



**The National Energy Regulatory Authority of
Ukraine Governance and Independence**

by the Energy Community Secretariat

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PURPOSE STATEMENT

Compliance assessment of the National Energy and Utilities Regulatory Commission with the Energy Community acquis

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The National Energy Regulatory Authority of Ukraine Governance and Independence

Ukraine Energy Market Observatory

Assessment 17/23

1. Introduction

1.1 Background information

In March 2018 the Energy Community Secretariat (hereinafter “the Secretariat”) issued a report (hereinafter ‘the 2018 Report’) on the compliance of NEURC¹ with the obligations stemming from the Energy Community *acquis communautaire* (hereinafter “the acquis”). The 2018 Report was produced at a time when the regulator was subject to a number of organizational turbulences and critical questioning of its decisions on the one hand and needed to deliver numerous secondary acts on electricity and gas market reform on the other.² The update in May 2019 evaluated whether progress has been made to strengthen the shortcomings identified in the 2018 Report. Both the 2018 Report and its update in 2019 analysed the legislative framework defining the organisational structure, competences and duties of NEURC (hereinafter, “NEURC”, “the Commission” or “the Regulator”) as well as its practical independence, professionalism and expertise.

In 2019, and already after the date of the Secretariat’s review, a number of important events took place. In particular, on 13 June 2019, the Constitutional Court adopted a decision³ which was implemented by adoption of the Law No. 394-IX “On Amendments to Certain Laws of Ukraine Regarding Ensuring Constitutional Principles in the Fields of Energy and Public Utilities”⁴ of 19 December 2019 (hereinafter “the Law 394-IX”). The latter amended the Law of Ukraine on “The National Commission that Carries out State Regulation in the Sphere of Energy and Communal Services” (hereinafter “the NEURC Law”). The judgment essentially challenges the concept of a regulatory authority outside the government’s structures. Law 394-IX changed NEURC’s legal status to that of a “*central executive power body with a special status established by the Cabinet of Ministers of Ukraine*”. The changes *de iure* amount to a breach of the requirement of the acquis for independence of the Regulator of other public bodies and must remain temporary.⁵ Additionally, the transitory provisions of Law 394-IX allow for the appointment to the Regulator’s board members for a full term without a transparent selection process.

¹www.nerc.gov.ua.

² NEURC Independence Review 2019

³<https://ccu.gov.ua/novyna/ksu-vyznav-nekonstytuciynymy-okremi-polozhennya-zakonu-ukrayiny-pro-nacionalnu-komisiyu-shcho>

⁴ <https://zakon.rada.gov.ua/laws/show/394-20#Text>

⁵ Annual Implementation Report, Energy Community Secretariat, 2021

The present assessment follows a formal request from the NEURC received by the Secretariat upon the European Council's decision to grant EU candidate status to Ukraine on 23 June 2022. This implies that for full integration of Ukraine in the governance system of the European energy markets, in particular within the Energy Community framework, NEURC's independence, operation and performance must fully satisfy European standards. The need for an update of the Secretariat's previous assessments is further reinforced by the unprecedented full-scale unprovoked and unjustified aggression launched by Russia. The Law of Ukraine "On the Legal Status of Martial Law" (hereinafter "the Martial Law") has been affected by the Presidential Decree No. 64/2022. It impacts the governance of the country as a whole and the energy sector in particular. Among others, pending legislative initiatives and revisions to the system of government bodies' management, including on remuneration of civil servants, are under discussion. Full compliance with the *acquis communautaire* in law and in practice, will need to be ensured and where necessary reinstated, in order to install confidence in the Regulator's impartial role by domestic market participants and investors alike. This will be a key factor in the post-war reconstruction and transformation of Ukraine's energy markets and systems.

The 2018 assessment of NEURC independence and 2019 update were prepared within the framework of Third Energy Package (hereinafter "TEP"). The main legal framework defining regulatory independence and the minimum set of competences that must be granted to Regulators under the TEP consist of Articles 35-38 of Electricity Directive 2009/72/EC and Articles 39-42 of Gas Directive 2009/73/EC.⁶ In the meantime, Ministerial Council Decision 2021/13/MC-EnC incorporated Directive (EU) 2019/944 of 5 June 2019 on common rules for the internal market for electricity (hereinafter "Directive (EU) 2019/944") in the Energy Community henceforth. Articles 57-64 of Directive (EU) 2019/944 address the regulatory independence and the minimum set of competences. By Ministerial Council Decision 2022/03/MC-EnC of 15 December 2022, the Energy Community completed the incorporation of the Clean Energy Package (hereinafter "CEP"). The deadline for transposition of the requirements of the CEP, including Directive (EU) 2019/944, is 31 December 2023 and has thus not expired yet. The CEP significantly increases the tasks of Regulators. However, the key provisions on independence essentially remain unchanged. While the present review does not assess full compliance of NEURC with the CEP, the relevant provisions on regulatory independence are referenced where applicable. Finally, this assessment takes into consideration the increased competences of NEURC introduced by the Law No 3141-IX "On Amendments to Certain Laws of Ukraine as to Prevention of Abuse in the Wholesale Energy Markets" (hereinafter "REMIT Law") transposing Regulation (EU) 1227/2011 on wholesale energy market integrity and transparency (hereinafter "REMIT")⁷, as adopted and adapted by Ministerial Council Decision 2018/10/MC-EnC, into Ukraine's legal framework.

1.2 Scope of the present review

The present review analyses the current legal status of the Regulator following the legislative changes in 2019 and the progress made towards implementing the Secretariat's recommendations from the past reviews. The application of the Martial Law and relevant recent developments are also taken into consideration in the present review.

⁶ Those provisions have been included in the Energy Community *acquis* by Ministerial Council Decision 2011/02/MC-EnC of 5 October 2011 with a transposition deadline of 1 January 2015. Ukraine is legally bound by the *acquis* based on Article 11 of the Energy Community Treaty upon its accession to the Energy Community in February 2011.

⁷ https://www.energy-community.org/dam/jcr:aec217c0-51fa-426a-a986-f36455546f51/Decision_2018_10_MC-EnC_Reg_1227-2011.pdf

2. Constitutional Court's decision and legislative changes after the Secretariat's review of 2019

2.1 The Constitutional Court Decision of June 2019

On 13 June 2019, the Constitutional Court of Ukraine issued Decision No. 5-r/20198 regarding the constitutionality of certain provisions of the NEURC Law. The Decision finds that without a special status given to it in the Constitution, NEURC is to be considered an authority exercising central executive power and hence is to be subordinated to the Cabinet of Ministers of Ukraine within the scope of separation of powers. Moreover, the President of Ukraine does not have the authority to appoint and dismiss its members.

2.2 Changes to the legislation of December 2019 governing NEURC operation

Following the decision of the Constitutional Court, on 19 December 2019, the Parliament of Ukraine adopted Law No. 394-IX. The following changes aimed at maintaining a certain degree of NEURC's operational independence were introduced with regard to:

- **the entry into force of NEURC's decisions.** Changes to the law abolished the requirement of NEURC regulatory acts coming into force only after publication in the official printed edition - the newspaper "Uryadovyi Kuryer". NEURC decisions come into force from the day following their publication on the official website of the Regulator unless a later date of entry into force is established by the decision itself. This change resolved a problem that repeatedly arose in connection with a significant delay in the publication and entry into force of regulatory acts, which had impacted the activity of energy markets;
- **the approval of Regulator's decisions by other bodies.** It is clearly defined that the decisions of the Regulator are not subject to approval by state authorities, except in the cases provided for by the Law;
- **preventing appointment of NEURC Board Members by filing a respective court claim.** The Administrative Procedural Code of Ukraine was amended by a ban to suspend the decision of the selection committee for candidates for the position of NEURC members via filing a court claim. Similarly, a ban of a court claim against the Cabinet of Ministers' decision on appointment of a NEURC Board Member has been introduced;

At the same time, a number of problematic issues, including from the viewpoint of compliance with the acquis, regarding the Regulator's independence were introduced by the Law with regard to:

- **the legal status of NEURC and its independence in the decision making.** The status of the Regulator was changed from a "permanent independent state collegial body" to "a central body of executive power (hereinafter "CBEP") with a special status" created by the Cabinet of Ministers of Ukraine (hereinafter "CMU"). Accordingly, NEURC is subject to the Law of Ukraine "On Central Bodies of Executive Power", which is shallow on the specifics of NEURC as "CBEPs with a special status" (e.g. in terms of appointment of Board Members) compared to other CBEP. Additionally, and most importantly, in accordance with Article 21 of the Law of Ukraine "On the Cabinet of Ministers of Ukraine" (hereinafter "CMU Law"), the CMU can cancel acts of ministries and other central bodies of executive power in whole or in part. An exception is made for the decisions of some CBEP (e.g. the National Commission in charge of electronic communications, radio frequency spectrum and the provision of postal services, or the National Anti-Corruption Bureau). However, there is no explicit exemption for NEURC.

⁸ <https://ccu.gov.ua/dokument/5-r/2019>

Thus, the current designation of NEURC as a CBEP subordinated to CMU is in conflict with the requirements of Article 35(4) lit (a), Directive 2009/72/EC, Article 39(4) lit (a) Directive 2009/73/EC and Article 57 (4) lit (a) Directive (EU) 2019/944, including the risk that the Regulator's decisions may be fully or partially cancelled by the government.

- **the grounds for dismissal of the Regulator's members.** The Law also introduced a new basis for the dismissal of a member of the Regulator by the CMU, in the event of "*establishing that he/she has violated the requirements of the laws regulating activities in the fields of energy and communal services*". It is not specified by the Law which violations could trigger such a decision, and the procedure for establishing a violation is not defined. This allows for a broad interpretation and application on an ad hoc basis as an instrument of repression.
- **the rotation and term in office of NEURC Members.** The provisions regarding periodic rotation of board members, as required by the *acquis*, has been removed from the Law, together with the restrictions on the number of terms in office for NEURC board members (which under the previous law was limited to two terms). Instead, rotation was defined in the Final and Transitional Provisions of Law 394-IX by a list of a specific time frame for board members, subject to a concrete list of members to be defined by the President of Ukraine⁹. By consequence, all board members serving at the time of adoption of Law 394-IX – both those who were selected on a competitive basis and those who were temporarily appointed by decision of the President in late 2019 – could keep their offices only until competitively selected board members were appointed. Amending the law by introducing a list with a timeframe when the term of office for Board members shall be terminated amounts to relieving the commissioners from office contrary to Article 35(5), second sub-paragraph of Directive 2009/72/EC. The absence of a restriction on the number of terms in office violates the requirement of Article 35(5) lit (b) of Directive 2009/72/EC and Article 39(5) lit (b) Directive 2009/73/EC, as well as Article 57(5) lit (d) of Directive (EU) 2019/944, according to which term in office in renewable only once.
- **the appointment of NEURC board members.** Changes to the Law granted all members of the Regulator serving at the time of adoption, regardless of whether they were appointed via a competitive selection process or not, a term in office – the full term according to the NEURC Law (six years) minus the period served. Four members of NEURC were then appointed only temporarily for three months until a competitive selection. Hence, the full term of office was granted to members only temporarily appointed without a competition, which contradicts the requirements of the Law requiring the competitive selection of the members of the Regulator. Article 57(5) lit (e) of Directive (EU) 2019/944 requires that the members of the board of the regulatory authority are appointed based on objective, transparent and published criteria, in an independent and impartial procedure. In its 2019 report, the Secretariat recognized the appointment of NEURC board members in an open competition under legally defined selection criteria as a significant improvement compared to the previous direct appointment by the President¹⁰. The 2018 report had evidenced that the fact that members of the Commission, including the Chairman, were appointed by Decree of the President without a transparent and competitive selection process, had created mistrust to NEURC. Thus, an appointment without competitive selection amounted to back-sliding towards progress achieved in the past.

⁹ Following provisions of Law 394-IX, 30 on June 2020, the President of Ukraine has issued Order No. 258/2020 "On Application of the Rotation Scheme to Members of National Commission that Carries out State Regulation in the Spheres of Energy and Communal Services" (hereinafter "the Order"). The Order provided concrete names of then serving Board Members to whom rotation was applied within time frames as indicated by Law 394-IX. Thus, the Order designated application of rotation to one of the serving Board Members each year by July 1 of 2020, 2021 and 2023 respectively and to two serving Board Members each year as of July 1 2024 and 2025

¹⁰ Update of Energy Community's Secretariat's Review of March 2019

2.3 Filing with the Constitutional Court of November 2020 No 3/525(20)

On 4 November 2020, fifty members of the Verkhovna Rada (hereinafter “MPs”) filed submission No. 3/525(20) to the Constitutional Court of Ukraine¹¹, regarding the unconstitutionality of clauses 3, 4 of Chapter II of “Final and Transitional Provisions” of the Law No. 394-IX and selected decrees of the President of Ukraine.

The submission challenges the decrees of Presidents of Ukraine regarding the appointment of members of the NEURC, three full time and four as temporarily appointed, in accordance with paragraph 3-1 of the Final and Transitional provisions of Law 394-IX. Regarding the four temporarily appointed NEURC members, the MPs also challenged their right to perform the functions of members of NEURC for six years (the full term of office), since they were appointed without an open competitive selection. In addition, the principle of rotation of NEURC members and the right of the President to determine the list of names for rotation at his discretion were contested. According to the MPs who signed the submission, such actions go beyond the powers of the President, and therefore are not constitutional.

On May 18, 2021, the Grand Chamber of the Constitutional Court of Ukraine took a Decision in camera.¹² No public information has been released regarding the Decision.

2.4 Changes introduced by the REMIT Law of June 2023 and by the Law “On Green Transformation of the Energy System of Ukraine” of July 2023

On 10 June 2023, the Verkhovna Rada of Ukraine adopted the REMIT Law that transposed the REMIT into Ukraine's legal framework.

The authority of NEURC has been significantly strengthened by the adoption of the REMIT Law. In particular, NEURC gained the competences to register and publish market participants and insider platform administrators; to collect and analyse information on trades in the wholesale energy markets; to define the requirements for and provide recommendations to ensure compliance with REMIT; to cooperate and exchange information with other authorities, including regulators, during investigations; to define requirements for protection, submission, disclosure and publication of information received by the market and trading platforms participants; to define actions that constitute manipulations or attempts of manipulations of the wholesale energy markets; and to carry out investigations of abuse in the wholesale energy markets and impose fines.

The maximum levels of fines to be applicable by the NEURC for violations in the wholesale energy markets have been significantly increased compared to those previously applied. In July 2023, NEURC and the Energy Community Secretariat signed the Memorandum of Understanding on consulting the decisions to impose fines for abuses in the wholesale energy market on market participants, setting the process by which the Secretariat will provide its opinion on NEURC's decisions for application of penalties.

Additionally, certain new provisions applicable to NEURC unrelated to REMIT have been introduced by the REMIT Law. Namely,

- one of the criteria for early termination of board members – the court decision on violation of laws – needs to be final. This is a clarification of a previously existing provision;

¹¹ https://ccu.gov.ua/sites/default/files/3_525_2020.pdf

¹² <https://ccu.gov.ua/novyna/u-spravi-shchodo-konstytucijnosti-pryznachennya-chleniv-nacionalnoyi-komisiyi-shcho>

- the obligation to hold a preliminary meeting between NEURC and the Energy and Communal Services Committee of the Verkhovna Rada prior to its annual report with the Parliament;
- the requirement to publish the decision on bonuses of board members;
- liability of the Regulator's officials for causing losses to state; and
- the obligation of NEURC to provide information on its activities, except for information with restricted access.

The aforementioned changes have been cleared with the Secretariat.

On 27 July 2023, the Law on Green Transformation of the Energy System of Ukraine entered into force.¹³ The new legislation assigns new competences to NEURC, which now:

- is an authorized authority for issuance, circulation, and redemption of the guarantees of origin ("GoUs" for electricity produced from renewable energy sources in the territory of Ukraine;
- is tasked to form and support the register of facilities including those of customers and active customers using renewable energy sources for electricity production including approval of the relevant procedure;
- conducts scheduled and unscheduled inspections of an electric power facility, included in the register of GoUs, in order to assess the reliability of the data provided to the register;
- informs the Energy Community Secretariat in case of non-recognition of the GoU for electricity produced within a country, which is a party to the Energy Community Treaty

In view of the new aforementioned tasks brought by the new legislation, there might be a need to increase the staff of the Regulator.

2.5 Resolution of the Cabinet of Ministers of Ukraine No 772 of July 2023

Following the adoption of Law No. 394-IX, on 14 July 2023 the CMU adopted Resolution No 722¹⁴ "On Amendments to Resolutions of the CMU No. 442 of September 10, 2014 "On optimization of the system of central executive bodies" and No. 394 of June 24, 2016 "On approval of the Regulation on the Minister of the CMU" (hereinafter "Resolution 772").

By this resolution, NEURC was added to the list of CBEPs whose activities are guided and coordinated directly by the Cabinet of Ministers. While the legal basis for NEURC's designation as CBEP was established already in 2019, as explained in section 2.2 above, this reinforces the concerns related to NEURC's dependence on the government. According to the the CMU Law, the government exercises extensive powers in relation to the CEBPs subordinated to it. Namely, the government is entitled to direct and coordinate activities of CEBPs,¹⁵ to create, reorganize and liquidate CEPBs¹⁶ as well as to cancel in whole or in part the decisions of the CEPBs.¹⁷

Those provisions are also in conflict with the provisions of the NEURC Law, inter alia Article 4(2) regarding the principle of independence within the limits of the Law, and Article 5(3) prohibiting the approval of decisions by other executive bodies. The provisions of the CMU Law related to CEBPs are not in line with the requirements that the regulatory authority may not seek or take direct instructions from any government or other public or private entity and shall take autonomous

¹³ <https://zakon.rada.gov.ua/laws/show/3220-20#Text>

¹⁴ <https://www.kmu.gov.ua/npas/pro-vnesennia-zmin-do-postanov-kabinetu-ministriv-ukrainy-vid-10-veresnia-2014-r-442-i-vid-24-s722-140723>

¹⁵ Section I, Article 2 (9), Section V Article 21 (1) of the CMU Law.

¹⁶ Section IV, Article 1 (6)(8) of the CMU Law.

¹⁷ Section V, Article 21 (6) of the CMU Law.

decisions, independently from any political body stipulated in Article 35 of Directive 2009/72/EC 4 (b) (ii), 5 (a) and Article 39 4 (b) (ii), 5 (a) of Directive 2009/73/EC and by Article 57 (4) lit (b),(i) (ii) of Directive (EU) 2019/944.

The CMU Law contains provisions exempting some CEPBs from the CMU full and discretionary powers, but these are not applicable to NEURC. Thus, the risk that based on the latest legal developments, the government will interfere in NEURC's activities and render whatever remained of its regulatory independence has significantly increased.

2.6 Draft Law No 8222 and Draft Law No 10000

Draft Law No 8222 "On amendments to the Law of Ukraine "On Civil Service" on the implementation of unified approaches to paying civil servants based on the classification of positions" (hereinafter "Draft Law 8222") was adopted by the Verkhovna Rada of Ukraine in the first reading on 28 July 2023¹⁸. In particular, the amendments propose that from 1 January 2025 the remuneration of civil servants in all state bodies is carried out on the basis of the classification of positions in accordance with the draft Law, and not any longer based on sector-specific laws such as the NEURC Law. NEURC staff qualifies as civil servants under the NEURC Law. Draft Law 8222 also requires that all existing legislation is aligned with it, including the NEURC Law. The application of the draft Law is expected to result in a 40%-60% decrease of NEURC's staff salaries depending on the position.

While the draft Law No 8222 is under preparation for the second reading by the relevant working group¹⁹, its elements on remuneration of civil servants in all state bodies on the basis of the classification of positions is proposed by the CMU for introduction as early as from 1 January 2024 by the draft Law On State Budget of Ukraine for 2024²⁰, No. 10000 of 15.09.2023 (hereinafter "draft Law No. 10000"). In particular, final provisions of the draft Law No.10000 provide that in case the state body carried out the classification of positions, then provisions of the special laws [e.g. NEURC Law] on calculation of salaries do not apply in 2024. For those bodies, that have not conducted the classification – the draft Law No.10000 proposes to limit the level of incentive payments to staff anyway. In both cases, proposed amendments may lead to the decrease of NEURC's staff salaries compared to those in place under current NEURC Law.

The Energy Community *acquis*, specifically TEP Article 35 (5) (a) of Directives 2009/72/EC and Article 39 (5) (a) of Directive 2009/73/EC and CEP Article 57 5 (b) of Directive (EU) 2019/944 require Ukraine to equip NEURC with sufficient financial and human resources to carry out its duties. The Secretariat's Policy Guidelines 02/2015 of 28 January 2015 on Independence of NRAs specifies that this requires that an energy regulator is 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. Staff salaries should be benchmarked against those of the regulated industry. Furthermore, an energy regulator's independence must include autonomy in using its budget for staff salaries. These requirements are currently adequately reflected in the NEURC Law and should not be overwritten by the general legislation on civil servants' remuneration. Should the draft Law 8222 be adopted in its current version, it would negatively impact the financial independence of the NEURC.

The Secretariat has suggested that in order to comply with the Energy Community *acquis*, Draft Law

¹⁸ Draft Law on Changes to the Law of Ukraine "On State Service" as to Introduction of Unified Approaches to Salaries of Civil Servants Based on Classification of Positions, registration No. 8222 of November 23, 2022 <https://itd.rada.gov.ua/billInfo/Bills/Card/40885>

¹⁹ in the Committee on the Organization of State Power, Local Self Government, Regional Development and Urban Planning

²⁰ <https://itd.rada.gov.ua/billInfo/Bills/pubFile/1986636>

No 8222 and the draft Law No.10000 either specify that NEURC's salaries are defined in compliance with the NEURC Law or NEURC is explicitly exempted from the provisions of both draft laws.

2.7 Appointment of Board Members

Pursuant to Presidential Decree No. 258/2020 of 30 June 2020, related to NEURC members' rotation, the Cabinet of Ministers of Ukraine announced a competitive selection process for the vacancy of a NEURC member. On 12 October 2020, the selection committee proposed the successful candidates to the government for consideration. The government rejected the proposed candidates without any justification by protocol decision of 28 October 2020.

According to the current version of the NEURC Law, the Cabinet of Ministers of Ukraine *"makes a decision on the appointment of a member(s) of the Regulator from the list of candidates submitted by the Competition Commission within 10 working days from the date of submission of the relevant application by the Competition Commission"*. This does not envisage the possibility to reject submitted candidacies. According to the NEURC Law, the selection committee (Competition Commission) selects two candidates for one vacancy, from which the government chooses one for appointment.

On 29 December 2021, the Cabinet of Ministers of Ukraine appointed two new NEURC Board Members, who are the winners of the competitions in 2020 and 2021.

A new selection process was launched by the Competition Commission in March 2023,²¹ as the next replacement of a NEURC board member listed in a Presidential Decree on Application of Rotation was expected by 1 July 2023. On the one hand, the Competition Commission increased the transparency of the selection process by publication of the candidates' interviews. On the other hand, however, online candidate interviews were not allowed due to the Martial Law. The selection process was observed by international organisations. As a result of the selection process, in June 2023, the proposal for two candidates was submitted by the Competition Commission²² to the government for its decision on appointment within 10 working days²³. However, the government has not yet appointed a new board member on that basis. The breach of due process and the delay with appointment may negatively impact the functionality and efficiency of the Regulator's performance, especially in view of new tasks under the REMIT Law, the Law on Green Transformation of the Energy System of Ukraine, the Clean Energy Package and the Electricity Market Integration Package.

2.8. Law 3354-IX

On 24 August 2023, the Law of Ukraine "On law-making activity"²⁴ (hereinafter Law 3354-IX) was adopted by the Verkhovna Rada of Ukraine, which, among other, amended²⁵ the Article 14 of the NEURC Law with the provisions requiring decisions of the Regulator, which are normative legal acts, to come through the state registration by the Ministry of Justice of Ukraine. According to the Article 54 of the Law 3354-IX, state registration of normative legal act consists in conducting its legal

²¹ <https://www.kmu.gov.ua/diyalnist/provedennya-konkursiv/konkursna-komiisiya-z-doboru-kandidativ-na-posadi-chleniv-nkrekp/povidomlennya/oholoshennia-pro-tretii-vidkryti-konkurs-na-zainiattia-posad-chleniv-natsionalnoi-komisii-shcho-zdiisniuie-derzhavne-rehuliuвання-u-sferakh-enerhetyky-ta-komunalnykh-posluh>

²² Minutes No.17 of selection commission meetings of 14.06.2023

²³ NEURC Law, Article 8(3)

²⁴ <https://zakon.rada.gov.ua/laws/show/en/3354-IX?lang=uk#Text>

²⁵ Point 2 (14) of Chapter XIV. Final Provisions will be enacted in one year after the into force one year after the termination or cancellation of martial law in Ukraine

examination for compliance with number of legal requirements²⁶ and may take up to 15 working days (with the possibility to be prolonged for maximum 10 working days more). Thus, the Law 3354-IX reintroduced the practice of entry into force of regulatory acts only after their state registration, which was abolished with the NEURC Law adoption in compliance with the Third Energy Package. This creates the significant risk in terms of delay in the entry into force of NEURC's acts. This may impact the operation and regulation of energy markets and influence the substance of the NEURC's acts. Therefore, the amendments to the NEURC Law introduced by the Law 3351-IX affect NEURC's independence secured by the Directives, in particular, Article 35 (4) and (5) of Directive 2009/72/EC and Article 39 (4) and (5) and Article 57 (4a) (5a) of Directive (EU) 2019/944 as regards functional independence of NRA from any other public entity and autonomous decisions of NRA independently from any political body. This newly introduced requirement on state registration of NEURC's decisions also constitutes a burden for performance of NEURC's tasks under the Electricity Market Integration Package where number of terms, conditions and methodologies shall be approved by the Regulator on the national and regional level within the timeframes and procedures stipulated by the relevant EU Regulations.

Finally, the Law 3354-IX specifies that NEURC's decisions may be appealed by individuals or legal entities to an administrative court in the manner established by law.

3. Implications of the Martial Law

3.1 Transparency of Regulatory Decision Making

With the adoption of NEURC Resolution of 15 April 2020 "On Electricity Market Participants Actions for the Period of Quarantine and Limitation Measures Connected to Spread of Coronavirus Disease" ("COVID-19 Resolution") and of the Resolution No 332 of 25 February 2022 governing the functioning of the electricity market during martial law and 30 days thereafter (hereinafter "Resolution 332"), NEURC initiated the amendment of key regulations in the electricity market, such as the Market Rules, the DAM/IDM Market rules and the network codes without carrying out a full public consultation process. This practice started even before the Martial Law applied in Ukraine. It does not contribute to the transparency of the electricity market regulation and contradicts Article 15 of the NEURC Law and NEURC's Resolution No 2133 of 6 December 2016 "On the NEURC Order" governing the decision-making of NEURC.

The approach may be considered legitimate by the need to urgently make decisions at times of war and disruptions. On the other hand, it contravenes the requirement of publication of draft decisions four business days in advance of approval. In some cases, the performance of a public consultation process, including the publication of the draft, receipt of comments/proposals, public hearings, publication of the public hearings results, publication of final draft for approval, has been fully omitted. This approach also prevented the coordination with the Competition Authority of Ukraine, as required by Article 2 of the Electricity Market Law. However, the situation has improved recently, by conclusion of a Memorandum of Understanding between NEURC and the Energy Community Secretariat²⁷ regardless of Martial Law limitations, in an effort to ensure transparency and public

²⁶ The Constitution and laws of Ukraine, the Convention on the Protection of Human Rights and Fundamental Freedoms and its Protocols, international treaties of Ukraine, the binding consent of which was given by the Verkhovna Rada of Ukraine, Ukraine's obligations in the field of European integration and the law of the European Union (EU *acquis*); practice of the European Court of Human Rights; the rules of standard design technique.

²⁷ Memorandum of Understanding between the NEURC and the Energy Community Secretariat on Mutual Cooperation in the Area of Public Service Obligation, dated December 1, 2022

consultation on regulations impacting electricity market operation. Still, the Secretariat invites NEURC to provide timely and complete information supporting proposed amendments or introducing new PSOs and, most importantly, include Secretariat's substantive proposals into the final decisions.

3.2. Provision of information to the Secretariat and taking into consideration the Secretariat's opinions

The provision of information by NEURC to the Secretariat has been restricted due to confidentiality required by the Martial Law, in particular with regard to Public Service Obligations ("PSO") where the Secretariat's opinion is required by law.

3.3. Decisions of the Ministry of Energy on issues in the sphere of NEURC competence

In a number of instances, government authorities, in particular the Ministry of Energy, have taken decisions that, by their nature and essence, fall within the powers of the Regulator and have had a significant impact on market relations and the activities of regulated markets. Examples are the Order of the Ministry of Energy No.132 "On ensuring sale and purchase of electricity by universal suppliers during the Martial Law" of March 21, 2023 and No. 148 of April 13, 2022 "On settlement of the issues of electricity supply to consumers and settlements between the retail market participants during the Martial Law". Even under the conditions of martial law, it is important that other governmental bodies respect the Regulator's competence to issue decisions within its competences.

In July 2023, public statements made by high level governmental officials invited NEURC to repeal certain decisions, called into question NEURC's competence to discharge with its statutory obligations and announced further unspecified action. NEURC changed the decision in question subsequently. Despite the decision concerned the setting of water supply tariffs, another competence of the Regulator in Ukraine, any challenge to the independence of NEURC as an integrated regulator of energy and public utilities will inevitably affect the performance of its independent role in the energy sectors as well.

3.4. Planned reform of government bodies

Currently, there is a public discussion related to the reform of public authorities in Ukraine. The government apparently considers reducing the number of authorities including CEPBs, the number of civil servants, unify the functionality on ensuring state servants' functioning in order to minimize respective expenses of the state budget. To date, the potential impacts for NEURC are not yet clear. However, it cannot be ruled out that NEURC's institutional integrity is again at risk.²⁸

4. Role of state bodies in NEURC budget approval and operational aspects

Certain legal reform measures recommended by the Secretariat in the 2018 Report have not yet been introduced. NEURC's budget is still subject to the approval by external authorities as part of annual budgetary process of Ukraine. In compliance with Article 11 (2) of NEURC Law, the draft NEURC budget is submitted to the Ministry of Finance for further inclusion in the draft annual budget. NEURC approves its budget only upon the Law of Ukraine on State Budget for a calendar year

²⁸ <https://www.epravda.com.ua/publications/2022/07/4/688781/>
<https://jur-gazeta.com/dumka-eksperta/z-prismakom-nepriemnostey-chi-zagrozhuuyut-derzhavnim-sluzhbovcyam-masovi-zvilnennya-u-2023-roci.html>

enters into force. An approval by the Budget Committee of the *Verkhovna Rada* is also required before the adoption of the NEURC budget. Moreover, the Regulator's accounts are held by the Treasury of Ukraine and not by the Regulator as a legal entity itself. As already recalled in earlier assessments by the Secretariat, such approval runs contrary to Article 35(5) Directive 2009/72/EC and Article 39(5) Directive 2009/73/EC and Article 57 (5) lit (c) of Directive 2019/944 and does not allow the Regulator to fully cover its needs.

In addition, the Ministry of Finance has to approve the staff list of the Regulator, the budget program and the report on the budget's implementation. The issue of approving the structure of the NEURC is subject to the Law "On Central Bodies of Executive Power".

In addition, NEURC does not have the right to independently define the number of its own staff because the maximum number of employees of the NEURC, is determined by Resolution of the CMU No 85 of 4 May 2014 "On some issues of approval of the maximum number of employees of the staff and territorial bodies of the central bodies of executive power, other state bodies". The Secretariat recalls that NEURC requires the necessary human and financial resources to carry out its duties and exercise its powers in an effective and efficient manner.

5. Conclusions and recommendations

The national regulatory authorities for energy are subject to the requirements of the Energy Community *acquis* in relation to their status, independence and tasks. Although the Directives provide for certain flexibility of the Contracting Parties in designing the establishment of the regulatory bodies, their independence must remain intact. This is especially important for Ukraine in the context of integration of its energy markets with those of the Parties to the Energy Community, the need to attract investments needed by the Ukrainian economy and its energy sector in particular, in efforts to supporting Ukraine during the application of the Martial Law and the future reconstruction of Ukraine. To respect and develop NEURC's independence is not only a legal requirement. It is a cornerstone on which Ukraine will have to build its future integration with the European energy markets, to continue its reform path in the energy sectors and to establish confidence with public donors and private investors alike.

In the view of the Secretariat, reasonable improvements have been made on effective independence of NEURC since the issuance of the 2018 and 2019 Reports. The launching of a more transparent competitive selection of board members that commenced in 2018 has certainly been one of the biggest achievements. The legislation adopted in December 2019 allowing entry into force of NEURC's decisions following a publication on its own website, removal of the requirement of approval of NEURC's decisions by other bodies and a ban on blocking the appointment of NEURC board members by filing court claims are important contributions to NEURC's functional independence. The REMIT Law reflects the basic requirements of the REMIT Regulation adapted for the Energy Community and goes even beyond in certain aspects. Strengthening the NEURC's authority in the context of REMIT fully meets the requirements of the *acquis*.

The Secretariat also takes into full account that a number of the Regulator's decisions are now influenced by the ongoing war in the country and the Martial Law implications in relation to transparency of its decision-making.

However, several other provisions of Ukrainian legislation, including the NEURC Law, do not guarantee the independence of the Regulator. These structural concerns are serious. In particular,

this relates to subordinating NEURC under the government by the Law No. 394-IX and Resolution 772, adopted following the judgment of the Constitutional Court of Ukraine of 2019. Those changes are incompliant with the Energy Community *acquis*. The same goes for the lack of complete financial independence related to the management of NEURC's budget and the proposed restrictions on civil servants' salaries proposed by draft Law No. 8222. Recently adopted Law No 3354-IX bringing back the state registration of Regulator's decisions is of concern as it affects the functional independence of the NEURC. Finally, delays in appointment of NEURC's board members following a competitive selection procedure further weaken NEURC's independence and operational capabilities, also in view of the new and challenging regulatory tasks introduced already with the REMIT Law and the Law of Green Transformation of the Energy Sector, to be further reinforced with the imminent implementation of the Clean Energy Package.

Numerous initiatives to optimize the functioning of CBEPs, public interventions in its autonomy to adopt decisions, revision of the system of civil servants' salaries, discussions of reformation of the system of power bodies that were noted by and communicated to the Secretariat, illustrate the lack of perception of a special status of NEURC by other public authorities.

In view of the above, the Secretariat recommends the following:

- To resolve the issue of the status of the Regulator by introducing relevant changes to the Constitution of Ukraine, once the Martial Law has expired. As a result of the amendments to the Constitution, there will be a need to revise other legislative acts;
- Amending the CMU Law and the Law of Ukraine "On Central Bodies of Executive Power", and changing CMU Resolution 772 in order to exempt NEURC from the CMU's subordination, as done for other independent bodies;
- Amending the NEURC Law to introduce a proper rotation of board members that does not amount to dismissal;
- Amending the Law 3354-IX in order to exempt the NEURC's decisions which are normative legal acts from the state registration procedure provided in the law;
- The status, powers and tasks of the NEURC to be recognised by all state institutions on a constant basis and be effectively safeguarded. Without prejudice to the provisions of *acquis* on close consultation with other relevant national authorities, NEURC shall take autonomous decisions that may be appealed only in the court. Other power bodies shall not interfere on issues in the sphere of NEURC authority/competence;
- The government should ensure the timely appointment of new NEURC board members following the submission of candidates by the Competition Commission.
- Removal of barriers to full financial and operational independence of NEURC in terms of managing its own budget and ensure the appointment of staff without the approval by external bodies. The draft Law 8222 might further encroach on the financial independence of the NEURC and should be amended for final reading;
- NEURC should ensure the transparency and predictability of its decisions in order to build trust within the limits allowed by the application of the Martial Law. Timely provision of information to the Secretariat and taking into consideration of the Secretariat's opinions in accordance with the requirements of the *acquis* should be ensured.
- Any reform of the system of governmental bodies under discussion in Ukraine shall take into account the special role of NEURC against the benchmark of the Energy Community *acquis*.

The Secretariat therefore upholds its previous conclusions that legal reforms are needed to address the identified shortcomings and to ensure effective independence of NEURC.

NEURC also bears a responsibility to maintain previous achievements in the reform of energy markets and minimize the interventions in market mechanisms and prevent back-sliding from what

was achieved before the full-scale invasion. Furthermore, activities towards market integration with neighboring EU Member States and Moldova should be stepped-up in line with the agreed roadmap for further market integration following the synchronization of Ukraine's electricity network with the Continental European network as the basis of Ukraine's energy security and its post-war reconstruction.

The Secretariat is ready to make every effort to support Ukraine and its energy regulatory authority in these matters.

Annex I – Legal compliance overview²⁹

Requirement	Energy Community acquis	Law on NEURC	Assessment
Institution is established by law		Law on NEURC	compliant
Vacancies for Board members are announced publically		Article 8(2)	compliant
Selection process and criteria for Board members is defined by law and includes a selection committee	[*] ³⁰	Articles 7 and 8(3)	compliant ³¹
Single national regulator with nation-wide competences in gas and electricity	TEP: Article 35(1) Directive 2009/72/EC, Article 39(1) Directive 2009/73/EC CEP: Article 57 (1) of Directive 2019/944	Article 1	compliant
Regional regulators	Article 35(2), (3)	-	not applicable
Legal and functional independence from public and private interest is stipulated by law	TEP: Article 35(4) lit (a), Directive 2009/72/EC, Article 39(4) lit (a) Directive 2009/73/EC, CEP: Article 57 (4) lit (a) of Directive 2019/944	Articles 1(1) and 5	revision needed
Management and staff to act independently and not take/seek for instructions	TEP: Article 35(4) lit (b) Directive 2009/72/EC, Article 39(4) lit (b) Directive 2009/73/EC CEP: Article 57 (4) lit (b) (i), (ii) of Directive 2019/944	Article 5(2)	compliant ³²
Management is prohibited to hold shares in regulated companies or be member of a political parties		Article 7 (management) Staff: Article 10 Law on Civil Service	compliant
Sanctions in case of violation of	[*]	Article 8(6) indent 8	compliant

²⁹ Legal compliance does not necessarily have to equal to practical implementation. On the later see the text of the report.

³⁰ These requirements are not stemming from the acquis directly but are elements of best practise (see Secretariat's Policy Guidelines on independence of national regulatory authorities, PG 02/2015 of 28 January 2015).

³¹ Delays by CMU in timely appointment of Board Members following competitive selection are reflected in the text of the report

³² Respective provisions are envisioned by the NEURC Law, however, practical implementation especially under Martial Law require improvements. Risks are present for staff independence due to provisions of Draft Law 8222

the prohibition to hold shares in regulated companies or be member of a political parties

Requirement	Energy Community acquis	Law on NEURC	Assessment
Autonomous and independent decision making	TEP: Article 35(5) lit (a) Directive 2009/72/EC, Article 39(5) lit (a) Directive 2009/73/EC, TEP Article 57 (5) lit (a) of Directive 2019/944	Articles 5(3) and 14(6)	<u>revision needed</u> ³³
Decisions are immediately legal binding	TEP: Article 37(4) lit (a) Directive 2009/72/EC, Article 41(4) lit (a) Directive 2009/73/EC, CEP: Article 59 (3) lit (a)	Article 14 (6), (7)	<u>revision needed</u> ³⁴
Decisions are subject to judicial review	TEP: Article 37(16) lit (a) Directive 2009/72/EC, Article 41(16) lit (a) Directive 2009/73/EC, CEP: Article 60 (7)(8) of Directive 2019/944	Articles 5(3) and 14 (10)	<u>incompliant</u>
Decisions are to be duly substantiated and justified to allow for judicial review			<u>revision needed</u>
Term of Board Members is limited to 5-7 years	TEP: Article 35(5) lit (b) Directive 2009/72/EC, Article 39(5) lit (b) Directive 2009/73/EC, CEP: Article 57 (5) lit (d), (e), (f), (g) of Directive 2019/944	Articles 8(5)	<u>revision needed</u>
Board Members' terms are renewable only once			
A rotation scheme is in place			
Dismissal reasons for Board Members are limited to cases of criminal offence or in compliance with independence	TEP: Article 35(5) lit (b) Directive 2009/72/EC, Article 39(5) lit (b) Directive 2009/73/EC, CEP: Article 57 (5) lit (g) of Directive 2019/944	Article 8(6)	compliant
Separate budget and autonomy to	TEP: Article 35(5) lit (a) Directive	Articles 5(3) and 11	<u>revision needed</u> ³⁵

³³ Final legal subordination model and transitory steps under Martial Law are proposed in the text of the report

³⁴ After the termination of martial law in order to enter into force acts of Regulator are subject to the state registration by the Ministry of Justice

³⁵ Separate budget in ensured both legally and in practice, while autonomy in usage is limited due to dependence on the budgetary process

use	2009/72/EC, Article 39(5) lit (a) Directive		
Adequate human resources	2009/73/EC, CEP: Article 57 (5) lit (b), (c) of Directive 2019/944	Article 5(4)	compliant ³⁶
Management has autonomy on internal organisation (work program, statutes)	TEP: Article 35(4) lit (a) Directive 2009/72/EC, Article 39(4) lit (a) Directive 2009/73/EC, CEP: XXX	Article 4	revision needed ³⁷

Requirement	Energy Community acquis	Law on NEURC	Assessment
Budget is financed from levies		Article 13	compliant
Budget does not require approval by another public body	[*]	Article 11	<u>revision needed</u>
Certainty on financial resource			compliant ³⁸
NRA provides an annual activity report	TEP: Article 37(1) lit (e) Directive 2009/72/EC, Article 41(1) lit (e) Directive 2009/73/EC, CEP: Article 57 (6), (7) of Directive 2019/944	Article 6(1)	compliant
Decisions are published in advance	TEP: Article 35(4) lit (a) Directive 2009/72/EC, Article 39(4) lit (a) Directive 2009/73/EC, CEP: Article 60 (7) lit (g) of Directive 2019/944	Article 14(8)	compliant ³⁹
Board meetings are in general open	[*]	Article 14(2)	compliant

³⁶ While immediately compliance is present, risks in this respect come from legislative initiative under discussion in terms of provision of Draft Law 8222 as stated in the report text

³⁷ Present limitations are discussed in part 4 of the report

³⁸ Present immediately, however future risks can materialize with Draft Law 8222 and reform of state power bodies under discussion

³⁹ Compliance is present in general except in the cases of Martial Law Resolution 322 as discussed in part 4.1 of the report