with the EC, USAID, and the countries of the region.

To this end, the CEER invites the European Commission and the countries of the region to reflect on the abovementioned issues, with the view to incorporate in the forthcoming Treaty the appropriate mechanisms, which will allow for the eventual implementation of the above.