



Analysis of CMU Resolution No.1 on peculiarities of electricity import during autumn-winter 2022/2023 under martial law in Ukraine

by the Energy Community Secretariat

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PURPOSE STATEMENT

Analysis of Resolution No. 1 of Cabinet of Ministers of Ukraine of 3 January 2023 on the peculiarities of the import of electricity during the autumn-winter period of 2022/2023 under the conditions of the legal regime of martial law in Ukraine

TABLE OF CONTENT

Introduction	1
Background	1
Impact on the market	4
Compliance assessment	5
Conclusions and recommendations	6

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Assessment 3/23

Introduction

Resolution No 1 adopted by the Cabinet of Ministers of Ukraine (“the CMU”) on 3 January 2023 determines a procedure on the peculiarities of the import of electricity during the autumn-winter period of 2022/2023 under the conditions of the legal regime of martial law in Ukraine (“Resolution No 1”).¹ It introduces rules for load shedding in Ukraine, by limiting disconnection of consumers using imported electricity only to emergency situations.

Background

a) Resolution No 1

According to the Explanatory Note accompanying the Resolution No 1, the purpose of the act is to “cover part of the electricity deficit with import from EU Member States, by base load within the available cross-border capacity.” It refers to the shortage of domestic generation capacity and the need to forced disconnection (“load shedding”) for consumers. In case of electricity shortages due to Russian shelling, the transmission system operator *Ukrenergo* (“TSO”) incurs deviations and is exposed to payments under the FSkar mechanism. In addition, the Explanatory Note infers the significant difference between the base price on the DAM in the EU (200-400 EUR/MWh) and the base price on the DAM in Ukraine (86 EUR/MWh). It considers that in order to attract imports, “additional incentives, in particular guaranteeing uninterrupted power supply” are needed. The purpose of Resolution No 1 is thus to promote electricity imports by protecting them from load-shedding.

The Resolution No 1 applies to the TSO, the distribution system operators (“DSOs”), suppliers and consumers, with the exception of households. Resolution No 1 does not apply to wholesale traders, which are subject to a separate license and cannot supply electricity to end-consumers. The market participants addressed are obliged to ensure the continuity of services for the transmission, distribution and supply of imported electricity. Consumers are excluded from load-shedding if the volumes of imported electricity are higher than the volumes of electricity consumed in previous periods, i.e. before the application of emergency load-shedding measures. The exemption from load-shedding also does not apply in cases of “special schedules of emergency shutdowns or activation of special automatic systems of load disconnection or devices of automatic frequency downloading”. In such instances, the supply of imported electricity to consumers may be terminated.

¹ CMU Resolution on a Procedure on the peculiarities of the import of electricity during the autumn-winter period of 2022/2023 under the conditions of the legal regime of martial law in Ukraine, No.1 of 03.01.2023

The Resolution No 1 further creates a system of exchanging information about consumers using imported electricity that cannot be disconnected. Suppliers of imported electricity are to notify the TSO the volumes of imported electricity (per DSO), the regions and consumers connected to the TSO, and to notify the respective DSO about the need for distribution of imported electricity per consumer and per settlement period. The TSO, when initiating consumption limits, schedules of hourly load shedding, limitation of consumers' consumption (except for special schedules of emergency disconnections needed to prevent system emergency in Ukraine UES) shall increase for DSOs the allowed capacity and volumes by the total volume of imported electricity consumed by customers connected to TSO and that respective DSO. Based on information received from the suppliers, the DSOs will inform the TSO about the volumes of imported electricity consumed by customers connected to their networks. Upon instruction from the TSO to apply hourly cut-off schedules and/or limitations of consumption, the DSOs notify the TSO about consumers under supply of imported electricity and the volume of their consumption. After taking special load-shedding measures not subject to the exemption (use of special schedules of emergency shutdowns, activation of special automatic load disconnection devices or automatic frequency unloading devices), the DSOs shall prioritise restoration of the distribution of electricity to consumers consuming imported electricity. During the period of consumption of imported electricity, consumers protected from load-shedding are obliged to take appropriate measures to reduce electricity consumption by their own sub-consumers².

b) Imports of electricity

The Electricity Market Law³ requires that any importer of electricity has to sell a minimum of 10% of their monthly sales volume in the day ahead market ("DAM"). Such obligation has been reflected in the Market Rules approved by NEURC in 2020.⁴ In addition, Article 67(3)(1) of the Electricity Market Law provides a legal basis for the National Energy and Utilities Regulatory Commission ("NEURC") to establish a share of mandatory sale at the DAM for producers and importers of up to 30% of their monthly sale volumes. At the same time, the Ukrainian DAM is functioning under the conditions of price caps corresponding to EUR 90/MWh, established by NEURC. Accordingly, the prices on the electricity market in Ukraine are much lower than in the EU. This means that importers are facing an economic loss (at least) equal to the share of their obligatory sale at the Ukrainian DAM multiplied by the difference in prices.

c) Ukrainian law governing load shedding

² Sub-consumer is a consumer whose electrical installations are connected to the technological network of a major consumer (NEURC Resolution No. 312 of 14.03.2018 "On Approval of Retail Market Rules", Section I, part 1.1.2.). A shop connected to networks of a metallurgical plant without own connection to DSO networks is a sub-consumer, while metallurgical plant is a major consumer.

³ Section XVII Final & Transitory Provisions, part 9, para two of the Electricity Market Law.

⁴ NEURC Resolution No. 307 of March 13, 2018, part 10.9 of Section X, Final and Transitory Provisions: "*For producers of electric energy, except for micro-, mini-, small hydroelectric power plants and electric power plants that produce electricity from alternative energy sources, and importers in each calculation period of the supply day, the maximum lower limit of the mandatory sale of electric energy on the day ahead market is 10% of the total volume of electricity output by all output units of such a producer in this settlement period. TSO provides a per decade check of compliance by market participants with the requirements of this paragraph and notifies the Regulator of cases of violation by market participants.*"

Article 16(2) and (4) of the Electricity Market Law stipulates that “[Security of supply] rules must be transparent so that they do not predict in advance the impossibility of their implementation, do not distort competition on the electricity market and affect trade on the electricity market only to the extent necessary to restore the security of the electricity supply. Such rules must not create excessive obligations for market participants and minimize negative consequences for the functioning of the electricity market. If measures are taken in the event of violation of security of electricity supply, no discrimination shall be allowed between electricity purchase-sale contracts within Ukraine and electricity export-import contracts.” Article 44 of the Electricity Market Law on operational and technical dispatching stipulates that it “shall be based on the principles of objectivity, transparency and non-discrimination, and shall ensure proper operation of the electricity market.” Moreover, it prescribes that “[D]ispatching of installed generating capacities and use of cross-border capacity shall be done in accordance with the transmission network code, market rules and other regulatory and legal acts, be based on economic criteria and be subject to technical constraints of the system.”

The Rules on Security of Electricity Supply, adopted by the Ministry of Energy,⁵ envisages load-shedding measures, namely limiting the consumption of electricity, emergency disconnection of users. In addition to the provisions from the transmission network code on the preparation of the energy system defense plan and protection of energy system by regulating the consumption of electricity, two instructions by the Ministry of Energy govern load-shedding.⁶ Order No 654 establishes the procedure for hourly power disconnection schedules, including the categories of consumers to be exempted from hourly power disconnection schedules. Order No 456 determines types of emergency schedules and conditions for their application, inclusion and exemption of some categories of consumers in the corresponding schedules, the order for application of the schedules and procedure of notifying the consumers.

d) Energy Community rules governing load shedding

Directive 2009/72/EC does not contain rules on load shedding in addition to the tasks of TSO for ensuring safe and secure operation of the system and for managing electricity flows (Article 12).

Regulation 2019/941 of 5 June 2019 on risk-preparedness in the electricity sector (“the Risk Preparedness Regulation”) has been adapted and incorporated in the Energy Community by Ministerial Council Decision 2021/13/MC-EnC of 30 November 2021. The deadline for transposition by Ukraine is 31 December 2023. Article 11 of the Risk Preparedness Regulation and the Annex stipulate the content of risk-preparedness plans, the first of which is due in 2025. The plans shall at least “[...] provide a framework for manual load shedding, stipulating the circumstances in which loads are to be shed and, with regard to public safety and personal security, specifying which categories of electricity users are, in accordance with national law, entitled to receive special protection against disconnection, justifying the need for such protection, and specifying how the TSOs and DSOs are to decrease consumption.” (emphasis added)

Commission Regulation (EU) 2017/2196 of 24 November 2017 establishing a network code on electricity emergency and restoration (“the ERNC”) has been incorporated and adapted by the

⁵ Ministry for Energy, Order No.448, dated 27.08.2018.

⁶ Ministry of Energy, Order No.654, dated 15.10.2015 and Order No.456, dated 23.11.2006.

Ministerial Council Decision 2022/03/MC-EnC of 15 December 2022.⁷ It also has to be transposed and implemented at national level by 31 December 2023. Article 11(1) of the ERNC stipulates that by 31 December 2023, each TSO shall design a system defence plan in consultation with relevant DSOs, significant grid users, national regulatory authorities or other designated entities, neighbouring TSOs and the other TSOs in its synchronous area. Pursuant to Article 15(5) of the ERNC, “[E]ach TSO shall design the scheme for the automatic low frequency demand disconnection in accordance with the parameters for shedding load in real-time laid down in the Annex. The scheme shall include the disconnection of demand at different frequencies, from a ‘starting mandatory level’ to a ‘final mandatory level’, within an implementation range whilst respecting a minimum number and maximum size of steps. The implementation range shall define the maximum admissible deviation of netted demand to be disconnected from the target netted demand to be disconnected at a given frequency, calculated through a linear interpolation between starting and final mandatory levels. The implementation range shall not allow the disconnection of less netted demand than the amount of netted demand to be disconnected at the starting mandatory level. A step cannot be considered as such if no netted demand is disconnected when this step is reached.” (emphasis added)

Impact on the market

Resolution No 1 aims at incentivizing imports by protecting consumers of imported electricity through a guarantee that the electricity sold at a presumable economic loss (at DAM at capped prices) will actually be delivered and is not subject to load shedding. It is evidently meant to (partially) compensate those consumers for the higher prices of imported electricity. That said, it does not address the root cause of the price difference, the mandatory sales of a portion of imports on the Ukrainian DAM and the price caps applied there.

The issue of the application of hourly consumer disconnection schedules (and other types of schedules) is regulated by acts of the Ministry of Energy (Orders No 654 and No 456). Resolution No 1 introduces an obligation to take into account the factor of origin of electricity when applying the relevant schedules. In particular, Order No 654 provides that the hourly power disconnection schedules are drawn up annually by TSO and DSOs respectively until 1 September each year and are to be valid from 1 October of the current year to 1 October of the following year. Order No 654 does not contain a procedure for amending the schedules throughout the year. When drawing up the hourly power disconnection schedules, the power supply schemes of consumers of the first category,⁸ as well as objects of critical infrastructure are taken into account. The types of lines that are not included in the schedules for disconnection are defined in Order 654 as well.⁹ Order 654

⁷ Ministerial Council Decision 2022/03/MC-EnC of 15 December 2022 on the incorporation of Regulation (EU) 2019/942, Regulation (EU) 2019/943, Regulation (EU) 2015/1222, Regulation (EU) 2016/1719, Regulation (EU) 2017/2195, Regulation (EU) 2017/2196, Regulation (EU) 2017/1485 in the Energy Community acquis, amending Annex I of the Energy Community Treaty, and on the amendments of the Ministerial Council Decisions No 2021/13/MC-EnC and No 2011/02/MC-EnC.

⁸ Those are consumers, the interruption of the power supply of which can cause danger to people's lives, significant damage to economic entities, damage to expensive basic equipment, mass shortage of products, disruption of a complex technological process, disruption of the functioning of particularly important elements of the communal economy.

⁹ Those are lines established under the effect of special automatic frequency unloading, lines that are a reserve power supply for the own needs of power plants and substations with a voltage from 220 kV and above, control points of power networks and devices that ensure their operational communication (radio relay lines, antenna devices, etc.), power networks that ensure the technological security of traffic management on railway, air and pipeline transport.

was amended by the Ministry of Energy with regard to its application during the martial law at the end of 2022.¹⁰ The amendments stipulated that *“during the period of martial law and within 12 months after its termination or cancellation, the hourly power disconnection schedules shall not be applied to industrial enterprises under certain conditions.”*¹¹ The time frames, as well as the conditions for not applying schedules of disconnection to certain categories of consumers in the Order No 654 approved by the Ministry of Energy and the Resolution No 1 of the CMU differ, there might be a risk that the TSO and or the DSOs would not be able to fulfil the obligations under both acts. Therefore, the Ministry’s Order No 654 needs to be aligned with the CMU Resolution.

As imports conducted by traders are sold to consumers through supply companies or to large consumers directly, traders do not fall within the remit of Resolution No 1. Based on the scheme of exchanging information from Resolution No 1 about consumers using imported electricity it is the task of the suppliers to notify the TSO and the DSOs about the volumes of imported electricity and there is no obligation for the TSO to verify the volumes of imported electricity against allocated cross-border capacity. This makes the mechanism prone to misuse by suppliers which could benefit from the load-shedding exemption for higher volumes of electricity than actually imported.

Compliance assessment

As explained, the Risk Preparedness Regulation and the ERNC are yet to be transposed and implemented by Ukraine. Regardless of that, those acts are not providing for a full harmonization of the rules on load shedding and on disconnection of system users but leave discretion to the national authorities and TSO in charge.

That said, Resolution No1 protects from load-shedding only consumers using imported electricity. This may be considered a different treatment in contravention of Article 7 of the Energy Community Treaty as well as Article 16(4) (non-discrimination between electricity contracts within Ukraine and contracts for electricity exports or imports in taking security of supply measures) and Article 44 of the Electricity Market Law (non-discriminatory treatment in case of operational and technical dispatching).

However, the purpose of the free movement goods is *“to eliminate obstacles to the importation of goods and not to ensure that goods of national origin always enjoy the same treatment as imported or reimported goods.”*¹² *“Treatment which works to the detriment of national products as compared with imported products and which is put into effect by a Member State in a sector which is not subject to Community rules or in relation to which there has been no harmonization of national*

¹⁰ Order #412 of 09.12.2022, <https://zakon.rada.gov.ua/laws/show/z1570-22#n2>

¹¹ Those conditions relate to: *“reduction of the level of electric power consumption and the volume of electric energy consumption in the hours of maximum load of the UES of Ukraine, by 50% relative to the median level of electric power consumption and the volume of electric energy consumption in the hours of maximum load of the UES of Ukraine, determined for the previous calculation period (month), when the restriction schedules were not applied, or there was no other unplanned decrease in electricity consumption by the relevant enterprises; and reduction of the level of electric power consumption and the volume of electric energy consumption in the hours of off-peak load of the UES of Ukraine, by 25% relative to the median level of electric power consumption and the volume of electric energy consumption in the hours of off-peak load of the UES of Ukraine, determined for the previous calculation period (month), when the restriction schedules were not applied, or there was no other unplanned decrease in electricity consumption by the relevant enterprises.”*

¹² Case 355/85 *Driancourt v Cognet* ECLI:EU:C:1986:410, para.10.

laws does not come within the scope of Community law".¹³ As explained, the Risk Preparedness Regulation and the ERNC do not harmonize national load-shedding rules. This means that in principle Energy Community law does not prohibit measures that are more detrimental to national products (in this case electricity produced in Ukraine) as compared to imported products (electricity imported from the EU).

The load shedding rules do also not confer an economic advantage involving State resources which could amount to State aid to consumers using imported electricity since it is not granted by the State or through State resources. Namely, only advantages granted directly or indirectly through State resources can constitute State aid and the transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. State aid does not require a positive transfer of funds and waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources.¹⁴ In the present case, the load shedding rules are defining the schedule for disconnection without transfer of State resources.

Conclusions and recommendations

It is recommended that:

- the procedures of the Ministry of Energy and Resolution No 1 are aligned so that the TSO and the DSOs have clear rules to apply;
- to attract more imports, the caps on prices at the Ukrainian DAM as well as the obligation for electricity importers to sell a fixed share of their volumes at DAM are reviewed;
- instructions to market participants regarding the practical implementation of the CMU Procedure to be prepared as a guidance issued by the Ministry of Energy (for example related to tracking imported electricity, monitoring of volumes of import and consequences in case it would not be physically possible to deliver the imported electricity, procedure of correction of disconnection/load shedding limits with export volumes along different time frames – daily);
- the results of monitoring of the impact of Resolution No 1 on the markets by NEURC and the Ministry of Energy¹⁵ should be published (taking into account confidentiality).
- the CMU Procedure is not extended beyond the deadline of validity 30 April 2023.

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¹³ C-98/86 *Ministère public v Mathot*, ECLI:EU:C:1987:89, para.9; Case 355/85 *Driancourt v Cognet* ECLI:EU:C:1986:410, para.11.

¹⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 51. See also: ECJ C-83/98 P, *Ladbroke Racing*, ECLI:EU:C:2000:248 paras 48-51.

¹⁵ CMU Procedure, point 2.