



**Analysis of the draft amendments to the Law “On the Electricity Market” related to the harmonization of the rules for cross-border capacity allocation registered as Law No. 5322 in Verkhovna Rada of Ukraine**

by the Energy Community Secretariat

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## PURPOSE STATEMENT

Assessment 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 and provided to the Secretariat by the NEURC.

## TABLE OF CONTENT

Introduction	1
Background	1
Compliance assessment	2
Conclusions and recommendations	5

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## Ukraine Energy Market Observatory

Assessment 6/23

### Introduction

The present assessment concerns the draft amendments to the Law “On the Electricity Market” (hereinafter, Electricity Market Law) related to provisions on the joint capacity allocations on interconnectors between Ukraine and the neighbouring Parties to the Energy Community (the European Union and Moldova) that were proposed by the Committee on Energy, Housing and Utilities Services of Verkhovna Rada of Ukraine (hereinafter, the Committee) on 21 April 2023 within the draft Law aiming to transpose the Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency (hereinafter, the REMIT Regulation) registered as Law No. 5322<sup>1</sup> for the second reading. When submitting this draft amendments to the Secretariat for review, the National Energy and Utilities Regulatory Commission (hereinafter, NEURC) informed that the Committee has reviewed the draft law submitted by the regulator and discussed it at a meeting with the electricity Transmission System Operator (hereinafter, the TSO), NEURC and market participants.

### Background

The Secretariat was consulted on earlier draft amendments to the Electricity Market Law prepared by NEURC. Namely, on 13 March 2023, NEURC addressed the Secretariat with a letter and draft amendments simplifying the procedure for adoption of national legislation governing joint capacity allocations. Instead of adoption of a procedure for cross-border allocations, NEURC proposed providing consent to rules to be developed and approved by the TSO after agreement with the neighbouring TSOs. The Secretariat provided its comments on 17 March 2023 and supported such proposal subject to ensuring that the NEURC’s consent would be subject to a public consultation by NEURC or the TSO, *Ukrenergo* and that NEURC needs to be competent to request changes to cross-border allocation rules.

Following NEURC’s views on the Secretariat’s comments submitted on 24 March 2023, and a meeting between NEURC and the Secretariat held on 29 March 2023, the Secretariat submitted its comments to the draft amendments. Among the rest, the Secretariat underlined that the proposed amendments are considered a transitional approach until the transposition and implementation of the new package by 31 December 2023. Following this, the Secretariat published its assessment of that draft in Ukraine Energy Market Observatory Assessment 4/23 in March 2023 (hereinafter, Observatory Assessment 4/23).<sup>2</sup>

After the publication of the Observatory Assessment 4/23, NEURC submitted an updated draft amendments to the Secretariat on 6 April 2023, in which it took into consideration several of

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<sup>1</sup> [https://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=71559](https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71559)

<sup>2</sup> See: Energy Community Secretariat, Ukraine Energy Market Observatory Assessment 4/23, Assessment of the draft amendments to the Law “On the Electricity Market” related to the harmonization of the rules for the cross-border capacity allocation provided by the NEURC: <https://www.energy-community.org/dam/jcr:f004fe99-eea7-429e-9b41-ffa4a070689c/Note04.pdf>

the Secretariat's comments, to which the Secretariat submitted its review on 17 April 2023, expressing its support for the draft amendments to the Electricity Market Law with few caveats. Namely, the Secretariat referred to the need for opening public consultation to all interested parties (including foreigners), the need to define a procedure for congestion revenue sharing under unilateral auctions to be applied in transitional period until the joint auctions are introduced, as well as the need to include a clear deadline for submission of the rules on joint cross-border capacity allocation by the TSO to NEURC. The same day, NEURC published draft amendments to the Electricity Market Law on its website for public consultation,<sup>3</sup> that is subject to separate Observatory Assessment by the Secretariat.

Finally, on 25 April 2023, NEURC sent a request to the Secretariat asking its assessment of draft amendments to the Electricity Market Law pending discussion in the Committee as part of the draft Law aiming to transpose the REMIT Regulation registered as Law No. 5322.

For more details concerning background information and the impact of joint capacity allocation on the markets and stakeholders in Ukraine and the neighbouring systems, the Secretariat refers to its Observatory Assessment 4/23.

## 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. As part of those acts, the Network Codes and Guidelines set out detailed rules related to different market segments and system operation, including related to capacity allocation in for the long-term (Regulation (EU) 2016/1719) and short-term (Regulation (EU) 2015/1222) timeframe.

As the draft amendments to the Electricity Market Law are evidently not intended to transpose Decision 2022/03/MC-EnC, the present assessment is based on the rules of the Third Energy Package, namely Regulation (EC) 714/2009 and its Annex I on Guidelines on the Management and Allocation of Available Transfer Capacity of Interconnections Between National Systems (hereinafter, Congestion Management Guidelines). Ensuring complete transposition of the new *acquis* by the end of this year will require further amendments to the primary (and secondary) legislation which are not yet incorporated within these draft amendments proposed by the Committee on 21 April 2023.

The Secretariat finds the draft amendments largely compliant with the Energy Community *acquis*. They also addressed some of Secretariat's earlier comments, such as those related to defining an obligation for congestion revenue sharing also under unilateral allocation until joint auctions are put in place as required by point 6.3 of Annex I to Regulation (EC) 714/2009).

However, few provisions are still raising concerns:

- Public consultation open to all interested parties

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<sup>3</sup> See: <https://www.nerc.gov.ua/news/oprilyudnyuyetsya-proyekt-zakonu-ukrayini-pro-vnesennya-zmin-do-zakonu-ukrayini-pro-rinok-elektrichnoyi-energiyi-v-chastini-vregulyuvannya-okremih-pitan-provedennya-spilnih-aukcioniw?fbclid=IwAR1cJOiKG7wpWma5xUAebCqDXPsKSGPQWhK1HzYx1AVErH6W1PgO4BE0E00>

During the previous consultations, the Secretariat suggested that the draft amendments to Articles 33(17<sup>1</sup>) and 39(10) of the Electricity Market Law should clearly define that public consultations should be open to every interested party. The objective of such clarification should be allowing participation to both domestic and foreign market participants and national regulatory authorities.

The draft amendments subject to this review are introducing a requirement for holding public consultations by the TSO when developing rules for cross-border capacity allocation and when determining the structure of allocation capacity subject to a procedure to be adopted by the NEURC. The draft amendments envisage a period of three months for NEURC to adopt the procedure for TSO's public consultation.

Section 1.10 of the Congestion Management Guidelines (Annex to the Regulation (EU) 714/2009 requires that the NRAs "*shall regularly evaluate the congestion-management methods, paying particular attention to compliance with the principles and rules established in this Regulation and those Guidelines and with the terms and conditions set by the regulatory authorities themselves under those principles and rules*" and that "[S]uch evaluation shall include consultation of all market participants and dedicated studies." No binding obligation for public consultation on the draft rules by the TSO is envisaged by the Third Energy Package.

While it is subject to national procedure how public consultations are performed and ensured that all interested parties are consulted on the rules that would affect them, adoption of separate procedure for the public consultations might delay the implementation of the joint auctions.

- Section XVII Final and transitional provisions draft amendments to the Electricity Market Law fails to ensure:
  - o Temporary character of unilateral auctions

The unilateral auctions are currently governed by a Procedure adopted by NEURC. That Procedure shall cease to apply when the Rules for joint allocations are adopted and implemented by the TSO upon NEURC's approval. Therefore, the Section XVII Final and transitional provisions shall define the temporary character of the Procedure currently in force. The reason being that the very objective of the draft amendments to the Electricity Market Law is to enable performing joint auctions by *Ukrenergo* and the neighbouring TSOs, and any unilateral auction shall be temporary in accordance with the Procedure currently in place. Therefore, the draft amendments developed by the Committee should outline the temporary character of such unilateral auctions by specifying the temporary validity of the Procedure for allocation currently in place, namely only until joint auctions are introduced.

- o A clear deadline for the submission of the rules for capacity allocation for NEURC's approval

A timeline for the TSO to submit proposal(s) to NEURC (e.g. 6 months from the entry into force of the Electricity Market Law amendments at the latest) is not defined in the final and transitional provisions.

The Secretariat would like to underline that such clarity is a general EU practice also when agreement of several TSOs is required. Moreover, as the Secretariat was informed by the

TSOs during the joint meeting on 31 March 2023 that the rules for daily and long-term allocations are already drafted, the Secretariat considers that there are no obstacles for their swift submission to the NEURC for approval.

- Flexibility in usage of congestion management

In the final and transitional provisions, the Committee proposed to suspend the effect of Article 43 (1)-(5) of this Law for 2023 and to introduce provisions related to the usage of the revenues from the capacity allocation for the purpose not compliant with the Regulation (EU) 714/2009 and the Congestion Management Guidelines. Namely, they envisage that temporarily, in the period between 1 January 2023 and 31 December 2023, due to the application of the martial law in Ukraine, congestion revenues shall be used for covering the debts of the TSO (for electricity produced by renewables, for the Guaranteed Buyer, for balancing market) except for small part to be used to guarantee the actual availability of allocated capacity.

Article 16(6) of the Regulation (EU) 714/2009, stipulates that any revenues resulting from the allocation of interconnection shall be used for (a) guaranteeing the actual availability of the allocated capacity; and/or (b) maintaining or increasing interconnection capacities through network investments, in particular in new interconnectors. As an exception, if the revenues cannot be efficiently used for those purposes, *“they may be used, subject to approval by the regulatory authorities [...] up to a maximum amount to be decided by those regulatory authorities, as income to be taken into account by the regulatory authorities when approving the methodology for calculating network tariffs and/or fixing network tariffs.”* The same provision also stipulates that the Secretariat shall be consulted on such approval and that the *“rest of revenues shall be placed on a separate internal account line until such time as it can be spent on the purposes set out in points (a) and/or (b) of the first subparagraph.”* Section 6 of the Congestion Management Guidelines includes more details on the congestion revenues use, including a requirement that the NRAs *“shall be transparent regarding the use of revenues resulting from the allocation of interconnection capacity”*.

The Ukrainian Electricity Market Law was amended in 2021<sup>4</sup> to exactly envisage such exception and use of congestion revenues for purposes other than those stipulated in Article 16(6) of the Regulation (EU) 714/2009.

Proposed amendment in the Electricity Market Law that most of the congestion revenues shall be used for purposes other than those stipulated in Article 16 of the Regulation (EU) 714/2009 is not compliant with the *acquis* because that provision allows usage of congestion revenues for different purposes “up to a certain amount” and only in case “if the revenues cannot be efficiently used” for the purposes envisaged in Article 16. Moreover, deciding this in the Electricity Market Law encroaches upon the NEURC’s competences as a national regulatory authority that according to Article 16 of the Regulation (EU) 714/2009 shall have the right to approve such usage.

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<sup>4</sup> Article 43(2) as amended by the Law No. 1396-IX dd. 15.04.2021.

## Conclusions and recommendations

The proposed amendments to the Law are largely compliant with the Energy Community *acquis* in force. That said, the Secretariat recommends to:

- simplify the procedure for public consultation by the TSO though ensuring participation of every interested party, since the adoption of a separate procedure for public consultation by the TSO, as envisaged by the draft amendments is likely to further delay the implementation of the joint allocations;
- stipulate deadlines for the submission of draft rules for cross-border capacity allocations to be made by the TSO (as short as possible), given that the rules for joint allocation are a crucial next step for further integration of the Ukrainian market with the neighboring ones;
- stipulate the temporary character of unilateral auctions, by defining in the final and transitional provisions that the Procedure for (unilateral) allocations now in force is applicable only until the joint auctions are introduced;
- delete draft amendments on using congestion revenues as proposed in the final and transitional provisions because the Electricity Market Law in force already provides for a flexibility in using congestion revenues subject to approval by the NEURC and upon submitting information to the Secretariat, in compliance with the Energy Community law;
- envisage compensation in case of *force majeure* during the temporary period of unilateral auctions by defining it in the final and transitional provisions, having in mind that such compensation is introduced by the draft amendments to the Electricity Market Law for the case of joint cross-border allocations.

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