



**Assessment of the draft Procedure for conducting public consultations by the transmission system operator during the development of the cross-border capacity allocation rules and determination of the capacity allocation structure**

**by the Energy Community Secretariat**

**July, 2023**

## PURPOSE STATEMENT

Assessment of the draft Procedure for conducting public consultations by the transmission system operator during the development of the cross-border capacity allocation rules and determination of the capacity allocation structure as requested by the National Energy and Utilities Regulatory Commission.

## TABLE OF CONTENT

Introduction	1
Background	1
Impact on the markets and stakeholders in Ukraine	2
Compliance assessment	2
Conclusions and recommendations	3
Annex 1.	4

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## Ukraine Energy Market Observatory

### Assessment 12/23

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## Introduction

The present assessment follows a request of the National Energy and Utilities Regulatory Commission (hereinafter, NEURC) to the Secretariat on 19 June 2023 to provide a compliance assessment of the draft Procedure for conducting public consultations by the transmission system operator during the development of the cross-border capacity allocation rules and determination of the capacity allocation structure (hereinafter, the draft Procedure), following the recent changes to the Law “On the Electricity Market” adopted by the Verkhovna Rada of Ukraine on 10 June 2023<sup>1</sup> (hereinafter, Law 3141-IX).

## Background

Amendments to the Electricity Market Law (hereinafter, EML) by the Law 3141-IX, inter alia, introduce a public consultation of cross border capacity allocation rules and determination of the capacity allocation structure (hereinafter, the Rules) by the the electricity Transmission System Operator of Ukraine (hereinafter, the TSO). This particular aspect was a part of larger amendments to legislation targeted to simplify the procedure for adoption of joint capacity allocation rules between Ukraine and Contracting Parties and EU Member States. The Secretariat provided its evaluation of the respective draft laws under Ukraine Energy Market Observatory in the Assessments 6/2023 and 7/2023<sup>2</sup>.

Regarding the Procedure, the Law 3141-IX, inter alia, introduces the following amendments to EML:

- Article 6 on the tasks of the NEURC in the electricity market “*to approve the procedure for conducting public consultations by the TSO when developing the rules for the cross border capacity allocation of cross border networks and determining the structure of capacity distribution*”,
- Articles 33 with a new provision 17<sup>1)t</sup> by which TSO “*conducts public consultations with all interested parties when developing the rules for the capacity allocation of cross border lines and determining the structure of capacity distribution of in accordance with the procedure approved by the Regulator*”,

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<sup>1</sup> Draft Law No.5322, <https://itd.rada.gov.ua/billInfo/Bills/Card/26136>

<sup>2</sup> See: Energy Community Secretariat, Ukraine Energy Market Observatory <https://www.energy-community.org/Ukraine/observatory.html>, Assessment 6/2023 of the draft amendments to the Law “On the Electricity Market” related to the harmonization of the rules for cross-border capacity allocation subject to discussion by the Committee on Energy, Housing and Utilities Services of Verkhovna Rada of Ukraine within draft Law No.5322 provided to the Secretariat by the NEURC” and Assessment 7/2023 of draft amendments to the Law “On the Electricity Market” published for public consultation by the NEURC on 17 April 2023”

- Article 39 (5), regarding the details of public consultation process by the TSO and to Article 39 (6) regarding Procedure's content.

Further to new requirements, on 15 June 2023 the NEURC published the draft Procedure on its website<sup>3</sup> and on 22 June 2023 approved the draft Procedure for further public consultation. The public consultation process of the draft Procedure is currently ongoing.

## Impact on the markets and stakeholders in Ukraine

The draft Procedure sets out an important stage of the process of approval of the Rules – their public consultation by TSO Ukrenergo, leading finally to regulatory approval thereof by the NEURC. Further to finalization of approval by NEURC and in presence of a respective decision by the NRA of the neighboring Contracting Party or EU Member State, the Rules for joint allocation of cross border capacity enter into force. This is key to ensuring commercial exchanges of electricity between the Ukraine and Contracting Parties and EU Member States. It is especially important for Ukraine in the context of the electricity market integration into the EU internal market to increase the overall efficiency of trading, increase liquidity and security of supply, in particular given to challenges ahead of the next autumn/winter season.

## Compliance assessment

On 15 December 2022, the Ministerial Council, by Decision 2022/03/MC-EnC, incorporated the European Union's electricity market acquis in the Energy Community complemented by Procedural Act 2022/01/MC-EnC on Regional Energy Market Integration. The deadline for transposition and implementation of those acts by Contracting Parties, including Ukraine, is 31 December 2023. The new electricity package includes Network Codes and Guidelines defining detailed rules related to different market segments and system operation, including those related to coordinated capacity calculation in the so-called capacity calculation regions for the long-term (Regulation (EU) 2016/1719, hereinafter, the FCA Guideline) and short-term (Regulation (EU) 2015/1222, hereinafter, CACM Guideline) timeframe.

Articles 6 of the FCA Guideline and Article 12 of the CACM Guideline govern the consultation process when submitting proposals for terms and conditions or methodologies or their amendments in accordance with those acts. Namely, those provisions impose an obligation on the TSOs and NEMOs responsible for submitting proposals, to hold a consultation that shall last for a period of not less than one month. In addition, they also require that the entities responsible for the proposal “*shall duly consider the views of stakeholders resulting from the consultations [...], prior to its submission for regulatory approval*”.

Moreover, proposals submitted by the TSOs at regional level shall be submitted to consultation at least at regional level, and those at bilateral or at multilateral level shall consult at least the Member States and Contracting Parties concerned.

Finally, the entities responsible for consultation shall develop “*a clear and robust justification for including or not the views resulting from the consultation*” and shall published it in a timely manner before or simultaneously with the publication of the proposal.

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<sup>3</sup> <https://www.nerc.gov.ua/storage/app/uploads/public/648/c75/612/648c7561268ab353319805.pdf>

The draft Procedure subject to the present assessment largely complies with the acquis. However, it envisages a shorter period for consultation than the period required by the FCA and the CACM Guidelines, and the obligation for preparing justification for including or not the views resulting from the consultation need to be further strengthened. With regard to the requirement for consultation of the Contracting Parties and Member States concerned, in the present case, this is to be ensured by publishing the draft rules for cross-border capacity allocation and determination of the capacity allocation structure for public consultation by *Ukrenergo* upon their approval with the neighbouring TSOs. Such procedure is to be followed also in case of amendments to the rules, or in case the draft rules are not approved by NEURC.

In the section below, the Secretariat has made some proposals for improving the draft Procedure accordingly.

## Conclusions and recommendations

The proposed draft Procedure largely complies with the Energy Community Acquis. However, improvements are needed in order to:

- a) Distinguish between public consultation and hearing meetings within the public consultation process,
- b) clarify that the Rules are offered for public consultation by TSO *Ukrenergo* after agreeing thereof with a neighboring TSO,
- c) extend a period for collection of comments and proposals to the draft rules to one month in compliance with the requirements of the FCA and the CACM Guidelines,
- d) allow for public consultation in a hybrid format, including a possibility for online participation of stakeholders,
- e) allow for the public consultation to be held in English language, in addition to Ukrainian,
- f) ensure that the TSO, when publishing all received responses prior to public consultation, provides a preliminarily high-level position regarding acceptance/non-acceptance of comments/proposals from stakeholders,
- g) ensure that the TSO provides a clear and robust justification for acceptance/non-acceptance of the views resulting from the public consultation prior to submission for regulatory approval and
- h) Repetitive consultation process in the case Regulator declines approval of the Rules.

The Secretariat summarized the detailed proposals to the draft Procedure text in the Annex below.



## Annex

### Detailed assessment of the Procedure for conducting public consultations by the transmission system operator during the development of the cross-border capacity allocation rules and determination of the capacity allocation structure

Proposed draft	Secretariat's assessment and recommendations
<p>1. This Procedure defines the procedure for organizing and holding public consultations on issues of developing of the cross-border capacity allocation rules and determination of the capacity allocation structure (hereinafter referred to as public consultations).</p>	
<p>2. TSO ensures the organization and conduct of public consultations.</p>	
<p>3. Public consultations are held for the purpose of developing by the TSO the draft document (hereinafter referred to as the draft document) on the following issues:  development of the cross-border capacity allocation rules or amendments to them;  determination of the capacity allocation structure.</p>	
<p>4. TSO posts on its official website an informational notice on holding public consultations, containing information on:  date, time and place of public consultations;  the procedure for holding public consultations and registering participants;  issues submitted for public consultations;  form for submission of comments and suggestions;  the period during which comments and proposals to the draft document are accepted;  postal address and e-mail address to which comments and suggestions can be sent;  surname and first name of the person designated as responsible for conducting public consultations.</p> <p>The text of the draft document, an explanatory note, a comparative table (if the draft document involves amendments to the documents) and other informational and analytical materials for the draft document (if available) are attached to the information message. The specified materials are placed in zip , rar formats (an archive of individual files of materials in doc , docx text format).</p>	<p>a) Article 6(2) of the FCA Guideline and Article 12(2) of the CACM Guideline require that the proposals are submitted by the TSOs at regional level shall be submitted to consultation at least at regional level, and those at bilateral or at multilateral level shall consult at least the Member States and Contracting Parties concerned.</p> <p>The Law 3141-IX (amendment to EML Article 38(5) provides that "5. <i>The TSO develops, coordinates with the relevant TSO of the neighboring state - a party to the Energy Community, conducts public consultations with all interested parties and submits to the Regulator for approval the rules for the distribution of capacity of interstate crossings for one or several interstate crossings ...</i>" meaning that the cross-border allocation rules are published for public consultation after coordination with the neighbouring TSO.</p> <p>In order to ensure compliance with these rules please clarify that draft cross-border capacity allocation rules are offered for public consultation AFTER coordination thereof with the neighbouring TSO.</p> <p>b) In order to ensure participation of a wider audience including foreign participants, it is necessary to add</p>

	<p>information regarding virtual format of public consultations with a link to a chosen virtual platform and requirements for registration of participants online.</p> <p>It is therefore recommended to include a hybrid format of public consultation.</p>
<p>5. The period during which comments and proposals to the draft document are accepted is set by the TSO and cannot be less than 10 days and more than one month from the date of publication of the information notice on holding public consultations. The calculation of such a period starts from the day following the day of publication of the information notice on the holding of public consultations.</p>	<p>In accordance with Article 6(1) of the FCA Guideline and Article 12(1) of the CACM Guideline the consultation shall last for a period of no less that one month.</p> <p>Since the shorter period proposed in point 5 of the draft Procedure is not in line with this requirement, please amend the timing for submitting proposals to no less than one month.</p>
<p>6. Comments and suggestions to the draft document are submitted in writing and/or electronically in doc , docx formats according to the form in accordance with Appendix 1.</p>	
<p>7. TSO places no later than 3 working days before the holding of public consultations on the official website on the Internet:</p> <p>    comments and suggestions to the draft document with justification in the form of a table according to Appendix 2;</p> <p>    copies of letters containing comments and suggestions submitted to TSO (information about individuals is provided taking into account the provisions of the Law of Ukraine "On the Protection of Personal Data").</p>	<p>In line with public consultation procedure of NRA of Ukraine (NEURC), approved by NEURC Resolution "On procedure of public consultation of regulatory acts..." of June 30, 2017 No. 866, Section 3, part 3.3 para 2, before public consultation of a regulatory act, NEURC publishes in its website "comments and proposals [of stakeholders] to a draft NEURC decision, ... , and a preliminary position of NEURC ...".</p> <p>This aspect is missing from proposed procedure herewith. Current draft proposes publication of information on inclusion or not of proposals only at final stage as stated in item 11 below.</p> <p>It is therefore recommended to amend the procedure with a relevant step in which TSO not only publishes all received proposals but also indicates in a comparative table its preliminary high level position regarding inclusion or not thereof. Time period in point 7 of 3 working days can thus be extended respectively to 5 working days.</p> <p>"TSO places no later than <b>5</b> working days before the holding of public consultations..."</p> <p>"comments and suggestions to the draft document with justifications and a <b>preliminary high level position of TSO</b> in the form of a table according to Appendix 2</p>
<p>8. TSO not later than 3 working days before public consultations, sends letters of invitation to the</p>	

<p>NEURC and to persons who submitted comments and suggestions to the draft document.</p> <p>Other persons who wish to participate in public consultations submit applications for participation in such public consultations to the TSO no later than 1 working day before the public consultations.</p>	
<p>9. Public consultations are held in the form of: meetings with all interested parties; video conferences.</p>	<p>In order to ensure participation of a wider audience including foreign participants please ensure the hybrid format of public consultations It is recommended to amend item 9 with the following:</p> <p>9. Public consultations are held in the form of meetings with all interested parties in hybrid format;</p>
<p>10. Public consultations are held in Ukrainian.</p>	<p>In order to ensure participation in the public consultation of foreign participants, availability of translation into English is necessary</p> <p>It is recommended to amend item 10 with consultation in Ukrainian and English or Ukrainian with translation into English (in case foreign participants have submitted comments).</p>
<p>11. The results of public consultations are formalized in a protocol, which states: the name of the draft document on which public consultations were held; date of public consultations; surname, first name and position of persons who participated in public consultations, indicating the organization that the person is authorized to represent.</p> <p>An appendix to the protocol is a table (Appendix 3), which states: comments and suggestions received by TSO; data on the consideration of comments and suggestions with mandatory justification of the adopted decision and the reasons for their non-consideration.</p>	
<p>12. Within 5 working days from the day of completion of public consultations, the TSO shall place on its official website on the Internet the protocol of public consultations with an application</p>	
<p>13. Within 5 working days from the day of completion of public consultations, the TSO sends the text of the draft document, prepared based on the results of public consultations, with comments and suggestions taken into account, an explanatory note, a comparison table (in the case when the draft document involves making changes to documents) and other informational and analytical materials for the draft document (if available).</p>	<p>Article 6(3) of the FCA Guideline and Article 12(3) of the CACM Guideline require the entities responsible for consultation to develop “a clear and robust justification for including or not the views resulting from the consultation” and to published it in a timely manner before or simultaneously with the publication of the proposal. Please amend the procedure with a requirement for the TSO to publish in a comparative table its clear and robust</p>



	<p>justification for including or not the views resulting from the consultation</p> <p>It is recommended to use the following wording:  “... TSO prior to its submission for regulatory approval develops a clear and robust justification for including or not the views resulting from the consultation. Such justification shall be developed and published in a timely manner before or simultaneously with the publication of the proposal before submitting it for approval to the regulator”.</p>
<p>14.</p>	<p>The provisions of the Law 3141-IX, amendments to EML Article 38 (5) require a repetitive consultation process in case Regulator does not approve a final draft submitted by TSO after holding public consultation and in case of amendments to the rules.</p> <p>Therefore, it is recommended to introduce new item in compliance with requirements of the Law 3141-IX , amendments to EML Article 39(5) for the case of non-approval of proposals by Regulator and need for a repetitive consultation process by TSO, and in case of amendments to the rules.</p> <p>“In the event that the Regulator does not approve the rules for the allocation of cross border capacity of cross border networks and provides its comments/proposals following submission by the TSO per item 13, or in case of amendments to the rules. the TSO ensures their coordination with the transmission system operator of the neighboring state, conducts repetitive public consultations per this procedure with all interested parties and re-submits resulting proposals for approval to the Regulator”.</p>
<p>14. TSO ensures the publication of the materials stipulated by the provisions of this Procedure in Ukrainian and English.</p>	