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Vienna, 18 May 2018
ECS-8/15O18052018

RE: Case ECS-8/15; Reasoned Request

Honorable Presidency of the Energy Community,
Honorable Vice-Presidencies of the Energy Community,

Please find attached the Reasoned Request in relation to Case ECS-8/15.

Please accept, Excellencies, the assurances of my highest consideration.

Yours sincerely,

Janez Kopač
Director

H.E. MR. KRESHNIK BEKTESHI
MINISTER OF ECONOMY OF THE REPUBLIC OF MACEDONIA

H.E. MR. CHIRIL GABURICI
MINISTER OF ECONOMY AND INFRASTRUCTURE OF THE REPUBLIC OF MOLDOVA

H.E. MR. MIGUEL ARIAS CAÑETE
CLIMATE ACTION & ENERGY COMMISSIONER
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H.E. MR. IHOR NASALYK
MINISTER OF ENERGY AND COAL INDUSTRY OF UKRAINE

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TO THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY
represented by the Presidency and the Vice-Presidency of the Energy Community

REASONED REQUEST

in Case ECS-8/15

Submitted pursuant to Article 90 of the Treaty establishing the Energy Community ("the Treaty") and Articles 15 and 29 of Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 on the Rules of Procedure for Dispute Settlement under the Treaty,[1] the

SECRETARIAT OF THE ENERGY COMMUNITY

against

UKRAINE

is seeking a Decision from the Ministerial Council that

> by maintaining in force its current regime for allocation of cross-border capacity for transit of electricity, Ukraine fails to fulfil its obligations under the Energy Community Treaty, and in particular Article 41 thereof, Articles 3(1), 12(f) and 32(1) of Directive 2009/72/EC, Articles 16(1) and 19 of Regulation (EC) 714/2009 as well as Section 2.1 of the Congestion Management Guidelines as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

The Secretariat of the Energy Community has the honour of submitting the following Reasoned Request to the Ministerial Council.

I. Relevant Facts

(1) The subject-matter of the present case consists in several instances of non-compliance by the existing legislation and its application in Ukraine with the Energy Community *acquis communautaire* related to allocation of cross-border capacity by the Ukrainian transmission system operator *Ukrenergo*, under the Auction Rules approved by the National Commission for State Energy and Public Utilities Regulation (NEURC).

[1] Procedural Act No 2015/04/MC-EnC of 16.10.2015.

1. The electricity sector in Ukraine

(2) The electricity market of Ukraine is organized according to a single buyer model (the wholesale electricity market of Ukraine: "the WEM") on the basis of the Electricity Sector Law of 1998.[2] The WEM is based on an agreement between the participants of the wholesale electricity market of Ukraine ("the WEM Agreement") and the conditions and requirements of the WEM Rules.[3] The Agreement and its amendments have been approved by the National Electricity Regulatory Commission (NERC) as well as by the Antimonopoly Committee of Ukraine. There are no direct bilateral contracts between generators/suppliers and consumers, and there is no functioning balancing market or market for ancillary services. They are an integral part of the WEM Agreement. The same goes for the WEM Rules which define the mechanism of functioning of the WEM, the procedure of load allocation between generating units, the procedure of setting the electricity generation price and the electricity wholesale market price.[4]

(3) All participants of WEM must sign the WEM Agreement with the administrator of the market, the State owned enterprise *Energorynok,* as a precondition for obtaining the status of a member to the WEM. The WEM Agreement defines the conditions of engaging in energy activities as well as the rights and obligations of WEM participants towards the WEM. The WEM is the exclusive wholesale market place in Ukraine, any other wholesale trade in electricity is (still) prohibited.[5]

(4) *Energorynok* purchases all the electricity produced by the generators or imported for sale in Ukraine, except for the electricity used by generators for their own needs, electricity produced by CHPs and supplied to consumers on their territory, and electricity produced in small power units.[6] *Energorynok* also sells electricity for export to the winners of auctions for access to cross-border transmission capacity organized by the transmission system operator *Ukrenergo*, under prices regulated by NERC.

(5) The Ministry ensures the long-term and medium-term planning of the WEM through elaboration and update of a projected balance of electricity of the Integrated Power System of Ukraine,[7] pursuant to an Order of the Ministry of 2016 approving the procedure for preparing the annual and monthly balance of electricity.[8] This Order defines the imbalance of electricity as the difference between the volume of production and import of electricity, on the one hand, and consumption and export of electricity, on the other. If the proposals by the generation companies do not lead to a balance of production and consumption, no later than 25 October of the year preceding the settlement, the Ministry shall decide on balancing generation with demand of electricity, based on a draft electricity balance from the transmission system operator *Ukrenergo*. This balance may be done via:

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[2] Law of Ukraine 'On electricity' No. 575/97-BP, VR, 6 October 1997, published in Verkhovna Rada news, 1998 with the last amendments and additions from 16.07.2015.
[3] Rules on the Wholesale Electricity Market of Ukraine as Annex 2 from 2015 to the Agreement between members to the Wholesale Electricity Market of Ukraine, 15.11.1996 as amended last time on 17.02.2012.
[4] Article 15 of Electricity Sector Law of 1998.
[5] Subparagraph 15 of paragraph 4 of Title VI of the Electricity Market Law of 2013 amends the Article 15 of the Electricity Sector Law1998.
[6] There are a number of exceptions as to the sale of electricity on wholesale electricity market, introduced by changes of the Electricity Sector Law as well as Cabinet of Minister's decrees.
[7] Para.4.5 of Regulation of the Ministry, approved by Decree of the President of Ukraine No382/2011, dated 06.04.2011.
[8] Order of the Ministry, "On approval of the preparation procedure of annual and monthly forecast balance of electricity of IPS of Ukraine", No.521, dated 26.08.2016. See: http://zakon2.rada.gov.ua/laws/show/z1224-16 (17.05.2018)

- increase/decrease of generation from nuclear power plants (if technical possible),
- increase/decrease of generation from thermal power plants(if technical possible),
- increase/decrease of export,
- organize import,
- limitation the volume of electricity consumption by energy suppliers.

(6) *Ukrenergo* owns and operates the high voltage network including cross-border interconnection lines. The power system of Ukraine is interconnected as a part of the Integrated Power System in synchronous parallel mode with the Unified Power System of the Russian Federation, Belarus and Moldova. *Ukrenergo* operates export transmission capacities primarily with Russia (3000 MW), Moldova (700 MW) and Belarus (900 MW).[9] A smaller part of the Ukrainian power system is linked with the synchronized European ENTSO-E network through the isolated Burshtyn island in western Ukraine which disposes of an installed generation capacity of 1950 MW.[10] After internal consumption, the Burshtyn island's export capacity ranges between 500 MW and 650 MW (550 MW in summer).[11] The NTC values for the interconnection capacity of Burtshtyn island are Ukraine – Hungary: 800 MW; Ukraine – Slovakia: 400 MW and Ukraine – Romania: 400 MW. However, out of approx.1600 MW of the total interconnectors' capacities only around 550 MW are used for export.

(7) Hence, in Ukraine cross-border capacity is used for export to the European Union Member States only in the amount of electricity available for export; i.e. electricity produced locally in the Burshtyn island after satisfying the demand of the domestic customers located in that territory.

(8) As described in the Reasoned Request in Case ECS-1/12[12] in the period 2011-2017 there was more demand for interconnection capacity than was actually put on auction, and only a small part of the total interconnectors' capacity was auctioned because the auctioning was always linked with the available electricity for export.

(9) In relation to the interconnection with Moldova, the situation is different. The two electricity systems operate synchronously, the interconnection lines are also not congested and the interconnection capacity between the two countries is sufficient for an increased cross-border trade. Those interconnectors are also used for export of electricity to Moldova.[13]

[9] Annual Report of NEURC for 2015 (table 2.2.3.) http://www.nerc.gov.ua/data/filearch/Catalog3/Richnyi_zvit_NKREKP_2015.pdf (15.05.2018)
[10] Burshtyn power plant (2351 MW), Kaluska Combined Heat and Power plant (200 MW) and Tereblya-Rikska hydroelectric power plant (27 MW) are the generation plants installed in this area.
[11] http://www.nerc.gov.ua/data/filearch/Catalog3/Richnyi_zvit_NKREKP_2015.pdf (15.05.2018)
[12] Reasoned Request in Case ECS-1/12, p.3.
[13] Reasoned Request in Case ECS-1/12, p.3.

2. The legal framework governing the allocation of cross-border capacities in Ukraine

a. Primary legal framework

(10) Before the adoption of the Electricity Market Law of 2013,[14] the Electricity Sector Law of 1998[15] was governing the allocation procedure and was providing a legal basis for adoption of Auction Rules by NERC.

(11) The Electricity Market Law adopted in 2013 came into force on 1 January 2014.[16] Article 10 of the Electricity Market Law governed the allocation of cross-border capacity. However, the Law was structured in a manner that the main part of the Law, introducing a new electricity market model, enters into force only on 1 July 2017. According to the Law's transitional provisions, Article 10 of the Electricity Market Law governing the cross-border allocations of capacity would come into force only three years after entry into force of the Law, on 1 July 2017, when the new market model was supposed to become effective. However, the Electricity Market Law of 2013 has not been implemented and the new electricity market model, the precondition for enforcing Article 10, has never been set up.

(12) In this situation, i.e. until a new market model is implemented, the transitional provisions of the Electricity Market Law amended Article 30 of the Electricity Sector Law of 1998 and that provision still governs the allocation procedures. The changes to Article 30 of the Electricity Sector Law entered into force on 1 December 2014 and were to be applied by 1 July 2017, provided that the new electricity market model was introduced by then.

(13) Pursuant to Article 30 of the Electricity Law 1998, as amended by the Electricity Market Law of 2013,[17] applicable still today, an electricity supplier intending to export electricity must purchase the required volume on the WEM of Ukraine under WEM prices, established by the WEM Rules and approved by NERC. Moreover, in order to export (or import) electricity, the energy undertaking in question needs a license for electricity supply and may not have any outstanding debts for electricity purchased at the WEM.

(14) Article 30 of the Electricity Law of 1998 as amended by the Electricity Market Law of 2013, also stipulates that the transmission of electricity intended for export is based on a contract concluded with *Ukrenergo*. The contracts on capacity rights are awarded by way of auctions. After the auction takes place, *Ukrenergo* enters into an agreement on the access to the cross-border transmission capacity for export of electricity with the winner of the auction. The terms and conditions of these contracts are to be approved by NERC.

(15) As regards the procedure for import of electricity, Article 15 of the Electricity Sector Law of 1998 as amended by the Electricity Market Law of 2013 and the WEM Rules stipulate that, all imported electricity must be sold to *Energorynok* at prices defined by NERC. Any other wholesale electricity market is prohibited.

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14 Law of Ukraine No. 663-VII 'On the principles of the functioning electricity market in Ukraine' as from 24.10.2013.

15 Law of Ukraine 'On electricity' No. 575/97-BP, VR, 6 October 1997, published in Verkhovna Rada news, 1998 with the last amendments and additions from 16.07.2015. It is still relevant for the present case because of the market model that it develops, that is still in place at the moment of sending this Reasoned Opinion.

16 According to Section VI – Final and transitional provisions – the Law comes into force on the first day of the month following the month of publication, and the first publication was in "The Voice of Ukraine" on 07.12.2013.

17 Paragraph 30 of the Title VI 'Final and transitional provisions' of the Law of Ukraine № 663-VII 'On the principles of the functioning electricity market in Ukraine' as from 24.10.2013.

(16) In parallel to the delayed implementation of the Electricity Market Law 2013, a new Electricity Market Law transposing the Third Energy Package was drafted. The new Law was adopted by the Ukrainian Parliament on 13 April 2017.[18]

(17) Even after entry into force of the new Electricity Market Law, its new provisions related the allocation of interconnectors' capacity, together with a new market model, would only take effect from July 2019 onwards.[19] Until then, the transitional provision governing the allocation of cross-border capacities (Section VII of the Law), still stipulates (as do the currently applicable Articles 30 and 15 of the Electricity Sector Law of 1998) that volumes of electricity required for export and/or import shall be purchased and/or sold at *Energorynok* at prices determined by the WEM Rules.

(18) Neither the Electricity Sector Law of 1998 nor the Electricity Market Law of 2017 define the term transit of electricity, or govern the procedure for allocation of cross-border capacity for the purpose of transit.

b. Secondary legal framework

(19) The allocation of cross-border capacity for export at all interconnectors in the Burshtyn island as well as with Moldova and Belarus is performed through auctions according to Auction Rules adopted by NERC. Based on the Electricity Sector Law, until December 2012, the auctions were held according to the Auction Rules adopted in 2009.[20] Afterwards, Auction Rules adopted by NERC in December 2012[21] have been applied. Under those Rules, the interconnectors' capacity was sold at a price regardless of whether congestion occurs.[22]

(20) The Auction Rules from 2012 were amended several times before being replaced by the Auction Rules from February 2015.[23] On 28 March 2017, the successor of NERC, the National Commission for State Energy and Public Utilities Regulation (NEURC) amended the Auction Rules of 2015. The Auction Rules of 2017 amending the Auction Rules of 2015 have been adopted on the basis of Article 30 of the Electricity Sector Law of 1998 as amended by Electricity Market Law from 2013, and they entered into force on 12 May 2017.[24] They form the basis of the present Reasoned Request.

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[18] Law of Ukraine No.4493: 'On electricity market', adopted on 13 April 2017 by Verkhovna Rada.
[19] See Final and transitional provisions in Law No.4493.
[20] Decree on approval of the Procedure of Auctions Relating to the Access to the Transmitting Capacity of Ukraine's International Power Grids for the Purpose of Electric Power Export adopted by National Power Industry Regulatory Committee of Ukraine, No.1207, 22 October 2009 (hereinafter, Auction Rules from 2009)
[21] Resolution on approval of the Procedure of holding auctions for access to the cross border capacity of cross border electric networks of Ukraine for export of electric energy No.1450, 8 November 2012, that became effective on 17 November 2012 after being registered in the Ministry of Justice and being published on the official website (hereinafter, Auction Rules of 2012).
[22] Article 1(2) Auction Rules of 2012.
[23] NEURC, "On approval of the Rules of electronic auctions on capacity allocation of cross-border electricity lines" No. 176 dated 12.02.2015.
[24] NEURC 'On approval of the Rules of electronic auctions on capacity allocation of cross-border electricity lines' No. 426 dated 28.03.2017. The Rules were published on 11 May 2017 in the 'Governmental Courier' ("*Урядовий кур'єр*") and entered into force on 12 May 2017 (next day after publication). The text of the 2017 Auction Rules was made available to the public on the NEURC's website starting from 31.03.2017, awaiting publication in the 'Governmental Courier' to enter into force.

(21) The Auction Rules of 2017 define the procedure for organizing and performing electronic auctions on access to cross-border capacity of electricity networks for export and/or import of electricity. [25] The auction office, which is defined as "*enterprise providing centralized dispatching control over Interconnected Power System of Ukraine*", i.e. *Ukrenergo*, is responsible for organization and holding the electronic auctions.[26] Yearly, monthly and daily explicit auctions are to be organized.[27] In case of no congestion, the capacity is allocated free of charge, whereas in case of congestion, the marginal price is equal to the minimum bid price satisfied of all bids. [28]

(22) Those rules – as the previous ones - are closely linked with and depend on the electricity market model currently in place in Ukraine as explained above, and as defined in the Electricity Sector Law of 1998 still applicable to date. Only energy suppliers are allowed to participate in auctions, and in order to participate they have to acquire the status of allocation participant. [29] *Ukrenergo*, verifies if the supplier has the status of WEM participant and whether it has open debts for electricity bought from the WEM.[30] Participating in the auctions also depends on the provision of a warranty deposit[31], which takes the form of a bank guarantee[32] and/or a fee defined as "*funds, paid by auction participants in yearly, monthly and/or daily auctions and which in case of non-fulfillment of the obligations by the auction participant become ownership of the auction office as a fine*." [33] Approved allocation participants are not allowed to take part in auctions in case they have financial obligations towards the auction office, or existing debts for electricity purchased at the WEM of Ukraine, or in case if the status of WEM member of the participant has been canceled.[34] In case the allocation participant has not made any bid in any auction during a period of a year from the date of registration, its registration as allocation participant is withdrawn.[35]

(23) If the applicant has been successful with its bids in the auctions, and has been allocated certain cross-border capacity on the yearly or monthly auctions, it can lose that capacity in case it has a debt towards the auction office or if it loses its status as WEM participant.[36] The participant also loses the allocated capacity if it does not submit its daily hourly schedule.[37] Use of allocated capacity is made by submitting daily hourly schedules for export of

[25] Article 1.1 Auction Rules of 2017.
[26] Article 2 Auction Rules of 2017.
[27] Article 4 Auction Rules of 2017.
[28] Article 10.1 Auction Rules of 2017.
[29] Article 5 Auction Rules of 2017.
[30] Article 2.2 Auction Rules of 2017.
[31] Article 6 Auction Rules of 2017.
[32] Defined as "*type of ensuring fulfillment of obligations where the bank undertakes the cash obligations towards the auction office in case the auction participant does not fulfill in full or partially its obligations*," The guarantee is to be provided no later than 13:00 Kyiv time on the day preceding the date of the gate opening of the yearly and/or monthly and/or daily auction.
[33] Article 1.2 Auction Rules of 2017, emphasis added. The fee is due no later than the day preceding the day of the gate opening of respective yearly and/or monthly and/or daily auction. The fee and/or the bank guarantee shall consist of an amount that exceeds or is equal to 100 (one hundred) minimal wages as defined in the applicable legislation of Ukraine on the date prior of the date of the opening of bids for the respective auction.[33] The minimal wage in Ukraine for the year of 2017 is 3 200 UAH per month (or 19.34 UAH per hour),[33] which amounts to 111, 49 EUR.[33] This means that the fee and/or bank guarantee is not less than approx. 11.000 EUR for the participation in annual, monthly or even daily auctions.
[34] Article 6.11 Auction Rules of 2017.
[35] Article 5.11 Auction Rules of 2017.
[36] Article 6.12 Auction Rules of 2017.
[37] Article 12.4 and 12.8 Auction Rules of 2017.

electricity to the auction office, which are subject to its approval.[38] The costs paid for the unused capacity, which have not been approved by the submission of daily hourly schedules of electricity export/import are not returned to the participant.[39] Moreover, in case a participant has been allocated capacity in a yearly auction, and during one month uses the allocated capacity for less than 70% of the booked capacity, it loses its right of access to the cross-border capacity of electricity network that it has obtained for the rest of the year, and the lost capacity is allocated at monthly and daily auctions.[40] Finally, in case the successful auction participant does not pay for the allocated cross-border capacity, that participant also loses the allocated capacity, and the costs of its bank guarantee or fee are paid as a fine amounting to 100 minimal wages, as described above.[41]

(24) The Auction Rules of 2015 provided already for the possibility for successful participants to the auctions to transfer the acquired capacity to another allocation participant, provided that they have informed and registered the transfer with the auction office.[42]

(25) In case of technical problems with the electronic platform, a fallback mode is applied, which means auctions are to be performed via e-mail and fax.[43] During 2015-2017 the fallback mode turned out to be the default solution, as electronic auction were not taking place. On 23 May 2017, Ukrenergo performed first electronic auctions.[44] Now, *Ukrenergo* performs yearly, monthly and daily auctions for capacity allocation electronically.

(26) The Auction Rules of 2017, as also the previous rules, do not define or govern transit and allocation of cross-border capacity for transit as a separate category.

3. Relevant facts concerning allocation of interconnectors' capacities for transit of electricity

a. The right to perform transit of electricity

(27) Approval from the Ministry of transit has only ever been granted to one State owned undertaking, State Foreign Trade Company *Ukrinterenergo*.[45] This happened at a meeting held in the Ministry, between NEURC, *Ukrenergo*, *Energorynok* and *Ukrinterenergo,* dedicated to electricity export and transit via the Burshtyn island on 17 June 2014. Based on the minutes of the meeting,[46] the Ministry entrusted the State owned company *Ukrinterenergo* with performing transit of electricity. By a letter to *Ukrenergo*,[47] the Ministry further entrusted *Ukrenergo* to ensure the performance of the full volumes of electricity transit through electricity lines of the Burshtyn Island under the current power supply contracts with

[38] Article 12.2 Auction Rules of 2017.
[39] Article 12.8 Auction Rules 2017.
[40] Article 12.9 Auction Rules of 2017.
[41] Article 17.2 Auction Rules of 2015.
[42] Article 13 Auction Rules of 2015
[43] Article 11 Auction Rules of 2015
[44] See, *Ukrenergo* website https://auctions.ua.energy/Public/Default.aspx?UC_CODE=UC001SysNews (15.05.2018).
[45] *Ukrinternero* was established in January 1993 with the purpose of ensuring, among the rest, that the interests of the state in foreign trade exchange are ensured.
[46] ANNEX 1, Copy of the Minutes of the meeting concerning electricity transport and transit via the transmission network in Burshtyn island, dated 17.06.2014.
[47] Letter from the Ministry was sent to *Ukrenergo*, No.01/32-1577 as from 30.07.2014.

foreign entities to which the electricity will be sold (which was a precondition for participation to allocation of cross-border of capacity in 2014, under the Auction Rules of 2009 and later of 2012)[48] concluded by *Ukrinterenergo*.

(28) The period for which *Ukrinterenergo* was entrusted with performing transit was not clearly defined. Instead, the minutes of the meeting concluded that such entrustment would be "*for period of settlement of issues on capacity allocation of electricity networks of Burshtyn Island for transit*." *Ukrinterenergo* declares providing electricity transit through the electricity network of Ukraine as well as performing export and/or import of electricity as its key commercial activity.[49] It was actually established to provide electricity transit through power transmission lines of Burshtyn Island and to ensure the maximum use of transit potential of Ukraine, resulting in the income and flow of foreign currency to the country and increasing contributions to the budget.[50]

(29) The complainant, *ERU Trading*, which has a license from *NEURC* for supply of electricity under unregulated tariff dated 16.2.2015[51] and is a member of the WEM of Ukraine, has applied for receiving cross-border capacity to be used for transit of electricity through Ukraine at several occasions in 2015. The applications submitted by the complainant concern transit along the following routes:

- *power system of Hungary => power system of Slovakia and/or Romania*
- *power system of Slovakia => power system of Hungary and/or Romania*
- *power system of Romania => power system of Slovakia and/or Hungary.*

(30) When assessing the application for transit of electricity in May 2015, *Ukrenergo* checked and confirmed that the applicant has concluded contracts with: foreign economic entities (the subject of which was transit of electricity via the transmission network in the Burshtyn island in western Ukraine),[52] with *Ukrenergo*[53] - a contract that was approved by *NEURC* as a regulated contract for transmission - [54] and with *Energorynok* – for covering the losses of electricity.[55] However, it noted that an undertaking could apply for interconnectors' capacity for the purpose of transit only if it has the approval from the Ministry.[56]

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[48] The Auction Rules of 2012 required that those contracts are coordinated and approved by *Ukrenergo,* including a very detailed assessment of the clauses of the contract, after which *Ukrenergo* demanded amendments to individual contracts. For details, see Opening Letter in Case ECS-1/12, p.4.
[49] See the website of *Ukrinterenergo*: http://www.uie.kiev.ua/?lang=2&change=232 (15.05.2018).
[50] See the website of *Ukrinterenergo*: http://www.uie.kiev.ua/en/main/work (15.05.2018).
[51] License No. AE575g19.
[52] Contracts with foreign companies for the export or import of electricity from or to Ukraine, with Energy Financing Team (Switzerland) AG[52] and GEN-I, doo (Slovenia) [Contract between *ERU Trading* and GEN-I, dated 24.04.2015, No. 1/1008 is submitted as a reference]. The contracts have been approved by *Ukrenergo* in the technical part (the approval did not cover the commercial terms for buying/selling electricity): Letter from *Ukrenergo* to *ERU Trading*, No. 02-2/02-2-4-2/5209, dated 07.05.2015.
[53] Contract between *ERU Trading* and *Ukrenergo*, No. 01/1711-15, dated 26.06.2015: on the provision of dispatching and electricity transmission services via the Burshtyn island, to execute the foreign economic contracts for transit with GEN-I doo and Energy Financing Team AG. The agreement was approved by NEURC as a regulated contract for transmission.
[54] NEURC letter, No. 688/174/61-15, date 14.07.2015.
[55] Contract between *ERU Trading* and *Energorynok*, No. 11482/07, dated 17.07.2015 for the sale and purchase of electricity needed for compensation of technical losses occurring during the electricity transit via the Burshtyn island, which was agreed with *Ukrenergo.*
[56] Letter from *Ukrenergo* to *ERU Trading*, No. 02-2/02-2-4-2/5209, dated 07.05.2015.

(31) The Ministry, despite being addressed by the complainant in July 2015,[57] never issued such approval. In July 2015, *Ukrenergo*[58] rejected all schedules for transit submitted on 17.07,[59] 20.07,[60] 21.07,[61] 22.07,[62] 23.07[63] and 27.07.[64] *Ukrenergo* explained that according to the minutes of the meeting in June 2014 only *Ukrinterenergo* is entrusted with performing transit of electricity. In the absence of any exemption approved by the Ministry, only *Ukrinternerego* could use cross-border capacities for transit, as it has been entrusted with the right to transit by the Ministry.[65]

(32) In reply to a similar request for using interconnectors' capacities for transit in August 2015,[66] *Ukrenergo* changed its view as to the applicability *rationae temporis* of the capacity allocation rules. In contrast to its earlier views, not the Auction Rules of 2015[67] but those of 2012 were to be applied.[68] Import and transit of electricity through Ukraine, however, were not considered subject to the Auction Rules of 2012 by *Ukrenergo*, because those rules were only governing allocation of cross-border capacity for export of electricity. As legal basis for its actions, *Ukrenergo* referred to a letter from the Ministry from December 2012, in which the Ministry stipulated that the use of available transmission capacity of interconnectors for transit and import of electricity has to be determined by instructions of the Ministry.[69]

b. Minutes of a meeting as a binding public act

(33) In September 2015,[70] Kyiv Economic Court of Appeal decided a case of a trader concerning a refusal by *Ukrenergo* for transit of electricity. The refusal was also based on the minutes of the meeting in the Ministry of Energy and Coal Industry of Ukraine of 17 June 2014. In that judgment, the Kyiv Economic Court of Appeal ruled that the minutes of the meeting were not an administrative or legal act issued by the Ministry, but represented a report on the progress of the meeting. It lacked any binding force upon the undertakings signing it. Furthermore, the Court ruled that in the minutes of the meeting, there was no exclusive entrustment of *Ukrinterenergo* as the only undertaking in charge of performing transit of electricity via Ukraine. The Court finally decided that by refusing the schedules for transit, *Ukrenergo* violated the contract that it had signed with that company governing the provision of dispatching and electricity transmission services via the Burshtyn Island, and concluded to execute foreign economic contracts for transit.

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[57] *ERU Trading* letter to the Ministry of Energy and Coal Industry of Ukraine, No. 1/01-1153, dated 16.07.2015.
[58] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1159, dated, 16.07.2015; *ERU Trading* letter to *Ukrenergo*, No. 1/01-1179, dated 23.07.2015.
[59] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1160, dated, 17.07.2015.
[60] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1161, dated, 20.07.2015.
[61] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1174, dated, 21.07.2015.
[62] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1175, dated, 22.07.2015.
[63] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1179, dated, 23.07.2015.
[64] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1187, dated, 27.07.2015.
[65] On 04.08.2015, *Ukrenergo* replied to *ERU Trading* with a reference to its letter dated 27.07.2015.The substance of the answer was identical to the reply in the letter dated 23.07.2015.
[66] *ERU Trading* letter to *Ukrenergo* and the Ministry of Energy and Coal Industry of Ukraine, No.1/01-1214/1, dated 27.08.2015.
[67] *Ukrenergo* letter to *ERU Trading*, No. 01/01-6/10429, dated 09.09.2015.
[68] Based on the time when applications for using interconnectors' capacity were submitted, and even though the 2015 Rules date from February 2015.
[69] Ministry of Energy and Coal Industry of Ukraine letter to *Ukrenergo*, No. 03/32-5487, dated 12.12.2012.
[70] Kyiv Economic Court of Appeal, No. 910/28218/14, dated 16.09.2015.

(34) *Ukrenergo* filed an appeal to the Supreme Economic Court of Ukraine with a request to cancel the decision of the Court of Appeal from September 2015, which the Supreme Economic Court did. On 12 January 2016, the Supreme Economic Court of Ukraine decided that based on the Record Keeping Instructions of central office of the Ministry as approved by Decree of the Ministry of Energy and Coal Industry,[71] minutes of a meeting (or protocols) are among the forms of adoption and record decisions of a Ministry.[72] They thus qualify as a legal basis for *Ukrenergo*'s follow-up actions.

(35) The Supreme Economic Court of Ukraine also decided that pursuant to the Electricity Sector Law[73] and the fact that *Ukrenergo* is a state undertaking subordinated to the Ministry, the latter's decisions are binding on *Ukrenergo*. The Court concluded that the decision of the Ministry imposing an obligation on *Ukrinterenergo* for ensuring the performance of transit of electricity constituted "*an inevitable circumstance"* for the state undertaking *Ukrenergo*, i.e. an event that did not depend on *Ukrenergo* and that the latter could not foresee at the time of entering in agreement with the trader concerned.[74] The Ministry's act constitutes *force majeure* (the definition of which includes „acts of Government") that allowed *Ukrenergo* to terminate the contract with the claimant without any liability for not performing its obligations under that contract.[75]

(36) On 12 April 2016, the claimant appealed to the Supreme Court of Ukraine to review the Decision adopted by Supreme Economic Court. As a court of final instance, the Supreme Court of Ukraine dismissed the appeal and upheld the judgment of the Supreme Economic Court of Ukraine.[76]

c. Other relevant facts

(37) In addition to the applications for transit to *Ukrenergo*, as well as to the Ministry for obtaining an approval for transit, a complaint has also been lodged to the Antimonopoly Committee (*AMCU*) of Ukraine in August 2015.[77] The complaint alleged that by refusing the schedules for transit of electricity submitted by *ERU Trading*, *Ukrenergo* violated the competition rules and abused its dominant position.[78] In December 2015, *AMCU* informed the complainant that it has addressed the Ministry requesting clarification concerning the transit of electricity, but too date, no reply has been received by the Ministry and no further action has been taken by the AMCU.

[71] Decree of Ministry of Energy, No.603 as of 09.08.2012.
[72] Points 48-51 of the Decision of the Supreme Economic Court in case No.910/28218/14 as from 12.01.2016 available at: http://reyestr.court.gov.ua/Review/55047776 (15.05.2018).
[73] Namely Article 8(1) of the Electricity Sector Law, according to which state regulation in the electricity sector is performed by the Ministry of Energy and Coal Industry.
[74] Point 59 of the Decision of Supreme Economic Court of Ukraine in case No.910/28218/14, *supra.*
[75] Based on para.7.1 of the agreement between *Ukrenergo* and LLC Trade Electricity Company, No.3 01/5579-13, dated 30.12.2013 which was beforehand approved by the letter of the Ministry of Energy, No. 04/13-4779, dated 24.12.2013.
[76] The judgment is available at: http://reyestr.court.gov.ua/Review/57403129 (15.05.2018).
[77] *ERU Trading* complaint to the Antimonopoly Committee of Ukraine, No. 1/01-1200, dated 06.08.2015
[78] On 25.08.2015, the AMCU requested additional documents from *ERU Trading* (Antimonopoly Committee of Ukraine letter to *ERU Trading*, No. 128-29/01-8881, dated 25.08.2015,) which the latter submitted on 21.09.2015 (*ERU Trading* supplement to the complaint to the Antimonopoly Committee of Ukraine, No. 1/01-1315, dated 06.08.2015).

(38) On 3 February 2017, the Secretariat addressed requests for information and explanation concerning transit of electricity to the Ministry of Energy and Coal Industry[79] to which the Ministry replied on 4 April 2017. In its reply,[80] the Ministry explained that *Ukrenergo* has to allocate all available capacity, but that imports are performed only in cases where the Ministry decides that there is a need for importing electricity in the annual balance. Therefore, since the Ministry decided in the annual balance that there is no need to import electricity, no allocation of capacity has been performed for the purpose of import for 2017. Such approval from the Ministry is necessary in order for *Ukrenergo* to allocate capacity for import, and to accept nomination of capacity for flow of electricity towards Ukraine (import).

(39) The Order of the Ministry of 2016 approving the procedure for preparing the annual and monthly balance of electricity is still in force.[81] The Ministry has changed the yearly forecast balance three times for 2017,[82] no import was envisaged.[83] No import has been planned in any of the monthly balances adopted by the Ministry either.[84]

(40) Despite the fact that no import was planned in the Ministry's approved balances, during several months of 2017, the results of auctions organized for allocating cross-border capacity published on the website of *Ukrenergo* show that capacity was allocated for import as well. Namely, in the months from June to September 2017 some allocation of capacity was taking place for import as well.[85] Nonetheless, no nomination could be done for using the interconnectors' capacity in direction of import, which in fact deprived simultaneous use of capacity allocated for import and export for transit purposes. This has also been confirmed by an audit report from the audit chamber of the Ukrainian Parliament from December 2017 (the Audit Report).[86] The Audit Report noted that imports have only been carried in 2015, by *Ukrinterenergo* based on an order from the Cabinet of Ministers,[87] and capacity was provided by *Ukrenergo* based on an Order from the Ministry of Energy and Coal Industry.[88]

(41) Regarding transit, the Ministry explained that an undertaking applying for interconnectors' capacity for the purposes of transit has to have contracts with foreign undertakings, an agreement with *Ukrenergo* as well as an agreement with *Energorynok*. Due to the fact that the Auction Rules of 2015 and their amendments of 2017 do not stipulate a procedure for allocation of cross-border capacity for the purpose of transit, *Ukrenergo* has to follow the

[79] ANNEX 2, ECS Letter to Ministry of Energy and Coal Industry of Ukraine dated 3 February 2017
[80] ANNEX 3, Letter from the Minister, Information from the Ministry of Energy and Coal Industry of Ukraine on cases No. ECS-1/12 and No. ECS-8/15 concerning the issue of cross-border allocation of transmission capacities relating to electricity import and transit organized and implemented by transmission system operator NEC *Ukrenergo* SE, dated 04.04.2017.
[81] Order of the Ministry, No.521, dated 26.08.2016, *supra*.
[82] See: http://mpe.kmu.gov.ua/minugol/control/uk/publish/officialcategory?cat_id=245183250 (15.05.2018)
[83] The changes concerned: the forecast of the generation volumes from NPPs, HPPs was increased and volumes of generation from TPPs and CHPS was decreased in December's version of balance; the export was decreased.
[84] See: http://mpe.kmu.gov.ua/minugol/control/uk/publish/officialcategory?cat_id=245183250 (15.05.2018)
[85] See: https://auctions.ua.energy/Public/Default.aspx?UC_CODE=UC001SysNews (15.05.2018)
[86] Audit Chamber "REPORT on results of the audit of the effectiveness of the management by Ministry of energy and coal industry of Ukraine objects of state property in the field of transit, export and import of energy carriers", approved by Decision of Audit Chamber No. 26-5, dated 19.12.2017 (in Ukrainian).
[87] Cabinet of Ministers of Ukraine, No.1188-p, 05.12.2014.
[88] Ministry of Energy and Coal Industry, "On some measures on the market of electric energy, No. 887 from 26.12.2014. The Ministry ordered *Ukrenergo* to provide the possibility of importing electricity from a parallel operating grid Russia in the amount of up to 1500 MW for the period from 27.12.2014 to 31.12.2015.

Decision of the Ministry, i.e. the minutes of the meeting of 2014. Those Minutes constitute the Ministry's decision to entrust *Ukrinterenergo* with performing electricity transit for the period until the settlement of the issue relating to allocation of transmission capacity through the network in the Burshtyn Island. Moreover, the Audit Report of December 2017 confirmed that *Ukrinterenergo* was the only company that performed transit of electricity from / to Romania, Slovakia, Hungary and the cost of dispatching services and the transportation of electricity corresponded to the tariff set for by NEURC Regulations.[89]

(42) The auctions results performed by Ukrenergo, in few months (June – August 2017) reveal that capacity has been allocated for both export and import to the same undertaking (other than *Ukrinterenergo*) at times.[90]

(43) However, the complainant *ERU Trading* confirmed that no commercial transit has taken place in practice because the allocated capacity for import could not be nominated, and no capacity could be nominated for transit (i.e. simultaneous export and import). *Ukrenergo* does not accept nominations for import (electricity flow to Ukraine) or transit (simultaneous nomination of export and import) because no undertaking, besides *Ukrinterenergo* has an agreement with *Energorynok* for purchasing electricity from imports, if the imports are not planned for the respective year in the energy balance as prepared by the Ministry of Energy and Coal Industry. In addition, a template contract for dispatching of transit has been prepared by *Ukrenergo* and has been submitted to NEURC for approval. Such a contract would need to be signed by the market participants and *Ukrenergo* so that they could accept nominations for transit of electricity when capacity is allocated for both import and export. No legal basis for such a template contract for transit exists in the primary and secondary legal acts in Ukraine.

(44) The Audit Report from December 2017 however, revealed that transit was taking place each year in the investigated period, from 2015 to the first nine months of 2017. The largest volume of transit was in direction Slovakia - Hungary (1718.9 thousand MWh in the amount of 1022.4 thousand euros), whereas the smallest transit was in the direction of Romania-Slovakia (16.0 thousand MWh at an amount of 83.4 thousand euros).[91] Total transit of electricity during the investigated period amounted to 2314.3 thousand MWh. For the provision of transit of electricity, *Ukrinterenergo* received 14.2 million euros.[92]

(45) To sum up, only export of electricity is being performed at the moment on commercial basis and in a market-based procedure. Even *Ukrinterenergo* participates to capacity allocation auctions for export of electricity.[93] In addition, based on the minutes of the meeting from July 2014, as confirmed by the Ministry of Energy and Coal Industry, only *Ukrinterenergo* can perform transit and can obtain all unused capacity at daily auctions for free (without participating to auctions and requiring capacity). *Ukrinterenergo* could decide whether it needs the capacity for transit or not, meaning that transit of electricity is still not performed on a commercial basis.

[89] Audit Report, p. 29.
[90] See results for months June, July and August 2017.
[91] Audit Report, p.29.
[92] *Ibid,* p.40.
[93] See auction results for December 2017.

(46) Since only a maximum of 650 MW of electricity could be exported from Burshtyn island and on the other hand capacity at interconnectors is much higher (amounting to 1600 MW as explained above), in cases where more electricity is exported less capacity is available after daily auctions, whereas in cases where there is less export, Ukrinterenergo obtains more capacity for free.

(47) As noted in the minutes of the meeting that took place in Vienna on 18 July 2017, even though the Auction Rules could further be amended by adding "[M]*arket participants which get allocation capacity rights for import and export in one synchronous zone can use this capacity for providing transit operation*," the breaches identified by the Secretariat in the Opening Letter in the present case could not be fully rectified, because of the link of capacity allocation for transit with the electricity market model in place.

(48) Finally, upon a request for information from the Secretariat, *Ukrenergo* – in an email response dated 29 March 2018[94] - informed that that the Auction Rules as amended in 2017 are still in force and applied in Ukraine. Based on the Electricity Market Law of 2017, *Ukrenergo* informed that they are working on a revision of those rules. Furthermore, *Ukrenergo* also informed that on the 21 February 2018 there was a multilateral meeting between *Ukrenergo* – *MAVIR* – *Transelectrica* – SEPS, at which it was decided to implement joint auctions. As of importance for the present case, concerning the allocation of interconnectors' capacity for transit of electricity, *Ukrenergo* confirmed that *Ukrinterenergo* is still the single undertaking, which based on the Minutes of the meeting from 17 June 2014, is the only supplier able to obtain such capacity.

II. Relevant Energy Community Law

(49) Energy Community Law is defined in Article 1 of the Dispute Settlement Procedures as "*a Treaty obligation or* […] *a Decision or Procedural Act addressed to* [a Party]." A violation of Energy Community Law occurs if "[a] *Party fails to comply with its obligations under the Treaty if any of these measures (actions or omissions) are incompatible with a provision or a principle of Energy Community Law*" (Article 3(1) Dispute Settlement Procedures).

(50) In the following, a selection of provisions of Energy Community law relevant for the present case is compiled. This compilation is for convenience only and does not imply that no other provisions may be of relevance for legal assessment hereto.

(51) Article 6 of the Treaty reads:

> *The Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. The Parties shall facilitate the achievement of the Energy Community's tasks. The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.*

[94] ANNEX 4.

(52) Article 11 of the Treaty reads:[95]

The "acquis communautaire on energy", for the purpose of this Treaty, shall mean (i) the Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity […] and (iii) the Regulation 1228/2003/EC of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity.

(53) Article 41 of the Treaty reads:

1. Customs duties and quantitative restrictions on the import and export of Network Energy and all measures having equivalent effect, shall be prohibited between the Parties. This prohibition shall also apply to customs duties of a fiscal nature.

2. Paragraph 1 shall not preclude quantitative restrictions or measures having equivalent effect, justified on grounds of public policy or public security; the protection of health and life of humans, animals or plants, or the protection of industrial and commercial property. Such restrictions or measures shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties.

(54) Article 3(1) of Directive 2003/54/EC ("Public service obligations and customer protection") reads:

Contracting Parties shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in electricity, and shall not discriminate between those undertakings as regards either rights or obligations.

(55) Article 12(f) of Directive 2009/72/EC ("Tasks of transmission system operators") reads:

Each transmission system operator shall be responsible for:

[…]

(f) ensuring non-discrimination as between system users or classes of system users, particularly in favour of its related undertakings.

(56) Article 32(1) of Directive 2009/72/EC ("Third-party access") reads:

Contracting Parties shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Contracting Parties shall ensure that those tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 37 and that those tariffs, and the

[95] Article 11 EnCT has been amended by Decision of the Ministerial Council of the Energy Community D/2011/02/MC-EnC and it introduces an obligation for the Contracting Parties to adopt Directive 2009/72/EC and Regulation (EC) No714/2009 by 1 January 2015. By then, the Contracting Parties have to comply with Directive 2003/54/EC and Regulation (EC) No 1228/2003.

methodologies - where only methodologies are approved - are published prior to their entry into force.

(57) Article 37(1)a) of Directive 2009/72/EC ("Duties and powers of the regulatory authority") reads:

The regulatory authority shall have the following duties:

(a) fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies.

(58) Article 1 of Regulation (EC) 714/2009 reads:

This Regulation aims at:

(a) setting fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal market in electricity, taking into account the particular characteristics of national and regional markets. This will involve the establishment of a compensation mechanism for cross-border flows of electricity and the setting of harmonised principles on cross-border transmission charges and the allocation of available capacities of interconnections between national transmission systems.

(b) facilitating the emergence of a well-functioning and transparent wholesale market with a high level of security of supply in electricity. It provides for mechanisms to harmonise the rules for cross-border exchanges in electricity.

(59) Article 2(1) of Regulation (EC) 714/2009 reads:

"interconnector" means a transmission line which crosses or spans a border between Contracting Parties and which connects the national transmission systems of the Contracting Parties.

(60) Article 16(1) of Regulation (EC) 714/2009 ("General principles of congestion management") reads:

Network congestion problems shall be addressed with non-discriminatory market-based solutions which give efficient economic signals to the market participants and transmission system operators involved. Network congestion problems shall preferentially be solved with non-transaction based methods, i.e. methods that do not involve a selection between the contracts of individual market participants.

(61) Article 19 of Regulation (EC) 714/2009 ("Regulatory authorities") reads:

The regulatory authorities, when carrying out their responsibilities, shall ensure compliance with this Regulation and the Guidelines adopted pursuant to Article 18.[96]

(62) Section 2.1 of the Congestion Management Guidelines („Congestion-management methods") reads:

[96] As adopted by the Permanent High Level Group under Procedural Act No 01/2012 PHLG-EnC of the Permanent High Level Group.

Congestion-management methods shall be market-based in order to facilitate efficient crossborder trade. For that purpose, capacity shall be allocated only by means of explicit (capacity) or implicit (capacity and energy) auctions. Both methods may coexist on the same interconnection. For intra-day trade continuous trading may be used.

(63) Article 3(2) of the Dispute Settlement Procedures reads:

Failure by a Party to comply with Energy Community law may consist of any measure by the public authorities of the Party (central, regional, local as well as legislative, administrative or judicative), including undertakings within the meaning of Article 19 of the Treaty, to which the measure is attributable.

III. Preliminary Procedure

(64) On 27 August 2015, the Secretariat received a complaint concerning allocation of interconnectors' capacities for transit of electricity by Private Enterprise Energy Resources of Ukraine (ERU Trading).[97] The complaint under Article 90 of the Treaty was registered under Case ECS-8/15. The complaint was further supplemented by a letter submitted on 22 February 2016[98] and by a list of additional documents that will be referred to in the following paragraphs.

(65) The complainant alleged that Ukraine breaches Energy Community law by requiring approval from the Ministry of Energy and Coal Industry of applications for access to interconnectors for the purpose of transit of electricity, and thus treating transit of electricity differently than export. For export, auctions for allocation of interconnectors' capacity are held by the transmission system operator *Ukrenergo* in accordance with the Auction Rules of 2015 as amended in 2017 without any involvement of the Ministry.

(66) Given the importance of non-discriminatory and market based allocation of cross-border capacity for the establishment of an internal market as pursued by the Treaty establishing the Energy Community, and it has been discussed at several occasions with the Ukrainian authorities[99] on 24 May 2017, the Secretariat sent an Opening Letter to Ukraine under Article 12 of the Dispute Settlement Procedures.[100]

(67) In the Opening Letter, the Secretariat preliminarily concluded that Ukraine fails to comply with Articles 7 and 41 of the Treaty, Articles 1, 2(1), 16(1) and 19 of Regulation (EC) 714/2009 as well as Section 2.1 of the Congestion Management Guidelines and Articles 3(1), 12(f), 32(1) and 37(1)(a) of Directive 2009/72/EC..

(68) The Opening Letter set a deadline of two months for a reply by the Government of Ukraine, i.e. by 24 July 2017. The Ministry of Energy and Coal Industry of Ukraine sent a letter to the Secretariat on 27 September 2017.[101]

[97] ANNEX 5.
[98] ANNEX 6.
[99] In addition to the issues of allocation of cross-border capacity for import, the subject of Case ECS-1/12.
[100] ANNEX 7.
[101] ANNEX 8.

(69) In its reply to the Opening Letter, the Government did not contest the presentation of the national legal and factual situation. The Secretariat's preliminary assessment expressed in the Opening Letter has not been refuted and the concerns related to non-compliance of the procedure for allocation of cross-border capacity have not been contested. The Ukrainian reply acknowledged that the Auction Rules adopted and approved by NERC of 2015, do not provide for a mechanism for allocating interconnectors' capacity for transit. Instead, *Ukrenergo* "*is guided by the decision of the Ministry of Energy and Coal Industry of Ukraine, according to which all unused transmission capacity of market participants are provided by the SFTC "Ukrinterenergo" for the implementation of the transit operations to maximize transmission capacity*."

(70) The question of the allocation of capacity for electricity transit has also been discussed during a meeting held in Vienna on 18 July 2017 with representatives of *Ukrenergo* and the Energy Community Secretariat. Both the minutes of the meeting held on 18 July 2017[102] and the Government's reply, acknowledge the need to base the allocation of cross-border capacity for transit on market principles on the basis of auctions. "*There is a need for the Ukrainian side to adopt an appropriate solution that would allow the allocation of capacity for the transit of electricity by market principles on auctions basis*," including via amendment to the Auction Rules.

(71) Having assessed the information and arguments put forward in the Reply, as well as all the follow-up activities undertaken after the Opening Letter, the Secretariat considers that the argumentation provided therein as well as the development in electricity sector reform until today do not change its finding of an infringement of Energy Community law.

(72) As all efforts made over the last years, including the attempts to make the primary legislation compatible with Energy Community law, did ultimately not result in fully rectifying the breaches identified in the Opening Letter, the Secretariat on 15 March 2018 submitted a Reasoned Opinion in the present case.[103]

(73) The Secretariat concluded that Ukraine continues to breach its obligations under the Treaty related to non-discriminatory and market based allocation of cross-border capacity, in particular Article 41 of the Treaty, Articles 3(1), 12(f) and 32(1) of Directive 2009/72/EC and Articles 16(1) and 19 of Regulation (EC) 714/2009 as well as Section 2.1 of the Congestion Management Guidelines.

(74) Ukraine submitted a Reply to the Reasoned Opinion on 15 May 2018.[104] The Reply does not dispel the concerns and breaches identified by the Secretariat in the Reasoned Opinion. It rather explains the legislative and regulatory framework in place, and the reasons why non-discriminatory allocation of capacity at interconnectors is not possible in Ukraine. A main reason, according to the Reply, is the lack of rules defining and governing transit within the electricity legislation. Transit (as well as export and import) in Ukraine is only defined in the tax legislation. According to the Ministry, in order for a market participant to obtain capacity for transit, it would need to perform (physical) import / sale of electricity and purchase / export of electricity, and *Ukrenergo* would need to prepare customs documentation, which *Ukrenergo* would not be able to do because there is no physical transfer or goods. At the

[102] ANNEX 9
[103] ANNEX 10.
[104] ANNEX 11.

same time, the Ministry submits that transit is not defined in the legislation in force. In particular, it explains that neither the Electricity Market Law of 2013 and the Auction Rules of 2015, nor the new Electricity Market Law of 2017 and the Auction Rules as amended in 2017, govern capacity allocation for the purpose of transit. The Reply also refers to a new draft Congestion management rules and interconnections' capacity allocation submitted by *Ukrenergo* to NEURC for approval in August 2017 that aim at defining transit. However, those rules not yet approved by NEURC (and have been revised by *Ukrenergo* after the public discussion), and the draft NEURC Resolution on approval of those rules subjected to public consultation in March 2018, do not contain provisions on transit.

(75) While it is true that transit is not defined in the electricity legislation in force in Ukraine, capacity allocation for transit purposes is not prohibited either. Since also the Reply to the Reasoned Opinion admitted that according to the legislation in force in Ukraine, transit could not be performed in a compliant manner, the Secretariat decided to refer this case to the Ministerial Council for a Decision.

IV. Legal Assessment

(76) According to Article 3(2) of the Dispute Settlement Procedures of 2015, a failure by a Party to comply with Energy Community law may consist of any measure by the public authorities of the Party, including undertakings within the meaning of Article 19 of the Treaty. Therefore, the actions of *Ukrenergo* are attributable to Ukraine and may constitute an infringement of Energy Community law by that Party.

(77) In the following, the Secretariat will assess the legal framework as well as the actions by *Ukrenergo* in light of Ukraine's obligations under the Treaty.

1. Introduction and relationship between Cases ECS-8/15 and ECS-1/12

(78) The subject-matter of Case ECS-8/15 involves issues of non-compliance by the existing legislation and its application in Ukraine with the Energy Community *acquis communautiare* related to allocation of cross-border capacity for transit of electricity. In concrete terms, linking the allocation of cross-border capacity with the undertakings' participation to, and the functioning of, the WEM the different treatment of interconnectors' capacities allocation for export on the one hand, and import and transit on the other hand, as well as requiring the Ministry's approval for the latter two activities constitute breaches of Energy Community law in the Secretariat's assessment.

(79) The Secretariat further notes that despite the adoption of the new Electricity Market Law of 2017, and in particular the amendments to Article 30 of the Electricity Sector Law of 1998, as well as the adoption of Auction Rules in 2017, their application by *Ukrenergo* in line with the electricity market model in place in Ukraine fails to comply with Energy Community law. The

Ministerial Council has already expressed itself on the compliance of the current regime for allocation of cross-border capacity for electricity in Ukraine in Case ECS-1/12.[105]

(80) Case ECS-1/12 concerned different rules applicable to the allocation of capacity on interconnectors depending on the directions of electricity flow. The domestic provisions under scrutiny in Case ECS-1/12 were Article 30(1) of the Electricity Sector Law of Ukraine, as well as Article 1(1) and 1(12) of the Auction Rules of 2012. While this breach has been partially rectified by the adoption of the new Auction Rules of December 2015, and then amended in 2017 in practice, imports are still to be performed upon approval by the Ministry of Energy and Coal Industry of Ukraine based on approval of the energy balance.[106]

(81) Allocation of cross-border capacity for transit of electricity has not been subject to Case ECS-1/12. While under Energy Community rules, allocating capacity for transit would consist of nominating capacity for import and export at the same time,[107] in Ukraine transit is considered a separate category[108] to which a procedure and approval different than for export applies.

(82) The actions of *Ukrenergo* and its refusals to allocate capacity for the purpose of transit are based on Ministry's letter of 2012 and minutes of a meeting from 2014, which are not relevant for the actions of *Ukrenergo* concerning export and import, as decided by the Ministerial Council in Case ECS-1/12. Another peculiarity of the present case concerns the fact that *Ukrinterenergo* was given the exclusive right to obtain interconnectors' capacity for transit.

(83) The two cases could not be joined under Article 6 of the Dispute Settlement Rules[109] without expanding the scope of Case ECS 1/12 in excess of what is allowed under the case-law of the Court of Justice.[110] Hence the Secretariat decided to pursue the present case separately from Case ECS-1/12. [111]

(84) Based on a Reasoned Request by the Secretariat,[112] and following the Opinion of the Advisory Committee dated 25 September 2017, the Ministerial Council adopted a decision

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[105] Ministerial Council Decision 2018/02/MC-EnC on the failure of Ukraine to comply with the Energy Community Treaty in Case ECS-1/12, 02.02.2018.

[106] This has been confirmed also by the Letter from the Ministry of Energy and Coal Industry to the Secretariat, dated 04.04.2017, as well as by the Reply to the Opening Letter in Case ECS-8/15.

[107] Transit of electricity is defined by Article 2(e) of Regulation (EC) 714/2009 as a „circumstance where a declared export of electricity occurs and where the nominated path for the transaction involves a country in which neither the dispatch nor the simultaneous corresponding take-up of the electricity will take place."

[108] The entrustment of *Ukrinterenergo* with right to access cross-border capacity for the purpose of transit is done with a Ministry's decision in the minutes of the meeting of 2014 because the Auction Rules do not govern transit, and such entrustment is done „for the period until the issue with transit is settled."

[109] Article 6 Dispute Settlement Procedure reads: *"If several pending cases concern the same subject matter, they may be consolidated and processed under the same case number."*

[110] The Opening Letter „*delimits the subject-matter of the dispute, so that it cannot thereafter be extended, ... the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure.*", C-51/83 *Commission v Italy*, [1984] ECR, paras.4-5; Case C 191/95 *Commission v Germany* [1998] ECR I 5449, para. 55, Case C 422/05 *Commission v Belgium* [2007] ECR I 0000, para. 25; Case C 186/06, *Commission v. Spain,* (2007) I-12093, para. 15.

[111] Joined Cases 209/78 and 218/78, *Heintz van Landewyck SARL and* others (FEDETAB) v Commission of the European Communities, [1980] ECR 3125, paras 29 and 32

[112] Reasoned Request in Case ECS-1/12, 19.05.2017.

that "*by maintaining in force its current regime for allocation of cross-border capacity for electricity, Ukraine failed to fulfil its obligations under the Energy Community Treaty, and in particular Article 41 thereof, Articles 3(1), 12(f) and 32 of Directive 2009/72/EC, Article 16(1) of Regulation (EC) 714/2009 as well as Sections 1.1; 1.6; 2.1; 2.5, 2.10 and 2.13 of the Congestion Management Guidelines as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011*."

2. Substance

a. Breach of Articles 3(1), 12(f) and 32(1) of Directive 2009/72/EC

(85) The allocation of interconnection capacity for transit based on a unilateral administrative action of the Ministry[113] fails to respect the principle of third party access to the transmission network as stipulated by Articles 12(f) and 32(1) of Directive 2009/72/EC. These provisions require that access to the networks is granted without discrimination and based on published tariffs.

(86) The principle of non-discrimination requires that comparable situations are not treated differently unless such difference in treatment is objectively justified.[114] As an overriding principle of Energy Community law, it is reflected throughout the *acquis communautaire*. Article 7 of the Treaty *prohibits any discrimination* within the scope of the Treaty. As "*specific expressions of the general principle of equality*",[115] the *acquis* places further obligations not to discriminate on both the transmission system operator and on the State.[116] In the present case, discrimination occurs in two instances:

(87) Firstly, allocation of cross-border capacity for export is performed by *Ukrenergo* under the Auction Rules of 2017. On the other hand, allocation of electricity for import is performed subject to approval by the Ministry of Energy and Coal Industry and only in case the electricity balance requires import of electricity for satisfying the domestic demand, thus excluding allocation of cross-border capacity for commercial imports.[117] This amounts to discrimination and was deemed unlawful by the Ministerial Council in Case ECS-1/12.

(88) Similar to imports, cross-border capacity for transit of electricity is exclusively provided to the State-owned undertaking *Ukrinterenergo* without performing auctions, because this is the only undertaking allowed to execute contracts with foreign undertakings for the purpose of transit of electricity, and *Ukrenergo* was instructed to accept only its requests for interconnectors' capacity for transit.

(89) Based on the Ministry's decision (contained in the minutes of the meeting of 2014), *Ukrenergo* thus applies different procedures for allocating cross-border's capacity for transit than for exports. Allocation of cross-border capacity is thus performed through different procedures based on the directions of the flow of electricity. While for export *Ukrenergo*

[113] Legal value of the minutes of the meeting of 2014, as an administrative act, has been confirmed by the highest court of Ukraine, as well as by the Ministry in its Reply to the Secretariat in a letter dated 04.04.2017.
[114] C-17/03 *Vereniging voor Energie, Milieu en Water* (VEMW) [2005] ECR I-4983, para. 48.
[115] Case C-17/03 *VEMW* [2005] ECR I-4983, para. 47.
[116] Case C-17/03 *VEMW* [2005] ECR I-4983, paras. 35 and 36.
[117] Despite the changes in the applicable legal framework, in practice such approval is still required. See Reasoned Opinion in Case ECS-1/12, p.18, para.102. See also Ministry's Letter to the Secretariat dated 04.04.2017

conducts auctions as market-based procedures and accepts bids from different undertakings, for transit, *Ukrenergo* applies a non-market based procedure. According to the case law of the Court of Justice, "*elements which characterize the comparability of different situations must be assessed in the light of the subject matter and purpose of the Community act which makes the distinction in question*."[118] As explained above, Energy Community law considers the flow of electricity, irrespective of the direction (import, export or transit), as a flow of electricity crossing borders (interconnectors) between two Parties of the Treaty. Therefore, energy undertakings applying for using the interconnector capacity must be treated equally irrespective of the direction and the flow of electricity.

(90) Even though since June 2017, *Ukrenergo* started allocating capacity for import no simultaneous capacity is awarded for import and export (i.e. transit) is performed. Namely, *Ukrenergo* cannot accept nominations for transit (or import in general) because this right has been exclusively given to *Ukrinterenergo*, and also because no energy undertaking (other than *Ukrinterenergo*) has contracts with *Energorynok* (for selling the imported electricity in the case of imports or for purchasing for losses in the case of transit via Burshtin island). As the Audit Report of the Ukrainian Parliament from December 2017 indicated, transit has only been performed by *Ukrinterenergo* without being subject to any competitive allocation of capacity and on non-commercial basis.

(91) Secondly, the procedure for allocating interconnector capacities for the purpose of transit in Ukraine is in itself discriminatory. The decision taken in the form of minutes of a meeting held in the Ministry to *Ukrinterenergo* constitute preferential access to interconnectors' capacity in Ukraine granted to that company. The Court of Justice of the European Union, whose case law is the point of reference for the interpretation of Energy Community law under Article 94 of the Treaty, held in a judgment concerning preferential capacity allocation on electricity interconnectors that such priority access amounts to different treatment, and that such treatment could not be justified on account of the underlying long-term electricity supply contracts concluded in performing a public service obligation.[119]

(92) According to the Court of Justice, reserving capacity to the benefit of certain system users deprives all other actual or potential system users of the possibility to access the network for that particular capacity. It thus puts them at significant disadvantage in comparison to the undertakings benefiting from the preferential access to the system. Maintaining in practice a procedure under which the available interconnector capacity necessary for transit of electricity is allocated to only one system user, *Ukrinterenergo*, encroaches upon the non-discriminatory principle as it treats that particular system user differently in conferring it an advantage to the detriment of all other actual or potential users.

(93) Both instances result in a breach of Energy Community law, namely Article 3(1) of Directive 2009/72/EC which requires Contracting Parties *not to discriminate between electricity undertakings* as regards either rights or obligations; Article 32(1) of Directive 2009/72/EC which requires them *to ensure access to the transmission* system for all third parties in an objective manner and *without discrimination*; Article 12(f) Directive 2009/72/EC according to which the transmission system operator is responsible for *ensuring non-discrimination* as between system users or classes of system users, particularly in favor of its related

[118] Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others v. Premier minister,* ECLI: EU: C: 2008:728, para.26.
[119] Case C-17/03 *VEMW* [2005] ECR I-4983, paras. 50-56.

undertakings. These actions also encroach upon Article 7 of the Treaty, which as the Advisory Committee held in its Opinion in Case ECS-1/12, is a "*subsidiary remedy if there are no more specific Treaty provisions available*."

(94) Under Article 3(2) of the Dispute Settlement Rules, a violation of Energy Community law by *Ukrenergo* is attributable to Ukraine as a Contracting Party. Consequently, the Secretariat submits that Ukraine has failed to comply with its obligations under Articles 3(1), 12(f) and 32(1) of Directive 2009/72/EC. The Secretariat recalls that that conclusion has already been supported with regard to different treatment of exports and imports by the Advisory Committee, in its Opinion in Case ECS-1/12.[120]

(95) Article 3(14) of that Directive provides a possibility for derogation from Article 32(1) of Directive 2009/72/EC[121] "*insofar as* [its] *application would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest and insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the Energy Community."*

(96) In order to be justifiable, any such obligation imposed in the general economic interest would also need to comply with Article 3(2) of Directive 2009/72/EC. In particular, any such obligation *"shall be clearly defined, transparent, non-discriminatory,[122] verifiable and shall guarantee equality of access for EU electricity companies to national consumers….",* and would have to comply with the limits of the principle of proportionality. The latter requires priority capacity allocation to be suitable to achieve the public service objective in question, and not go beyond what is necessary to achieve that objective.

(97) Furthermore, the Court of Justice emphasised in its *VEMW* judgment that the effect of a discriminatory measure such as priority capacity allocation would significantly imperil and even block the access of new operators to the market, and protect the position of companies in the situation of *Ukrinterenergo* against competition. Granting priority access to transmission capacity thus jeopardises "*contrary to the objective of the Directive, the transition from a monopolistic and compartmentalised market in electricity to one that is open and competitive*."[123] Moreover, the Secretariat cannot accept that minutes of a meeting held in the Ministry of Energy and Coal Industry could serve as a lawful basis for the imposition of any public service obligation to *Ukrinterenergo* for performing transit of electricity.

(98) It is to be noted that even throughout the preliminary procedure in Case ECS-1/12,[124] Ukraine did not invoke any exemption from the principle on non-discriminatory access to interconnectors for imports due to reasons of ensuring public service obligations. It has also not done so in its Reply to the Opening Letter in the present case. Yet it is for the Contracting Party concerned to not only invoke and sustain possible justification grounds for a discriminatory priority access scheme such as the one at issue, but also to show that all conditions required – in particular those set by Articles 3(14) and 3(2) of Directive 2009/72/EC – are fulfilled. In the Secretariat's view, even if a legitimate public interest in banning commercial imports existed, satisfying the conditions of Article 3(2) of Directive

[120] Advisory Committee Opinion in Case ECS-1/12, p.5.
[121] But not Article 12(f) of Directive 2009/72/EC.
[122] The Secretariat submits that, in the context of the present case, this criterion relates to how the wholesale public supplier and the retail public supplier, benefiting from preferential treatment, were assigned their respective functions.
[123] Case C-17/03 *VEMW* [2005] ECR I-4983, para. 62.
[124] As noted in the Reasoned Request in Case ECS-1/12, para.90.

2009/72/EC as well as proportionality and non-discrimination would not be possible in the case at hand.

(99) Furthermore, the Court of Justice emphasized in its *VEMW* judgment that the effect of a discriminatory measure such as priority capacity allocation would significantly imperil and even block the access of new operators to the market, and protect the position of companies, *in casu* the ones based on the territory of the Burshtyn island, against competition. Granting priority access to transmission capacity thus jeopardises "*contrary to the objective of the Directive, the transition from a monopolistic and compartmentalised market in electricity to one that is open and competitive*."[125]

b. Breach of Article 16(1) of Regulation (EC) 714/2009 and Section 2.1. of the Congestion Management Guidelines

(100) Article 16(1) of Regulation (EC) 714/2009 requires that network congestion problems are addressed with non-discriminatory, market-based solutions which give efficient economic signals to the market participants and transmission system operators. In addition, Section 2.1 of the Congestion Management Guidelines specifies that congestion management methods shall be market-based and capacity shall be allocated only by means of explicit (capacity) or implicit (capacity and energy) auctions.

(101) According to its Article 1, Regulation (EC) 714/2009 aims at setting fair rules for the allocation of available capacities of interconnections between national transmission systems, in line with objective of establishing a harmonised framework for cross-border exchanges of electricity. Article 2(1) of Regulation (EC) 714/2009 defines interconnector as "*a transmission line which crosses or spans a border between*" two Member States. When Regulation (EC) 714/2009 was adapted in line with Article 24 of the Treaty, and adopted as Energy Community law, the notion of interconnectors in Article 1 was defined as transmission lines or pipelines crossing a border between Contracting Parties. This excludes interconnectors between Contracting Parties and Member States, and thus all cross-border transactions from/to and via Ukraine (Burshtyn island) with EU Member States.

(102) However, on 23 September 2014, the Ministerial Council adopted a legally binding Interpretation under Article 94 of the Treaty in which it explained "that the different treatment of interconnections, cross-border flows, transactions or network capacities, depending on whether the border to be crossed is situated between two Member States of the European Union, two Contracting Parties or an EU Member State and a Contracting Party, frustrates the very idea of a single regulatory space for Network Energy and leads to barriers of trade". Article 1 of the Interpretation stipulates that

> „*In any legal act of the Energy Community incorporating European Union legislation, any reference to*
>
> *i. energy flows, imports and exports as well as commercial and balancing transactions;*
> *ii. network capacity;*
> *iii. existing or new gas and electricity infrastructure (including interconnections and interconnectors)*

[125] Case C-17/03 *VEMW* [2005] ECR I-4983, para. 62.

crossing borders, zones, entry-exit or control areas ***between Parties*** *and integrating the Contracting Party/Contracting Parties with the EU internal energy market,* ***shall be treated in the same way and be subject to the same provisions as the respective flows, imports, exports, transactions, capacities and infrastructure between Contracting Parties under Energy Community law****.*" [emphasis added].

(103) Consequently, the definition of „interconnector" from Article 2(1) of the Regulation (EC) 714/2009 can be understood as „*a transmission line which crosses or spans a border between Parties to the Treaty and which connects the national transmission systems of the Parties to the Treaty*."

(104) As described above, the Electricity Sector Law of 1998, as well as Article 1(1) of the Auction Rules of 2017 stipulate that auctions are to be held for access to cross-border capacity for export and/or import of electricity. The Electricity Sector Law and the Auction Rules do not govern the transit of electricity or the allocation of cross-border capacity at interconnectors for the purpose of transit as a separate category. As explained above, such a separate norm is not required under Energy Community law.

(105) For the transit of electricity, as detailed above, the Ministry of Energy and Coal Industry of Ukraine is tasked to give an approval. Based on a letter from the Ministry addressed to *Ukrenergo* and the minutes of the meeting from 2014, the latter does not allow private parties' access to interconnectors and prevents participation to auctions for cross-border capacity to energy undertakings without Ministry's approval. To require a unilateral administrative decision by a Ministry as a basis for the allocation of interconnectors, and not via competitive procedures such as explicit or implicit auctions, amounts to maintaining a non-market based method for capacity allocation that does not give efficient economic signals to the market participants and transmission system operators.

(106) It thus fails to comply with Article 16(1) of the Regulation (EC) 714/2009 and Section 2.1 of the Congestion Management Guidelines. This has also been held as "unquestionable" by the Advisory Committee in its Opinion in Case ECS-1/12, in relation to Ministry's approval of potential imports.[126]

c. Breach of Article 41 of the Treaty

(107) The prohibition of measures having an effect equivalent to a quantitative restriction, laid down in Article 41 of the Treaty, conflicts with any rule or measure enacted by a Party capable of directly or indirectly, actually or potentially, hindering trade among the Parties.[127] Measures requiring prior authorization, [128] even as a pure formality, [129] have been considered by the Court of Justice of the European Union as measures having equivalent effect to import restrictions. Making the transit of electricity depending on prior approval by the Ministry

[126] See: Advisory Committee Opinion in Case ECS-1/12, p.5.
[127] Case 8/74 *Procureur du Roi v Dassonville*, [1974] ECR 837, para. 5
[128] Case C-434/04 - *Ahokainen and Leppik*, [2006] ECR I-09171, para.21, 31, 35; Case C-170/04 - *Rosengren and Others*, [2007] ECR I-0407, para. 17, 18, 25, 38, 50; Case C-254/98 - *TK-Heimdienst*, [2000] ECR I-00151, para.26; Case C-389/96 - *Aher-Waggon v Bundesrepublik Deutschland*, [1998] ECR I-04473, para. 20
[129] C-54/05, *Commission v Republic of Finland*, [2007] ECR I- 02473, para.32; Case C-150/11 - *Commission v Belgium*, [2012] ECLI:EU:C:2012:539, para.51; Case C-443/10 – *Bonnarde* [2011] ECR I-09327. para.26-30

makes the transit of electricity in Ukraine more difficult than purely domestic supply and thus constitutes a measure prohibited by Article 41 of the Treaty in principle.

(108) Already in the early years of liberalization of the EU energy markets, the Court has also held that even though monopolies are not illegal *per se* they could be required to be abolished[130] if restricting free movement of goods unless such restrictions could be justified for provision of services of general economic interest, under Article 106(2) TFEU corresponding to Article 19 of the Treaty.[131] As a matter of fact, the requirement for Ministry's approval excludes the possibility of any system user from one Party of the Energy Community Treaty to sell electricity to customers in another Party via Ukraine.

(109) According to case law, it is incumbent on Ukraine to show that their rules fulfil the conditions for application of the derogating rules in Article 41(2) of the Treaty or legitimate reasons in the general interest.[132] This corresponds to the second sentence of Article 4 of the Dispute Settlement Rules whereby "*where, however, a Party invokes an exemption to a rule or general principle of Energy Community law, it is incumbent upon the Party concerned to prove that the requirements for such exemption are fulfilled*."

(110) The Secretariat therefore concludes that Ukraine is breaching Article 41 of the Treaty because its system of Ministry's approval amounts to a measure having equivalent effect to quantitative restriction. The Advisory Committee has accepted this argument in relation to Ministry's approval for imports in its Opinion in Case ECS-1/12.[133]

d. Article 19 Regulation (EC) 714/2009

(111) Under Article 19 of Regulation (EC) 714/2009, the national regulatory authority has an obligation to ensure compliance with that Regulation, including its Congestion Management Guidelines. *NEURC* has not taken later any effective remedial action to ensure compliance of the implementation of the Auction Rules by *Ukrenergo* with the *acquis communautaire*. Therefore, the Secretariat concludes that Ukraine has failed to fulfil its obligation under Article 19 of the Regulation (EC) 714/200 by the failure to remedy the violation of the infringed articles of the *acquis*. Under Article 2(2) of the Dispute Settlement Rules, a violation of Energy Community law by public authorities such as *NEURC* is attributable to Ukraine as a Contracting Party to the Treaty.

[130] Case C-393/92 *Gemeente Almelo and others v Energiebedrijf IJsselmij* [1994] ECR I-01477.
131 See the energy monopolies cases: Case C-157/94, *Commission* v *The Netherlands* (1997) ECR I-5699; Case C-158/94, *Commission* v *Italy* (1997) ECR I-5789; Case C-159/94, *Commission* v *France* (1997) ECR I-5815 and Case C-160/94, *Commission* v *Spain* (1997) ECR I-5851.
[132] Case C-159/94 Commission v France [1997] ECR I-5815, para. 94.
[133] Advisory Committee Opinion in Case ECS-1/12, p.5.

ON THESE GROUNDS

The Secretariat of the Energy Community respectfully requests that the Ministerial Council of the Energy Community declare in accordance with Article 91(1)(a) of the Treaty establishing the Energy Community that:

> by maintaining in force its current regime for allocation of cross-border capacity for transit of electricity, Ukraine fails to fulfil its obligations under the Energy Community Treaty, and in particular Article 41 thereof, Articles 3(1), 12(f) and 32(1) of Directive 2009/72/EC, Articles 16(1) and 19 of Regulation (EC) 714/2009 as well as Section 2.1 of the Congestion Management Guidelines as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

On behalf of the Secretariat of the Energy Community

Vienna, 18 May 2018

Janez Kopač
Director

Dirk Buschle
Legal Counsel/Deputy Director

List of Annexes

ANNEX 1 Minutes of the meeting concerning electricity transport and transit via the transmission network in Burshtyn island, dated 17.06.2014

ANNEX 2 ECS Letter to Ministry of Energy and Coal Industry of Ukraine dated 3 February 2017

ANNEX 3 Letter from the Minister, Information from the Ministry of Energy and Coal Industry of Ukraine on cases No. ECS-1/12 and No. ECS-8/15 concerning the issue of cross-border allocation of transmission capacities relating to electricity import and transit organized and implemented by transmission system operator NEC Ukrenergo SE, dated 04.04.2017

ANNEX 4 Email from *Ukrenergo* dated 29.03.2018

ANNEX 5 Complaint dated 27 August 2015, supplementary documents available upon request

ANNEX 6 Complaint supplement dated 22 February 2016, supplementary documents available upon request

ANNEX 7 Opening Letter of 24 May 2017

ANNEX 8 Reply to Opening Letter of 27 September 2017

ANNEX 9 Minutes of a meeting held in Vienna on 18 July 2017

ANNEX 10 Reasoned Opinion of 15 March 2018

ANNEX 11 Reply to Reasoned Opinion of 15 May 2018

Затверджено
Міністр енергетики та
вугільної промисловості
Ю. Продан
«19» червня 2014р.

Протокол

наради з питань забезпечення експорту та транзиту електроенергії електричними мережами «Острову Бурштинської ТЕС»

м. Київ

17.06.2014

Присутні: Улида В.Ю. – заступник Міністра енергетики та вугільної промисловості України; Андрійчук Ю.А. – член НКРЕ; Гнатюк Ю.Л. – директор ДП «Енергоринок»; Король Н.І. – заступник директора з правових питань ДП «Енергоринок»; Крикля С.М. – начальник відділу зовнішньоекономічних відносин ДП «Енергоринок»; Ущаповський К.В. - директор ДП «НЕК «Укренерго»; Масютка В.В. – начальник служби зовнішніх економічних відносин ДП «НЕК «Укренерго»; Кучер М.В. – перший заступник директора ДПЗД «Укрінтеренерго».

Розглянули:

1. Виділена частина ОЕС України – «Острів Бурштинської ТЕС» працює у режимі паралельної роботи з європейським енергооб'єднанням ENTSO-E, в результаті чого утворився енергетичний регіон, де діють європейські стандарти та правила роботи енергосистеми. В результаті змін енергетичних балансів окремих енергосистем виникають транзитні перетоки електроенергії між енергосистемами, при цьому, в нормативно-правовій базі цих європейських держав відсутнє поняття «транзит електроенергії» і оформлення таких перетоків здійснюється системними операторами.

Водночас, діючими нормативно-правовими актами не передбачено здійснення купівлі електричної енергії для компенсації втрат при здійсненні транзиту електроенергії системним оператором.

Реалізація транзитних поставок електроенергії мережами ОЕС України економічно доцільна та має попит у європейських контрагентів, хоча і носить ситуативний характер та залежить від кон'юнктури електроенергетичних європейських бірж. Величина транзиту електроенергії мережами ОЕС України у 2013 році фактично склала 125,01 млн. кВт.

Впорядкування цього питання на даному етапі потребує внесення змін до діючих нормативно-правових актів, які б забезпечили можливість здійснювати послугу з транзиту електроенергії безпосередньо ДП «НЕК «Укренерго».

2. Найбільш поширеним та маючим найбільший попит на європейських енергоринках є торгівля електроенергії «на добу вперед», або експорт електроенергії у режимі щодобового планування (D-1), операції з якого плануються та провадяться щоденно в країнах ЄС.

Згідно з діючою нормативно-правовою базою України зазначений режим експорту електроенергії знаходиться в процесі розроблення і планується запровадити в дію починаючи з 2017 року.

З метою досконального вивчення цього питання та налагодження скоординованих дій учасників щоденної торгівлі електроенергією існує необхідність запровадження торгових сесій у режимі щодобового планування (D-1) в тестовому режимі.

Вирішили:

1. ДП «НЕК «Укренерго» підготувати та надати Міненерговугілля пропозиції щодо внесення змін в діючі нормативно-правові акти стосовно забезпечення можливості здійснення транзиту електроенергії у складі енергетичного об'єднання ENTSO-E безпосередньо ДП «НЕК «Укренерго» в умовах діючих правил Оптового ринку електричної енергії України;
2. Доручити ДПЗД «Укрінтеренерго» забезпечення виконання транзиту електроенергії на період до врегулювання питання щодо розмежування пропускної спроможності електричних мереж «Острову Бурштинської ТЕС» при реалізації транзитних поставок електроенергії магістральними та міждержавними електричними мережами ОЕС України ДП «НЕК «Укренерго». Департаменту електроенергетики підготувати та направити ДП «НЕК «Укренерго» лист щодо забезпечення виконання ДПЗД «Укрінтеренерго» транзиту електроенергії при реалізації транзитних поставок магістральними та міждержавними мережами ОЕС України ДП «НЕК «Укренерго»;
3. ДП «НЕК «Укренерго», ДП «Енергоринок», ДПЗД «Укрінтеренерго» надати пропозиції Міненерговугілля щодо застосування в тестовому режимі щодобового планування (D-1) при експорті та транзиті електроенергії.

НКРЕ

Міненерговугілля

ДП «Енергоринок»

ДП «НЕК «Укренерго»

ДПЗД «Укрінтеренерго»

3

Approved
Minister of Energy and Coal Industry
Signed **Y. Prodan**
June 19, 2014

Minutes

of the Meeting on issues of provision of export and transit of electric power via grids of "Island of the Burshtyn Thermal Power Plant"

City of Kyiv 17.06.2014

Present: Ulyda V.Y. - Deputy Minister of Energy and Coal Industry of Ukraine; Andriychuk Y.A. - member of the National Electricity Regulatory Commission; Gnatyuk Y.L. - Director of the State Company "Energorynok" ("Energy market"); Korol N.I. - Deputy Director for legal issues of the State Company "Energorynok"; Kryklya S.M. - Head of the Department of Foreign Economic Relations of the State Company "Energorynok"; Ushchapovskyi K.V. - Director of the State Company "National Power Company "Ukrenergo"; Masyutka V.V. - Head of the Agency of Foreign Economic Relations of the State Company "National Power Company "Ukrenergo"; Kucher M.V. - First Deputy Director of the State Company of Foreign Economic Relations "Ukrinterenergo":

Considered:

1. The allocated part of the United Energy System (UES) of Ukraine - "Island of the Burshtyn Thermal Power Plant" operates parallel with the European Energy Association ENTSO-E, as a result of which there was established an energy region where there are European standards and work rules of the Energy System. As a result of changes of energy balances of certain energy systems there appear electricity transit overflows between energy systems, whereby the term "electricity transit" is absent in the regulatory framework of these European countries, and the registration of such overflows is carried out by system operators.

At the same time the current normative legal acts do not foresee any purchase of electric power in order to compensate expenses when carrying out the transit of electric power by a system operator.

The realization of transit supplies of electric power by the networks of the UES of Ukraine is economically reasonable and in demand among European counterparties, although it is situational and depends on the situation of European electricity exchanges. The transit value of electric power by the networks of the UES of Ukraine in 2013 totaled actually 125.01 million KWh.

The settlement of this issue at this stage needs adding changes to the current normative legal acts that would secure the opportunity of rendering services in the transit of electric power directly by the State Company "National Power Company "Ukrenergo".

2. The most common and with the greatest demand on the European energy markets is the electricity trade "a day ahead" or the electricity export in the mode of every day planning (D-1) the operations in which are planned and carried out every day in the EU countries.

Under the current legal framework of Ukraine the specified mode of electric power export is under development and planned to be introduced into practice beginning from 2017.

With a view to a thorough examination of this issue and establishing coordinated actions of participants of the daily trade in electricity there is a necessity in the introduction of trading sessions in a daily planning mode (D-1) in test mode.

4

Resolved:

1. The State Company "National Power Company "Ukrenergo" should prepare and submit the Ministry of Energy and Coal Industry proposals with regard to adding changes to the current normative legal acts that would secure the opportunity of rendering services in the transit of electric power as part of the Energy Association ENTSO-E directly by the State Company "National Power Company "Ukrenergo" under conditions of the current rules of the Wholesale market of electric power of Ukraine.

2. To entrust the State Company of Foreign Economic Relations "Ukrinterenergo" the provision of carrying out the transit of electric power for a period of time before regulating the issue on allocation of available capacities of grids of "Island of the Burshtyn Thermal Power Plant" when carrying out the transit supplies of electric power via main and interstate power networks of the United Energy System of Ukraine of the State Company "National Power Company "Ukrenergo". The Department of Electricity should prepare and submit the State Company "National Power Company "Ukrenergo" a letter on ensuring the realization by the State Company of Foreign Economic Relations "Ukrinterenergo" of the transit of electric power when carrying out the transit supplies via main and interstate power networks of the United Energy System of Ukraine of the State Company "National Power Company "Ukrenergo".

3. The State Company "National Power Company "Ukrenergo", the State Company "Energorynok" and the State Company of Foreign Economic Relations "Ukrinterenergo" should submit proposals to the Ministry of Energy and Coal Industry regarding the use in the test mode of a daily planning (D-1) during the export and transit of electric power.

National Electricity Regulatory Commission	Signed
Ministry of Energy and Coal Industry	Signed
State Company "Energorynok"	Signed
State Company "National Power Company "Ukrenergo"	Signed
State Company of Foreign Economic Relations "Ukrinterenergo"	Signed

Переклад тексту цього документу з української мови на англійську мову здійснено дипломованим перекладачем Скрипко Олесею Валеріївною.

Підпис_____

Energy Community

Energy Community Secretariat
Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

H.E. Mr. Ihor Nasalyk
Ministry of Energy and Coal Industry of Ukraine
Per e-mail:
kanc@mev.energy.gov.ua

Copy:
Attn. Mr Vsevolod Kovalchuk
Acting Director
National Energy Company "Ukrenergo"
Per e-mail:
Kovalchuk.vv@ua.energy

Vienna, 03 February 2017
ECS-08/15/03-02-2017

Request for Information

The Secretariat is dealing with two cases against Ukraine, Case ECS-1/12 and Case ECS-8/15 upon complaints. The subject matter of these cases concerns cross-border capacity allocation related to import and transit of electricity organized and performed by the Ukrainian transmission system operator *Ukrenergo*.

Pursuant to Article 16(1) of the Energy Community Dispute Settlement Rules, the Secretariat is approaching you in order to request the submission of information necessary for finalizing its assessment.

Firstly, the Secretariat has been informed that imports are performed in Ukraine only if approved by the Ministry in the electricity balance. On the other hand, commercial imports are not allowed, and therefore *Ukrenergo* does not perform auctions for import unless allowed by the Ministry. For instance, since there are no imports planned in the electricity balance for 2017, the Secretariat has been informed that the Ministry has sent a letter to *Ukrenergo* asking it not to perform auctions for allocation of interconnectors capacity for import.

The Secretariat would like to ask you to submit:

- **The electricity balance for 2017**
- **The Letter, and any other documentation, submitted from the Ministry to Ukrenergo indicating that allocation of cross-border capacity for import shall not be performed.**

Energy Community

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Secondly, the Secretariat notes that transit is not dealt with as separate category in the Rules for allocation of interconnectors' capacity adopted by the Regulator in February 2015.[1] Moreover, the Secretariat is informed that *Ukrenergo* does not allocate interconnectors' capacity for transit to market participants, referring to on Minutes of meeting organised by the Ministry of Energy dedicated to ensuring electricity export and transit via the Burshtyn island dated 17.06.2014.[2] Based on that document, in order for an undertaking to perform transit of electricity, such undertaking is required to present an approval from the Ministry to *Ukrenergo*. Moreover, in the period between 2014 and today, the Ministry has entrusted the State owned company *Ukrinterenergo* with performing transit of electricity exclusively.

The Secretariat would like to ask you to further explain the rules governing the transit of electricity in Ukraine, as well as the conditions that *Ukrenergo* is imposing on undertakings applying for transit of electricity.

The information is necessary for finalising the assessment in Cases ECS-1/12 and ECS-8/15. Please send the required information / documentation not later than

15 February 2017

In order to clarify the issues regarding import of electricity in Ukraine and transit, as well as allocation of cross-border capacities in this respect, **I would kindly like to ask for organizing a meeting on 8 February 2017 in Kiev with representatives from the Ministry, as well as *Ukrenergo*** who would be in a position to discuss the cases and to provide the necessary information to the Secretariat's representatives.

In order to set up the requested meeting, as well as to submit additional information and for requests, please contact the Senior Energy Lawyer at Rozeta.Karova@energy-community.org at +43 1 535 2222 42 by referring to the above-mentioned case numbers.

Dirk Buschle
Deputy Director/Legal Counsel

[1] Resolution of the Regulator "On approval of the Rules of electronic auctions on capacity allocation of cross-border electricity lines" No. 176 dated 12.02.2015

[2] At the meeting representatives of the Ministry, the Regulator, as well as *Energorynok* and *Ukrenergo* have participated. The Secretariat is in possession of a copy of the Minutes

Затверджую
Міністр енергетики та вугільної промисловості України

І. Насалик

17.02.2017

Прогнозний баланс електроенергії об'єднаної електроенергетичної системи України на березень 2017 року

млн.кВт·год

Показник	Прогноз відповідно до затвердженого річного балансу	Прогноз на березень 2017 р.	Відхилення від прогнозу, передбаченого річним балансом
1	2	3	4
1. Виробництво електроенергії - всього	**14 021**	**14 091**	**70**
в тому числі:			
1) виробництво електроенергії ТЕС енергогенеруючих компаній	**3 592**	**3 212**	**-380**
2) виробництво електроенергії ТЕЦ та когенераційними установками, що відпускають електроенергію в ОРЕ	**1 483**	**1 482**	**-1**
3) виробництво електроенергії ГЕС	**916**	**1 062**	**146**
з них:			
ГЕС ПАТ "Укргідроенерго"	866	1 012	146
інші ГЕС	50	50	0
у тому числі ті, що працюють за "зеленим" тарифом	25	25	0
4) виробництво електроенергії ГАЕС	**151**	**151**	**0**
5) виробництво електроенергії АЕС	**7 600**	**7 900**	**300**
6) виробництво електроенергії блок-станціями	**139**	**129**	**-10**
7) виробництво електроенергії альтернативними джерелами	**140**	**155**	**15**
з них:			
ВЕС	85	100	15
СЕС	40	40	0
інші	15	15	0
2. Імпорт електроенергії	**0**	**0**	**0**
3. Експорт електроенергії України	**550**	**320**	**-230**
1) експорт в країни СНД	**150**	**0**	**-150**
у тому числі:			
в Росію	0	0	0
в Білорусь	110	0	-110
в Молдову	40	0	-40
2) експорт в країни Східної Європи	**400**	**320**	**-80**
у тому числі:			
в Польщу	100	100	0
експорт "Бурштинського острова"	300	220	-80
4. Різниця перетоків із суміжними ЕС	**-160**	**-160**	**0**
5. Технологічний переток електроенергії, зумовлений паралельною роботою об'єднаної електроенергетичної системи України з ЕС суміжних країн	**0**	**0**	**0**
6. Електроспоживання (брутто)	**13 100**	**13 400**	**300**
приріст до минулого року, %	*1,5*	*3,8*	
7. Споживання електроенергії ГАЕС в насосному режимі	**211**	**211**	**0**

Заступник директора
з оперативного керування -
головний диспетчер
ДП "НЕК "Укренерго"

В.Зайченко

Директор Департаменту
електроенергетичного комплексу
Міненерговугілля України

О. Буславець

Президент ДП "НАЕК "Енергоатом"

Ю. Недашковський

Затверджую
Міністр енергетики та вугільної промисловості України
Т.Насалик
31.10.2016

Прогнозний баланс електроенергії об'єднаної електроенергетичної системи України на 2017 рік

млн.кВт·год

	січень	лютий	березень	квітень	травень	червень	липень	серпень	вересень	жовтень	листопад	грудень	Рік
1. Виробництво електроенергії - всього	**15 372**	**13 858**	**14 021**	**12 325**	**11 880**	**11 555**	**12 220**	**12 217**	**11 605**	**13 468**	**13 963**	**15 368**	**157 852**
в тому числі:													
1.1. ТЕС енергогенеруючих компаній	**4 966**	**4 201**	**3 592**	**3 321**	**3 594**	**3 829**	**4 030**	**4 741**	**4 204**	**4 385**	**4 211**	**5 025**	**50 099**
1.2. Теплоелектроцентралі та когенераційні установки, що відпускають електроенергію в ОРЕ	**1 689**	**1 477**	**1 483**	**785**	**491**	**450**	**464**	**467**	**508**	**964**	**1 294**	**1 629**	**11 701**
1.3. ГЕС	**473**	**426**	**916**	**1 075**	**1 179**	**726**	**417**	**401**	**349**	**557**	**620**	**561**	**7 700**
з них:													
ГЕС каскаду р.Дніпро, р.Дністер	443	396	866	1 030	1 142	691	392	376	329	537	595	531	7 328
інші ГЕС	30	30	50	45	37	35	25	25	20	20	25	30	372
у тому числі ті, що працюють за "зеленим" тарифом	15	15	25	25	17	15	10	10	10	10	13	15	180
1.4. ГАЕС	**151**	**139**	**151**	**146**	**150**	**146**	**150**	**148**	**146**	**149**	**145**	**149**	**1 770**
1.5. АЕС	**7 820**	**7 350**	**7 600**	**6 710**	**6 200**	**6 150**	**6 880**	**6 180**	**6 130**	**7 130**	**7 420**	**7 730**	**83 300**
1.6. Блок-станції	**143**	**135**	**139**	**138**	**136**	**124**	**139**	**140**	**138**	**143**	**143**	**144**	**1 662**
1.7. Альтернативні джерела	**130**	**130**	**140**	**150**	**130**	**130**	**140**	**140**	**130**	**140**	**130**	**130**	**1 620**
з них:													
ВЕС	90	90	85	80	55	55	60	60	60	85	90	90	900
СЕС	25	25	40	55	60	60	65	65	55	40	25	25	540
інші	15	15	15	15	15	15	15	15	15	15	15	15	180
2. Імпорт електроенергії	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**
3. Експорт електроенергії	**400**	**400**	**550**	**700**	**770**	**550**	**400**	**400**	**400**	**400**	**400**	**400**	**5 770**
4. Різниця перетоків електроенергії із суміжними ЕС	**-160**	**-160**	**-160**	**-120**	**-100**	**-100**	**-110**	**-110**	**-100**	**-160**	**-160**	**-160**	**-1 600**
5. Технологічний переток ел/ен, зумовлений паралельною роботою з ен/системами суміжних країн	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**
6. Електроспоживання (брутто)	**14 600**	**13 100**	**13 100**	**11 300**	**10 800**	**10 700**	**11 500**	**11 500**	**10 900**	**12 700**	**13 200**	**14 600**	**148 000**
приріст до минулого року, %	*1,0*	*2,9*	*1,5*	*1,4*	*1,2*	*1,3*	*1,4*	*2,9*	*0,2*	*0,0*	*0,8*	*1,4*	*1,3*
7. Споживання електроенергії ГАЕС в насосному режимі	**212**	**198**	**211**	**205**	**210**	**205**	**210**	**207**	**205**	**208**	**203**	**208**	**2 482**

Директор Департаменту
електроенергетичного комплексу
Міненерговугілля України
О.Буславець

Заступник директора
з оперативного керування -
головний диспетчер ДП "НЕК "Укренерго"
В.Зайченко

МІНІСТЕРСТВО ЕНЕРГЕТИКИ ТА ВУГІЛЬНОЇ ПРОМИСЛОВОСТІ УКРАЇНИ

вул. Хрещатик 30,
м.Київ, 01601, Україна

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MINISTRY OF ENERGY AND COAL INDUSTRY OF UKRAINE

30 Khreshchatyk,
Kyiv, 01601, Ukraine

_____ №_____

Шановний пане Копаче,

Користуючись цією нагодою, Міністерство енергетики та вугільної промисловості України поновлює Секретаріату Енергетичного Співтовариства запевнення у своїй високій повазі та повідомляє.

Міненерговугілля опрацювало лист Секретаріату Енергетичного Співтовариства від 3 лютого 2017 року № ECS-08/15/03-02-2017 стосовно справи ECS-1/12 та справи ECS-8/15, предметом яких є проблема транскордонного розподілу пропускної спроможності, пов'язаної з імпортом та транзитом електроенергії, яка організована та виконана оператором системи передачі електроенергії ДП «НЕК «Укренерго» та надсилає відповідну інформацію.

Сподіваємось на Вашу підтримку та плідну співпрацю.

З повагою,

Міністр **Ігор Насалик**

Його високоповажності
Директору Секретаріату
Енергетичного Співтовариства

Янезу Копачу

м. Відень

Додаток до листа Міненерговугілля
від_____№_____

Інформація Міненерговугілля стосовно справи ECS-1/12 та справи ECS-8/15, предметом яких є проблема транскордонного розподілу пропускної спроможності, пов'язаної з імпортом та транзитом електроенергії, яка організована та виконана оператором системи передачі електроенергії ДП «НЕК «Укренерго»

Відповідно до статті 10 Закону України «Про засади функціонування ринку електричної енергії України» та статті 30 Закону України «Про електроенергетику» ДП «НЕК «Укренерго» зобов'язане розподіляти всю вільну доступну пропускну спроможність. В той же час відповідно до наказу Міненерговугілля України від 24.11.2014 № 824 «Про затвердження Методики визначення доступної пропускної спроможності міждержавних електричних мереж об'єднаної енергетичної системи України (ОЕС України)» величини доступної пропускної спроможності можуть перевищувати величини експортного потенціалу ОЕС України, який розраховується згідно Порядку складання прогнозного фізичного балансу електричної енергії Об'єднаної енергетичної системи України та прогнозного балансу її купівлі-продажу в Оптовому ринку електричної енергії України на наступний розрахунковий місяць. Оскільки ДП «НЕК «Укренерго» входить до сфери управління Міненерговугілля, врегулювання зазначеної проблеми вимагає вироблення спільних підходів.

Також інформуємо, що ДП «НЕК «Укренерго» не проведено річний та подальші місячні аукціони з розподілу пропускної спроможності міждержавних електричних мереж України у напрямку імпорт у зв'язку з його нульовим значенням у затвердженому Міненерговугілля України від 31.10.2016 прогнозному балансі електроенергії України на 2017 рік. Разом з цим повідомляємо, що у разі внесення змін до прогнозного балансу на 2017 рік стосовно значення імпорту ДП «НЕК «Укренерго» має всі необхідні можливості для проведення аукціону з розподілу пропускної спроможності міждержавних електричних мереж.

Вважаємо за доцільне відзначити, що відповідно до діючого законодавства України імпортована електроенергія купується ДП «Енергоринок» за ціною, яка окремо встановлюється НКРЕКП (станом на сьогодні дана ціна не затверджена).

На виконання зобов'язань у рамках Договору про заснування Енергетичного Співтовариства розглядається можливість щодо участі України в ІТС механізмі (відповідно до Регламенту (ЄС) № 838/2010). Зазначений механізм передбачає компенсацію за здійснення транскордонної передачі (транзиту), у тому числі втрат, між країнами-учасницями ІТС механізму. В даний час досягнуто домовленості стосовно проведення консультації з представниками Секретаріату Енергетичного Співтовариства щодо оцінки наслідків та можливості приєднання України до даного механізму.

Стосовно питання здійснення транзиту електроенергії в Україні повідомляємо наступне.

Для здійснення транзиту електроенергії постачальник повинен укласти:

1. Зовнішньоекономічний контракт (контракти).

2. Договір з ДП «НЕК «Укренерго» (як Технічним виконавцем) про надання послуг з диспетчеризації та транспортування електричної енергії міждержавними та магістральними лініями електропередачі. Ціна послуг ДП «НЕК «Укренерго» за диспетчеризацію і транспортування електроенергії магістральними та міждержавними лініями електропередачі ОЕС України відповідає тарифу, який встановлюється НКРЕКП України. Даний договір повинен бути погоджений з НКРЕКП.

3. Договір з оптовим постачальником електричної енергії (ДП «Енергоринок») на компенсацію втрат електроенергії, які виникають в електричних мережах ОЕС України. Така компенсація, як правило, здійснюється шляхом закупівлі відповідного обсягу електроенергії на національному ринку електроенергії (ОРЕ України).

Оскільки порядком проведення електронних аукціонів з розподілення пропускної спроможності міждержавних електричних мереж, який затверджений постановою НКРЕКП від 12.02.2015 року № 176, не передбачений механізм розподілення доступу до пропускної спроможності міждержавних електричних мереж для здійснення транзиту електроенергії, на даний час ДП «НЕК «Укренерго» керується рішенням Міненерговугілля України (Протокол, затверджений 19.06.2014 Міністром енергетики та вугільної промисловості України Проданом Ю. В.).

Згідно рішення Протоколу, ДПЗД «Укрінтеренерго» доручено забезпечення виконання транзиту електроенергії на період до врегулювання питання щодо розподілення пропускної спроможності електричних мереж «Острову Бурштинської ТЕС» при реалізації транзитних поставок електроенергії магістральними та міждержавними електричними мережами ОЕС України ДП «НЕК «Укренерго». Крім того, Міністерство енергетики та вугільної промисловості України доручило ДП «НЕК «Укренерго» забезпечити виконання повного обсягу транзитних поставок електроенергії мережами «Острову Бурштинської ТЕС» за чинними зовнішньоекономічними контрактами ДПЗД «Укрінтеренерго».

Міненерговугілля, в межах компетенції, опрацювало перелік документів, які необхідні для закриття справи ECS-1/12 та справи ECS-8/15, та надсилає Прогнозний баланс електроенергії об'єднаної електроенергетичної системи України на 2017 рік. Пропонуємо вирішення питання провести у формі консультацій з експертами офісу Енергетичного Співтовариства в Україні, відповідальними за сектор електроенергетики.

Затверджую
Міністр енергетики та вугільної промисловості України
І.Насалик
31.10.2016

Прогнозний баланс електроенергії об'єднаної електроенергетичної системи України на 2017 рік

млн.кВт·год

	січень	лютий	березень	квітень	травень	червень	липень	серпень	вересень	жовтень	листопад	грудень	Рік
1. Виробництво електроенергії - всього в тому числі:	**15 372**	**13 858**	**14 021**	**12 325**	**11 880**	**11 555**	**12 220**	**12 217**	**11 605**	**13 468**	**13 963**	**15 368**	**157 852**
1.1. ТЕС енергогенеруючих компаній	**4 966**	**4 201**	**3 592**	**3 321**	**3 594**	**3 829**	**4 030**	**4 741**	**4 204**	**4 385**	**4 211**	**5 025**	**50 099**
1.2. Теплоелектроцентралі та когенераційні установки, що відпускають електроенергію в ОРЕ	**1 689**	**1 477**	**1 483**	**785**	**491**	**450**	**464**	**467**	**508**	**964**	**1 294**	**1 629**	**11 701**
1.3. ГЕС	**473**	**426**	**916**	**1 075**	**1 179**	**726**	**417**	**401**	**349**	**557**	**620**	**561**	**7 700**
з них:													
ГЕС каскаду р.Дніпро, р.Дністер	443	396	866	1 030	1 142	691	392	376	329	537	595	531	7 328
інші ГЕС	30	30	50	45	37	35	25	25	20	20	25	30	372
у тому числі ті, що працюють за "зеленим" тарифом	15	15	25	25	17	15	10	10	10	10	13	15	180
1.4. ГАЕС	**151**	**139**	**151**	**146**	**150**	**146**	**150**	**148**	**146**	**149**	**145**	**149**	**1 770**
1.5. АЕС	**7 820**	**7 350**	**7 600**	**6 710**	**6 200**	**6 150**	**6 880**	**6 180**	**6 130**	**7 130**	**7 420**	**7 730**	**83 300**
1.6. Блок-станції	**143**	**135**	**139**	**138**	**136**	**124**	**139**	**140**	**138**	**143**	**143**	**144**	**1 662**
1.7. Альтернативні джерела	**130**	**130**	**140**	**150**	**130**	**130**	**140**	**140**	**130**	**140**	**130**	**130**	**1 620**
з них:													
ВЕС	90	90	85	80	55	55	60	60	60	85	90	90	900
СЕС	25	25	40	55	60	60	65	65	55	40	25	25	540
інші	15	15	15	15	15	15	15	15	15	15	15	15	180
2. Імпорт електроенергії	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**
3. Експорт електроенергії	**400**	**400**	**550**	**700**	**770**	**550**	**400**	**400**	**400**	**400**	**400**	**400**	**5 770**
4. Різниця перетоків електроенергії із суміжними ЕС	**-160**	**-160**	**-160**	**-120**	**-100**	**-100**	**-110**	**-110**	**-100**	**-160**	**-160**	**-160**	**-1 600**
5. Технологічний переток ел/ен, зумовлений паралельною роботою з ен/системами суміжних країн	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**
6. Електроспоживання (брутто)	**14 600**	**13 100**	**13 100**	**11 300**	**10 800**	**10 700**	**11 500**	**11 500**	**10 900**	**12 700**	**13 200**	**14 600**	**148 000**
приріст до минулого року, %	*1,0*	*2,9*	*1,5*	*1,4*	*1,2*	*1,3*	*1,4*	*2,9*	*0,2*	*0,0*	*0,8*	*1,4*	*1,3*
7. Споживання електроенергії ГАЕС в насосному режимі	**212**	**198**	**211**	**205**	**210**	**205**	**210**	**207**	**205**	**208**	**203**	**208**	**2 482**

Директор Департаменту
електроенергетичного комплексу
Міненерговугілля України
О.Буславець

Заступник директора
з оперативного керування -
головний диспетчер ДП "НЕК "Укренерго"
В.Зайченко

Dear Mr. Kopač,

The Ministry of Energy and Coal Industry of Ukraine avails itself of the opportunity to renew to the Energy Community Secretariat the assurances of its highest esteem and has further the honour to inform the following.

The Ministry of Energy and Coal Industry of Ukraine has considered the letter of the Energy Community Secretariat No. ECS-08/15/03-02-2017 dated 3 February 2017 on cases No. ECS-1/12 and No. ECS-8/15 regarding the issue of cross-border allocation of transmission capacities relating to electricity import and transit organized and implemented by transmission system operator NEC Ukrenergo SE, and presents its response herewith.

We hope for your support and fruitful cooperation.

Best regards,

Minister **Igor Nasalyk**

To the attention of
His Excellency Janez Kopač,
Director of the Energy Community
Secretariat

Vienna

Attachment to the letter from the Ministry of Energy and Coal Industry of Ukraine
dated_____ No._____

Information from the Ministry of Energy and Coal Industry of Ukraine on cases No. ECS-1/12 and No. ECS-8/15 concerning the issue of cross-border allocation of transmission capacities relating to electricity import and transit organized and implemented by transmission system operator NEC Ukrenergo SE

According to Article 10 of the Law of Ukraine "On the Principles of the Functioning of the Electricity Market" and Article 30 of the Law of Ukraine "On Electricity" NEC Ukrenergo SE must allocate all available transmission capacity. At the same time, according to the Order of the Ministry of Energy and Coal Industry of Ukraine No. 824 dated 24.11.2014 "On approval of methods of assessment of available transmission capacity of cross-border electricity networks of the United Energy System of Ukraine (UES Ukraine)" the available capacities can exceed the export potential of Ukraine to be assessed according to the Procedure of preparing forecast physical electricity balance within the United Energy System of Ukraine and forecast balance for its sales and purchases within the Wholesale Electricity Market of Ukraine for the following billing month. Since NEC Ukrenergo SE is managed by the Ministry of Energy and Coal Industry of Ukraine, settling this issue requires elaborating of common approaches.

Furthermore, please be advised that NEC Ukrenergo SE has not conducted the annual and the following monthly auctions for allocation of import capacity of the Ukrainian cross-border electricity networks due to its zero value indicated in the 2017 forecast electricity balance of Ukraine dated 31.10.2016 as approved by the Ministry of Energy and Coal Industry of Ukraine. At the same time, please be advised that in case of amending the 2017 forecast balance with regard to import values NEC Ukrenergo SE would have any necessary opportunities to conduct an auction for allocation of transmission capacities of cross-border electricity networks.

We consider it noteworthy that, according to the Ukrainian legislation in force imported electricity is to be purchased by NEC Ukrenergo SE at the price to be set by the National Energy and Utilities Regulatory Commission of Ukraine (NEURC) (this price has not been approved so far).

Pursuant to Ukraine's commitments under the Treaty establishing the Energy Community, possibility of Ukraine's participation in the ITC mechanism (according to Regulation (EU) No. 838/2010) is now being considered. This mechanism provides for compensation for cross-border transmission (transit), including compensation for losses between countries participating in the ITC mechanism. Currently, an agreement has been reached on holding a consultation with representatives of the Energy Community Secretariat regarding assessment of the effects and possibility of Ukraine's participation in the mechanism.

As for the issue of electricity transit in Ukraine, we would like to inform the following.

The supplier must enter into the following agreements to be authorized to arrange electricity transit:

1. Foreign economic contract(s).

2. Agreement with NEC Ukrenergo SE (as contractor) on provision of electricity dispatch and transmission services via cross-border and main lines. The price for electricity dispatch and transmission services to be provided by NEC Ukrenergo SE within the main and cross-border electricity lines of the UES Ukraine must correspond to the tariff to be set by the NEURC of Ukraine. This agreement must be approved by the NEURC.

3. Agreement with the wholesale electricity supplier (Energorynok SE) on compensating for electricity losses within the electricity networks of the UES Ukraine. As a rule, such compensation is provided by purchasing corresponding volumes of electricity at the national electricity market (Wholesale Electricity Market (WEM) of Ukraine).

As the Procedure for conducting e-auctions for allocation of transmission capacities of cross-border electricity networks No. 176 approved by the NEURC on 12.02.2015 does not provide for the mechanism to allocate access to transmission capacities of cross-border electricity networks for electricity transit purposes, NEC Ukrenergo SE is currently guided by the Decision of the Ministry of Energy and Coal Industry of Ukraine (the Minutes approved on 19.06.2014 by Mr. Yu. V. Prodan, the Minister of Energy and Coal Industry of Ukraine).

According to the decision laid down in the Minutes, Ukrinterenergo State Foreign Trade Company is entrusted with arranging electricity transit for the period until the settlement of the issue relating to allocation of transmission capacity in electricity networks of the Energy Island of the Burshtyn Thermal Power Station (Burshtyn Energy Island) during the period of electricity transit supplies via main and cross-border electricity networks of the UES Ukraine by NEC Ukrenergo SE. Moreover, the Ministry of Energy and Coal Industry of Ukraine has entrusted NEC Ukrenergo SE with ensuring that transit electricity supplies via the Burshtyn Energy Island networks are made in full and in compliance with the existing foreign economic contracts of Ukrinterenergo State Foreign Trade Company.

Within the scope of its competence, the Ministry of Energy and Coal Industry of Ukraine has examined the list of documents required for closing the cases No. ECS-1/12 and ECS-8/15 and sends the 2017 forecast electricity balance of the United Energy System of Ukraine. We suggest settling this issue by holding consultations with experts from the Office of the Energy Community Secretariat in Ukraine in charge of the electricity sector.

From: ?????? ????????? ?????????
To: Rozeta Karova
Cc: ???????????? ?????? ????????
Subject: Request for info
Date: Thursday, 29. March 2018 10:01:08
Attachments: image003.png
image004.png
image005.png
image006.jpg
image007.gif
image008.gif
image009.png
image010.jpg

Dear Rozeta,

Thank you for your e-mail. I apologize for the delay in our response.

According to cross-border capacity allocation, I would like to inform you that the Allocation Rules (approved by NERC Regulation №426 dated 28.03.2017, entered into force on 12 May 2017) are still valid. But in connection with the new Ukrainian Law about electric market we developed a new Allocation Rules. At the moment it passed through a public hearings, and was sent to us for revision (namely, to complete the Allocation Rules compliance with the Harmonization Auction Rules until the middle of April 2018).

On 21 of February, 2018 a multilateral meeting of Ukrenergo – MAVIR – Transelectrica – SEPS took place in MAVIR's office, where it was decided to implement the Common Auctions (with mentioned TSO's). Now we harmonize the mentioned minutes of the meeting, and the next step will be the elaboration and approval of the Common Auction Rules.

According to another question about the transit of electricity, Ukrinterenergo is still the single supplier, it is still performing the Ministry's Minutes of meeting dd 17.06.2014.

If you would like any further information, please don't hesitate to contact me.

Best regards,

Oleksandr VOLKOV
Group of Administration of Commercial Accounting
Leading Economist

National Power Company "UKRENERGO"
Symona Petliury Str., 25, Kyiv, 01032
Ukraine

??????????-55

Dear Mr. Nemyrovskyi,

I hope this email finds you well!
We have been looking into the issue of transit of electricity via Ukraine, and the allocation of cross-border capacity. I was wondering whether there is any news, any update on this issue?

Namely, are you still applying the Allocation Rules that entered into force on 12 May 2017 - NEURC 'On approval of the Rules of electronic auctions on capacity allocation of cross-border electricity lines' No. 426 dated 28.03.2017 – or there are other amended rules in place?

Secondly, I wanted to check whether still *Ukrinterenergo*, as entrusted by the Ministry, is performing transit, and whether those minutes of the meeting dd 17.06.2014 and the Ministry's letter is still applied?

I would appreciate your short and prompt reply on this.
Thanks a lot,
Kind regards,
Rozeta

Dr Rozeta Karova
Senior Energy Lawyer

Energy Community Secretariat
Am Hof 4, Level 5, 1010 Vienna,
Austria

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ENERGY RESOURCES OF UKRAINE

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27.08.2015 № 1/01-1326

Energy Community Secretariat (ECS)

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PRIVATE ENTERPRISE

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Defendant: **State Enterprise National Power Company Ukrenergo**

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Fax: +38 (044) 238-32-64

E-mail: kanc@nec.energy.gov.ua

www.ukrenergo.energy.gov.ua

LETTER OF COMPLAINT

regarding the allocation of transmission capacity of Ukrainian cross-border power networks

ERU TRADING PRIVATE ENTERPRISE (hereinafter referred to as ERU TRADING) appeals to the Energy Community Secretariat in connection with non-compliance of the State Enterprise National Power Company Ukrenergo (hereinafter referred to as the Defendant or NPC Ukrenergo) with provisions of

the Energy Community Treaty and violation of the national legislation on access to cross-border power transmission capacity of Ukraine.

NPC Ukrenergo, in accordance with the consolidated list of natural monopolies[1], is a monopoly in electricity transmission via the main and interstate electricity networks of Ukraine (hereinafter referred to as the United Power Grid's networks of Ukraine) and as such abuses the monopoly (dominant) position on the market of access to the main and interstate electricity networks of Ukraine by preventing ERU TRADING's access to this market and restricting the competition.

Circumstances of the case:

ERU TRADING is a member of the Wholesale Electricity Market of Ukraine and has a license from the National Energy and Utilities Regulatory Commission (hereinafter referred to as the NEURC) for supply of electricity under unregulated tariff dd. 16 Feb. 2015 no. AE575919.

In the course of 2015, ERU TRADING was taking all reasonable measures for transit of electricity via the main and interstate power grids across Ukraine along the following routes:

- power system of Hungary -> power system of Slovakia and/or Romania
- power system of Slovakia -> power system of Hungary and/or Romania
- power system of Romania -> power system of Slovakia and/or Hungary.

Thus, to ensure the timely fulfilment of procedures for arrangement of transit electricity supplies, in accordance with the applicable rules and regulations, ERU TRADING executed all the necessary contracts and documents, including the following:

- **concluded** foreign economic contracts with **ENERGY FINANCING TEAM (Switzerland) AG** dd. 27.04.2015 no. 1/1006 (copy attached) and **GEN-I, trgovanje in prodaja električne energije, d.o.o. (Slovenia)** dd. 24.04.2015 no. 1/1008 (copy attached), **and had them approved by NPC Ukrenergo** (in the part of technical performance, copy attached). The subject of these contracts is the provision of services to ensure transit supplies of electricity via the electrical networks of the south-western part of the United Power Grid of Ukraine (Burshtynska TPP power island, hereinafter referred to as BuTPP power island);

- **concluded agreement with NPC Ukrenergo** dd. 26.06.2015 no. 01/1711-15 (copy attached) on provision of dispatching and electricity transmission services via the main and interstate electricity lines of Burshtynska TPP power island **and had it agreed with NEURC** (Letter dated 14.07.2015 no. 688/174/61-15, copy attached);

- **concluded agreement with State Enterprise Energorynok** dd. 17.07.2015 no. 11482/07 for the sale and purchase of electricity needed to compensate for technological power losses that occur during the electricity transportation via the main and interstate electricity lines of BuTPP power island **and had it agreed with NPC Ukrenergo** (copy attached).

However, due to NPC Ukrenergo's abuse of its monopoly (dominant) position and prevention of ERU TRADING's use of the transmission capacity of interstate electricity networks of Ukraine, electricity transit operations are not performed by the company.

[1] http://www.amc.gov.ua/amku/doccatalog/document?id=97650&

In the course of concluding the above mentioned contracts/agreements and their approval, NPC Ukrenergo with its letter dd. 07.05.2015 no. 02-2/02-2-4-2/5209 (copy attached) notified ERU TRADING that **one of the requirements for electricity transit under ERU TRADING contracts is availability of approval from the Ministry of Energy and Coal Industry (hereinafter referred to as the Ministry) for the possibility to use free transmission capacity for electricity transit.**[2] At the same time, **no justifications for that were provided. Not any rule or regulation establishes the above mentioned requirement of the Defendant to ERU TRADING or any other electricity market player.**

Despite the absence of any legal reasons for such requirements from NPC Ukrenergo, ERU TRADING with its letter dd. 16.07.2015 no. 1/01-1153 (copy attached) addressed the Ministry requesting it to approve the use of interstate electricity transmission networks of Ukraine for transit of electricity in August 2015 (ref. no. 32/4101). As of 27.08.2015, the answer has not been received.

Reference information:

The Ministry is not authorized to allocate the access to the transmission capacity of interstate networks. In addition, the approval of the Ministry has lost its relevance as NPC Ukrenergo has put forward new requirements as described below.

Taking into account the fact that the actual pre-conditions for transit of electricity via the networks of BuTPP power island were met by ERU TRADING and that the legislation does not establish any requirements for any additional permits either from the Ministry or from any other authorities, the company addressed **NPC Ukrenergo asking it to accept the schedules of transit operations by ERU TRADING. The schedules were submitted on 21-28 July 2015** (letters from ERU TRADING dated 17.07.2015 no. 1/01-1160, dated 20.07.2015 no. 1/01-1161, dated 21.07.2015 no. 1/01-1174, dated 22.07.2015 no. 1/01-1175, dated 23.07.2015 no. 1/01-1179, dated 27.07.2015 no. 1/01-1187, copies attached)**. None of them was accepted for execution.**

Instead, in response to the submitted schedules of transit operations, ERU TRADING received letters dated 23.07.2015 no. 02-2/02-2-1-2/8454 and dated 04.08.2015 no. 02/2-02/2-1-2/8880 (copy attached) in which NPC Ukrenergo **actually refused to fulfil the submitted schedules** justifying this by saying *that: "As of today, the use of free transmission capacity of interstate electricity networks of Ukraine for electricity transit is determined in accordance with the existing Procedure of Electronic Auctions for Allocation of Transmission Capacity of Interstate Electricity Networks approved by Resolution of NEURC no. 176 on 12.02.2015 (hereinafter referred to as the Auction Procedure) and decisions from the Minutes of meeting dedicated to ensuring electricity export and transit via electricity lines of Burshtynska TPP power island dated 17.06.2014 (hereinafter referred to as the Minutes of meeting).* ***NPC Ukrenergo addressed the Ministry of Energy and Coal Industry of Ukraine asking for its explanation/clarification of decisions contained in the Minutes of meeting and the possibility of using free transmission capacity of interstate electricity networks for transit supplies of electricity by all interested suppliers.***

Until receiving a response from the Ministry of Energy and Coal Industry of Ukraine, NPC Ukrenergo will be carrying out the decisions of the Minutes of meeting.[3]

Thus, NPC Ukrenergo refused to fulfil ERU TRADING's schedules for electricity transit referring to the decisions of the Minutes of meeting and did not even send these Minutes for consideration

[2] Paragraph 2 of NPC Ukrenergo's letter dd. 07.05.2015 no.02-2/02-2-4-2/5209
[3] Paragraph 2-3 of NPC Ukrenergo's letter dd. 23.07.2015 no. 02-2/02-2-1-2/8454.

(the letters do not contain any attachments, the document is not a public one, is not a legal regulation).

Therefore, as of today, **according to NPC Ukrenergo's letter dated 07.05.2015 no. 02-2/02-2-4-2/5209, ERU TRADING must obtain approval from the Ministry of Energy and Coal Industry of Ukraine and yet has to wait for a response from the Ministry of Energy and Coal Industry of Ukraine to NPC Ukrenergo as the latter fulfils the decisions of the Minutes of meeting.**

ERU TRADING received a copy of the above Minutes (copy attached) for consideration. Interestingly, according to paragraph 2 of the regulatory part: *"Ukrinterenergo is instructed to perform transit of electricity ... "*

As is know, Ukrinterenergo is a company that is part of coal and industrial complex managed by the Ministry of Energy and Coal Industry of Ukraine, and of course, the Ministry has the authority to provide instructions. **However, even in these Minutes of meeting not any restrictions are established according to which transit must be performed exclusively by Ukrinterenergo.**

At the same time, neither the general national legislation nor the regulation on the Ministry of Energy and Coal Industry of Ukraine approved by Presidential Decree on 6 April 2011 under no. 382/2011 authorize the Ministry of Energy and Coal Industry to make exclusive administrative decisions concerning the regulated access to the United Power Grid of Ukraine and especially concerning provision of such access only to one business entity.

In fact, NPC Ukrenergo admitted only one company, Ukrinterenergo, to the use of the main and interstate electricity networks in the territory of Ukraine for electricity transit. We know that there are other members of the Wholesale Electricity Market that faced similar problem.

Reference information:

ERU TRADING, guided by the Law of Ukraine "On information", for the purpose of comprehensive study of the raised issue, sent a letter to NPC Ukrenergo dated 16.07.2015 no. 1/01-1159 asking it to provide answers to the following questions:

1. *On the basis of what legislative or other regulatory documents NPC Ukrenergo concluded that access to free transmission capacity of interstate electrical networks for electricity transit is authorized, in each case, by the Ministry of Energy and Coal Industry of Ukraine, in the form of a written approval?*
2. *What companies are actually using free transmission capacity of interstate electricity networks for transit in the course of 2015? With monthly breakdown. In what amounts?*
3. *What companies have the approval of the Ministry of Energy and Coal Industry? When such approvals were issued?*

As of 27.08.2015, the answer has not been received.

We believe that NPC Ukrenergo and the Ministry do not adhere to the provisions of the Energy Community Treaty and the national legislation on access to cross-border power transmission capacity of Ukraine. **Neither the Procedure of Auctions to which the Defendant refers in its letter dd. 23.07.2015 no. 02-2/02-2-1-2/8454, nor the Minutes of meeting of the Ministry of Energy and Coal Industry, or any other legal document contains any restrictions on access to the use of interstate electricity networks of Ukraine. The Defendant, without any objectively justified reasons, limits the competitiveness of business entities and creates obstacles.**

Legal framework for the case in question:

1) Paragraph 1 of Article 30 of the Law of Ukraine "On Electric Power Industry" (hereinafter referred to as the Law) provides that: "Access to transmission capacity of interstate electricity networks **to perform operations of electricity export and/or import shall be granted to power suppliers who are members of the Wholesale Electricity Market of Ukraine, who have a license for electricity supply and have no overdue debt for electricity purchased on the Wholesale Electricity Market of Ukraine**".

In turn, paragraphs 7 and 8 of Article 30 of the Law of Ukraine "On Electric Power Industry" stipulate that: "**Allocation of free transmission capacity of interstate electricity networks shall be made by the enterprise** that performs centralized dispatch control of the United Power Grid of Ukraine and transmission of electricity via the main and interstate electricity networks **according to the Electronic Auction Procedure using electronic document flow and digital signature, except as prescribed by law.**

Power suppliers receive access to the transmission capacity of interstate electricity networks based on the results of the auction. The Procedure of Electronic Auctions for allocation of transmission capacity of interstate electricity networks shall be approved by the National Energy and Utilities Regulatory Commission in consultation with the Antimonopoly Committee of Ukraine".

Extensive analysis of Article 30 of the Law gives reasons to believe that the Law stipulates that **allocation of transmission capacity of interstate electricity networks shall be carried out through auction, except as provided by law.** The provisions of the Law do not set any restrictions on transit.

NPC Ukrenergo has to allocate the transmission capacity of interstate electricity networks for electricity transit through electronic auctions as is done in all European countries, and not to demand approvals of the Ministry, and certainly not to give refusals to market participants referring to the Minutes of meeting.

2) According to Article 2 of the Protocol on Ukraine's accession to the Energy Community Treaty, Ukraine has made a commitment, before 1 January 2012, to liberalize the market for allocation of interstate transmission capacity of Ukraine.

Sub-clause 2 of paragraph 2, Section VI Final and Transitional Provisions of the Law of Ukraine "On Principles of Functioning of the Electricity Market of Ukraine" determines that NEURC, within six months from the date of publication of the Law, must develop and approve **the Procedure of Electronic Auctions for allocation of the transmission capacity of interstate electricity networks** ensuring operation of the electronic auction procedures, electronic document flow and digital signature. (In fact, the name of the procedure does not presuppose any differentiation between the types of the customs operations (export/import/transit).

According to paragraph 5 of clause 1 of Section VI Final and Transitional Provisions of the Law, the Procedure of Electronic Auctions was supposed to be introduced by 1 December 2014.

In order to implement the above-mentioned provisions of the Law, NEURC approved a decree "On approval of the Procedure of Electronic Auctions for allocation of transmission capacity of interstate electricity networks." However, even a superficial analysis of this regulatory document gives reason to say about the lack of provisions regulating the issues associated with electricity transit.

The question of "special regime" to obtain permission to use the interstate transmission capacity for electricity transit has already been considered by the Energy Community Secretariat. Thus, in its open letter ECS-1/12 (attached) as part of dispute settlement procedure under the case concerning Ukraine for its failure to adhere to provisions of the Energy Community Treaty, the Energy Community Secretariat pointed out the following:

"In accordance with Article 1, Regulation (EC) 1228/2003 aims to establish rules for fair distribution of the available transmission capacity of power lines between national transmission systems. Article 2 of the above Regulation defines interconnection power line as "the power line which crosses or covers the border between Member States and links together their national transmission system." Based on these two provisions, one can conclude that the rules for allocation of the transmission capacity should be developed for all intersystem power lines without distinction between different directions of export, import or transit. The Secretariat concluded that the differences between different directions of electricity flow and establishment of different procedures for allocation of transmission capacity in different directions do not comply with Articles 1 and 2 (1) of Regulation (EC) 1228/2003".

As for the practice of issuance of permits by the Ministry, the Energy Community Secretariat concluded that "exclusive administrative decisions of the Ministry discord with the principle of regulated access to the electricity transmission network contained in Articles 20(1) and 23(2 (a) of Directive 2003,54/EC."

According to paragraph 2 of Article 3 of the Law on Ukraine "On Protection of Economic Competition", "If an international treaty ratified by the Verkhovna Rada of Ukraine establishes rules other than those contained in this Law, the rules of the international treaty shall apply."

Actions of NPC Ukrenergo and the Ministry of Energy and Coal Industry of Ukraine for sole allocation of interstate transmission capacity for electricity transit discord with the provisions of the Energy Community Treaty, Directive 2003/54/EC, the position of the Energy Community Secretariat and lead to restriction of the competition.

Article 5 of the Law of Ukraine "On Electric Power Industry" establishes that *"the state policy in the electric power sector is based on the principle of facilitation of competitive relations on the electricity market."*

According to paragraph 2.7 of Regulation by NEURC no. 152 dd. 11.10.1996, "On approval of terms and rules of electricity transmission via the main and interstate electricity networks, *"The Licensee in any form shall not abuse its dominant/monopoly position, as defined by the Law of Ukraine "On Protection of Economic Competition" and other legal acts".*

Taking into account the stated above and being guided by the provisions of the Energy Community Treaty and the Law of Ukraine "On Electric Power Industry",

I HEREBY KINDLY SOLICIT:

1. To accept this Letter of Complaint for consideration.
2. To explore Ukraine's fulfilment of its commitments under the Energy Community Treaty concerning the access to cross-border transmission capacities.
3. Within the appropriate competence, to take measures for NPC Ukrenergo to stop illegal actions expressed in prevention of ERU TRADING's use of the main and interstate electricity networks of Ukraine for transit of electricity.

Attachments:

1. A copy of contract with ENERGY FINANCING TEAM (Switzerland) AG dd. 27.04.2015 no. 1/1006 (on 31 sheets, 1 copy)
2. A copy of contract with GEN-I, trgovanje in prodaja električne energije, d.o.o. (Slovenia) dd. 24.04.2015 no. 1/1008 (on 32 sheets, 1 copy)
3. A copy of contract with NPC Ukrenergo dd. 26.06.2015 no. 01/1711-15 (on 12 sheets, 1 copy)
4. A copy of NEURC's letter dd. 14.07.2015 no. 688/174/61-15 (on 12 sheets, 1 copy)
5. A copy of NPC Ukrenergo's letter dd. 07.05.2015 no. 02-2/02-2-4-2/5209 (on 2 sheets, 1 copy)
6. A copy of ERU TRADING's letter dd. 16.07.2015 no. 1/01-1153 (on 2 sheets, 1 copy)
7. A copy of ERU TRADING's letter dd. 17.07.2015 no. 1/01-1160 (on 2 sheets, 1 copy)
8. A copy of ERU TRADING's letter dd. 20.07.2015 no. 1/01-1161 (on 2 sheets, 1 copy)
9. A copy of ERU TRADING's letter dd. 21.07.2015 no. 1/01-1174 (on 2 sheets, 1 copy)
10. A copy of ERU TRADING's letter dd. 22.07.2015 no. 1/01-1175 (on 2 sheets, 1 copy)
11. A copy of ERU TRADING's letter dd. 23.07.2015 no. 1/01-1179 (on 4 sheets, 1 copy)
12. A copy of ERU TRADING's letter dd. 27.07.2015 no. 1/01-1187 (on 2 sheets, 1 copy)
13. A copy of NPC Ukrenergo's letter dd. 23.07.2015 no. 02-2/02-2-1-2/8454 (on 1 sheet, 1 copy)
14. A copy of NPC Ukrenergo's letter dd. 04.08.2015 no. 02/2-02/2-1-2/8880 (on 1 sheet, 1 copy)
15. A copy of the Minutes of meeting dedicated to ensuring electricity export and transit via electricity networks of Burshtynska TPP Power Island dd. 17.06.2014 (on 2 sheets, 1 copy)
16. A copy of ERU TRADING's letter dd. 16.07.2015 no. 1/01-1159 (on 2 sheets, 1 copy).

CEO of ERU TRADING

A.M. Favorov

27 August 2015

Contact person: Sergiy Onyshchuk, +38 050 347 20 90, Sergiy.Onyshchuk@eru.com.ua

ENERGY RESOURCES OF UKRAINE

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22.02.2016 № 1/01-1776

Energy Community Secretariat (ECS)

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Email: contact@energy-community.org

Web: http://www.energy-community.org

Complainant: **ERU TRADING**

PRIVATE ENTERPRISE

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Tel./fax: +38 (044) 428-70-16

E-mail: erutrading@eru.com.ua

www.eru.com.ua

Defendant: **State Enterprise National Power Company Ukrenergo**

address: 25 S. Petliury Street, Kyiv, Ukraine, 01032

Tel.: +38 (044) 238-30-15

Fax: +38 (044) 238-32-64

E-mail: kanc@nec.energy.gov.ua

www.ukrenergo.energy.gov.ua

SUPPLEMENT TO THE CLAIM

On allocation of the transfer capacity of interstate power networks of Ukraine

As you know PRIVATE ENTERPRISE ERU TRADING (hereinafter – PE ERU TRADING) filed a claim in the Energy Community Secretariat No. №1/01-1326 dated August 27, 2015 (hereinafter – the Claim) regarding the non-compliance by the State Enterprise National Power Company Ukrenergo (hereinafter – the Defendant or the SE NPC Ukrenergo) with provisions of the Treaty establishing the Energy Community and the violation of national legislation on the access to the cross-border capacity of Ukraine.

In the complaint is set out in detail all the information about the problems of our company and partners, we face distribution procedures. Adding all translated and notarized supporting documents, including:

1. A copy of contract with ENERGY FINANCING TEAM (Switzerland) AG dd. 27.04.2015 no. 1/1006 (on 31 sheets, 1 copy);
2. A copy of contract with GEN-I, trgovanje in prodaja električne energije, d.o.o. (Slovenia) dd. 24.04.2015 no. 1/1008 (on 32 sheets, 1 copy);
3. A copy of contract with NPC Ukrenergo dd. 26.06.2015 no. 01/1711-15 (on 12 sheets, 1 copy);
4. A copy of NEURC's letter dd. 14.07.2015 no. 688/174/61-15 (on 12 sheets, 1 copy);
5. A copy of contract with State Enterprise Energorynok dd. 17.07.2015 no. 11482/07 (on 16 sheets, 1 copy);
6. A copy of NPC Ukrenergo's letter dd. 07.05.2015 no. 02-2/02-2-4-2/5209 (on 2 sheets, 1 copy);
7. A copy of ERU TRADING's letter dd. 16.07.2015 no. 1/01-1153 (on 2 sheets, 1 copy);
8. A copy of ERU TRADING's letter dd. 17.07.2015 no. 1/01-1160 (on 2 sheets, 1 copy);
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16. A copy of the Minutes of meeting dedicated to ensuring electricity export and transit via electricity networks of Burshtynska TPP Power Island dd. 17.06.2014 (on 2 sheets, 1 copy);
17. A copy of ERU TRADING's letter dd. 16.07.2015 no. 1/01-1159 (on 2 sheets, 1 copy).

The Energy Community Secretariat confirmed the Claim receipt by letter No. ECS-8/15^{0}01-09-2015 dated 01.09.2015 and suggested provide additional information.

PE ERU TRADING submitted the additional documents and information by letter 26.10.2015 №1/01-1397 (according to the requested list):

18. Copies of the letters of the SE NPC Ukrenergo No. 01/01-6/10429 dated 09.09.2015 (on 5 sheets in 1 copy) and No. 03/32-5487 dated 12.12.2012 (on 3 sheets in 1 copy), in which approaches of the national system operator to the solution of the issue of allocation of the available transfer capacity to ensure electric power transit are defined;
19. A copy of the letter of PE ERU TRADING to the Ministry of Energy and Coal Industry No. 1/01-1214 dated 27.08.2015 (on 5 sheets in 1 copy) and a copy of the letter of PE ERU TRADING to the SE NPC Ukrenergo and the Ministry of Energy and Coal Industry No. 1/01-1214/1 dated 27.08.2015 (on 5 sheets in 1 copy). The mentioned letters were left unanswered.
20. A copy of the claim of PE ERU TRADING to the Antimonopoly Committee of Ukraine on violation of legislation on protection of economic competition No. 1/01-1200 dated 06.08.2015 (on 18 sheets in 1 copy);

- a copy of supplement to the claim on violation of legislation on protection of economic competition of PE ERU TRADING to the Antimonopoly Committee of Ukraine No. 1/01-1315 dated 06.08.2015 (on 7 sheets in 1 copy);

- a copy of the letter of the Antimonopoly Committee of Ukraine on leaving without action the claim of PE ERU TRADING No. 128-29/01-8881 dated 25.08.2015 (on 5 sheets in 1 copy);
- a copy of the letter of PE ERU TRADING to the Antimonopoly Committee of Ukraine No. 1/01-1338 dated 21.09.2015 (on 5 sheets in 1 copy);

The term for the claim processing has expired. On the course/results of processing of the submitted claim no information was furnished to PE ERU TRADING.

21. PE ERU TRADING did not file a lawsuit. However, it became known to us that on September 16, 2015, the Kyiv Economic Court of Appeal passed a resolution in case No. 910/28218/14 in the action of Limited Liability Company Trading Electric Company against the SE NPC Ukrenergo, third person: the Ministry of Energy and Coal Industry of Ukraine, the subject of which was the prevention of the plaintiff from using the transfer capacity to ensure transit of electric power. A copy of the resolution is attached hereto (on 31 sheets in 1 copy, http://reyestr.court.gov.ua/Review/50799977).

Currently, the situation does not change. We haven't received any response from the Antimonopoly Committee of Ukraine.

There is no one Company In Ukraine which is allowed by Ministry of Energy and Mines to transit and the SE NPC Ukrenergo except DPZP Ukrinterenergo.

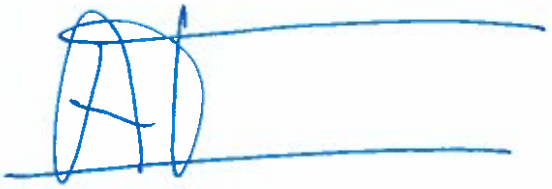
Regarding the legal assessment of the Rules of the auction now, we would like to communicate the following.

We as a market participant distribution interstate intersection, support early reform of the existing model. However, as of February 22, 2016 implementation process is still not finished.

1. E-platform and daily auctions are not implemented.
2. The amount of financial guarantees for participation in the auction is too large and thus limits the number of interested participants. In accordance with procedure the duty to ensure the distribution of financial guarantees term of not less than the term of access (for annual auctions this year) while prepay for each following month.
3. In no way regulates the transit of electricity.
4. The exporter has the responsibility to use no less than 70% received the results of the annual auction of bandwidth. Graphs that do not meet this principle is not accepted.

In turn, we intend to thank for their participation in the reform of Ukraine's energy sector and hope that our joint efforts will bring results.

Director of PE ERU TRADING
A. M. Favorov



February 22, 2016

Vienna, 24 May 2017
UA/MIN/jko/10/24-05-2017

Subject: Opening letter in Case ECS-8/15

Excellency,

Please find attached the opening letter in reference to Case ECS-8/15.
Please accept, Excellency, the expression of my highest considerations.

Yours sincerely,

Janez Kopač
Director

H.E. MR. IHOR NASALYK
MINISTER OF ENERGY AND COAL INDUSTRY OF UKRAINE

Opening Letter
in Case ECS-8/15

By the present Opening Letter, the Energy Community Secretariat (hereinafter: "the Secretariat") initiates dispute settlement proceedings against Ukraine for non-compliance with the Treaty establishing the Energy Community (hereinafter: "the Treaty"), and in particular with Articles 7 and 41 of the Treaty, Articles 1, 2(1), 16(1) and 19 of Regulation (EC) 714/2009 as well as Section 2.1 of the Congestion Management Guidelines and Articles 3(1), 12(f), 32(1) and 37(1)a) of Directive 2009/72/EC.

As stipulated in the Rules of Procedure for Dispute Settlement under the Treaty (hereinafter: "the Dispute Settlement Procedures"),[2] the Secretariat may initiate a preliminary procedure against a Party before seeking a decision from the Ministerial Council under Article 91 of the Treaty. According to Article 13 of these Rules, such a procedure is initiated by way of an Opening Letter.

The present case was initiated by a complaint of a private body under Article 90(2) of the Treaty. Part of the information used for the purpose of this Opening Letter was submitted to the Secretariat by the complainant. Ukraine is particularly invited to express itself on the validity of this information.

I. Factual background

1. The electricity sector in Ukraine

The electricity market of Ukraine is organized according to a single buyer model (the wholesale electricity market of Ukraine: "the WEM") on the basis of the Electricity Sector Law of 1998.[3] The WEM is based on an agreement between the participants of the wholesale electricity market of Ukraine ("the WEM Agreement") and the conditions and requirements of the WEM Rules.[4] The Agreement and its amendments have been approved by the National Electricity Regulatory Commission NERC as well as by the Antimonopoly Committee of Ukraine. There are no direct bilateral contracts between generators/suppliers and consumers, and there is no functioning balancing market or market for ancillary services. They are an integral part of the WEM Agreement. The same goes for the WEM Rules which define the mechanism of functioning of the WEM, the procedure of load allocation between generating units, the procedure of setting the electricity generation price and the electricity wholesale market price.[5]

[2] Consolidated Rules of Procedure for Dispute Settlement under the Treaty, as adopted by PA/2015/04/MC-EnC of 16 October 2015.
[3] Law of Ukraine 'On electricity' No. 575/97-BP, VR, 6 October 1997, published in Verkhovna Rada news, 1998 with the last amendments and additions from 16.07.2015.
[4] Rules on the Wholesale Electricity Market of Ukraine as Annex 2 from 2015 to the Agreement between members to the Wholesale Electricity Market of Ukraine, 15.11.1996 as amended last time on 17.02.2012.
[5] Article 15 of Electricity Sector Law of 1998.

All participants of WEM must sign the WEM Agreement with the administrator of the market, the State owned enterprise *Energorynok,* as a precondition for obtaining the status of a member to the WEM. The WEM Agreement defines the conditions of engaging in energy activities as well as the rights and obligations of WEM participants towards the WEM. The WEM is the exclusive wholesale market place in Ukraine, any other wholesale trade in electricity is prohibited.[6]

Energorynok purchases all the electricity produced by the generators or imported for sale in Ukraine, except for the electricity used by generators for their own needs, electricity produced by CHPs and supplied to consumers on their territory, and electricity produced in small power units.[7] *Energorynok* also sells electricity for export to the winners of auctions for access to cross-border transmission capacity organized by the transmission system operator *Ukrenergo*, under prices regulated by NERC.

The Ministry ensures the long-term and medium-term planning of the WEM through elaboration and update of a projected balance of electricity of the Integrated Power System of Ukraine,[8] pursuant to an Order of the Ministry of 2016 approving the procedure for preparing the annual and monthly balance of electricity.[9] This Order defines the imbalance of electricity as the difference between the volume of production and import of electricity on the one hand, and consumption and export of electricity on the other. It further stipulates that if the proposals by the generation companies do not lead to a balance of production and consumption, no later than 25 October of the year preceding the settlement, the Ministry shall decide on balancing generation with demand of electricity, based on a draft electricity balance from the transmission system operator *Ukrenergo*. This balance may be done via:

- increase/decrease of generation from nuclear power plants (if technical possible),
- increase/decrease of generation from thermal power plants(if technical possible),
- increase/decrease of export,
- organize import,
- limitation the volume of electricity consumption by energy suppliers.

Ukrenergo owns and operates the high voltage network including cross-border interconnection lines. The power system of Ukraine is interconnected as a part of the Integrated Power System in synchronous parallel mode with the Unified Power System of the Russian Federation, Belarus and Moldova. *Ukrenergo* operates export transmission capacities primarily with Russia (3000 MW), Moldova (700 MW) and Belarus (900 MW).[10] A smaller part of the Ukrainian power system is linked with the synchronized European ENTSO-E network through the isolated Burshtyn island in western Ukraine which disposes of an installed generation capacity of 1950 MW.[11] After internal

[6] Subparagraph 15 of paragraph 4 of Title VI of the Electricity Market Law of 2013 amends the Article 15 of the Electricity Sector Law1998.
[7] There are a number of exceptions as to the sale of electricity on wholesale electricity market, introduced by changes of the Electricity Sector Law as well as Cabinet of Minister's decrees.
[8] Para.4.5 of Regulation of the Ministry, approved by Decree of the President of Ukraine No382/2011, dated 06.04.2011.
[9] Order of the Ministry, "On approval of the preparation procedure of annual and monthly forecast balance of electricity of IPS of Ukraine", No.521, dated 26.08.2016.
[10] Annual Report of NEURC for 2015 (table 2.2.3.)
http://www.nerc.gov.ua/data/filearch/Catalog3/Richnyi_zvit_NKREKP_2015.pdf (23.05.2017)
[11] Burshtyn power plant (2351 MW), Kaluska Combined Heat and Power plant (200 MW) and Tereblya-Rikska hydroelectric power plant (27 MW) are the generation plants installed in this area.

consumption, the Burshtyn island's export capacity ranges between 500 MW and 650 MW (550 MW in summer).[12] The NTC values for the interconnection capacity of Burtshtyn island are Ukraine – Hungary: 800 MW; Ukraine – Slovakia: 400 MW and Ukraine – Romania: 400 MW. However, out of approx.1600MW of the total interconnectors' capacities only around 550 MW are used for export.

Hence, in Ukraine cross-border capacity is used for export to European Union Member States only in the amount of electricity available for export; i.e. electricity produced locally in the Burshtyn island after satisfying the demand of the domestic customers located in that territory.

As detailed in the in the Reasoned Opinion in Case ECS-1/12[13] in the period 2011-2017 there was more demand for interconnection capacity than was actually put on auction, and only a small part of the total interconnectors' capacity was auctioned because the auctioning was always linked with the available electricity for export.

In relation to the interconnection with Moldova, the situation is different. The two electricity systems operate synchronously, the interconnection lines are also not congested and the interconnection capacity between the two countries is sufficient for an increased cross-border trade. Those interconnectors are also used for export of electricity to Moldova, as detailed in the Reasoned Opinion[14] in Case ECS-1/12.

2. Legal framework governing allocation of cross-border capacity in Ukraine

a. Primary legal framework

Before the adoption of the Electricity Market Law[15] of 2013, the Electricity Sector Law of 1998[16] was governing the allocation procedure and was providing a legal basis for adoption of Auction Rules by NERC.

Article 10 of the Electricity Market Law governs the allocation of cross-border capacity. The Electricity Market Law entered into force on 1 January 2014,[17] with the exception of the provisions related to the introduction of a new electricity market model which was expected to enter into force only on 1 July 2017. Extensive and detailed provisions are governing the transitional period between the entry into force of the Law in January 2014 and the expected start of functioning of a new electricity market model in July 2017. Accordingly, Article 10 of the Electricity Market Law governing the cross-border allocations of capacity was to come into force also only on 1 July 2017, when the new market model is supposed to be effective.

[12] http://www.nerc.gov.ua/data/filearch/Catalog3/Richnyi_zvit_NKREKP_2015.pdf (23/05/2017)
[13] Reasoned Opinion in Case ECS-1/12, pp.5-6.
[14] Reasoned Opinion in Case ECS-1/12, p.6.
[15] Law of Ukraine No. 663-VII 'On the principles of the functioning electricity market in Ukraine' as from 24.10.2013.
[16] Law of Ukraine 'On electricity' No. 575/97-BP, VR, 6 October 1997, published in Verkhovna Rada news, 1998 with the last amendments and additions from 16.07.2015.
[17] According to Section VI – Final and transitional provisions – the Law comes into force on the first day of the month following the month of publication, and the first publication was in "The Voice of Ukraine" on 07.12.2013.

During the transitional period, in which both the Electricity Sector Law of 1998 and the Electricity Market Law of 2013 continue to exist in parallel, Article 30 of the Electricity Sector Law of 1998, as amended by the Electricity Market Law[18] governs allocation procedures. Those changes to Article 30 of the Electricity Sector Law entered into force on 1 December 2014 and were to be applied until 1 July 2017, provided that the new electricity market model is introduced by then.

By now, however, the Electricity Market Law of 2013 has not been implemented, the precondition for the amendments to Article 30 of the Electricity Sector Law of 1998 to enter into force, has not been performed. As a consequence, Article 30 of the Electricity Law of 1998 as amended by the Electricity Market Law of 2013 is still applicable today..

In the last couple of years, in parallel to the delayed implementation of the Electricity Market Law 2013, a new Electricity Market Law transposing the Third Energy Package[19] was drafted by a Working Group set up within the Ministry of Energy and Coal Industry (hereinafter: "the Ministry"). However, the new Law has been voted in second reading by the Ukrainian Parliament on 13 April 2017.[20] At the moment, the parliamentary procedure for adoption has not been finalized. The new Law has not been signed by the President of Ukraine yet, and has not been published in Official Journal, i.e. it has not entered into force. In any event, even after entry into force of the new Electricity Market Law, its new provisions related the allocation of interconnector capacity, together with a new market model, will only take effect from July 2019 onwards.[21] Until then, the transitional provision governing the allocation of cross-border capacities (Section VII of the Law), still stipulates (as do the currently applicable Articles 30 and 15 of the Electricity Sector Law of 1998) that volumes of electricity required for export and/or import shall be purchased and/or sold at *Energorynok* at prices determined by the WEM Rules.
Pursuant to Article 30 of the Electricity Law 1998, as amended by the Electricity Market Law of 2013, an electricity supplier wishing to export electricity must purchase the required volume on the WEM of Ukraine under WEM prices, established by the WEM Rules and approved by NERC. The same article also stipulates that in order to export (or import) electricity, the energy undertaking in question also needs a license for electricity supply and may not have any outstanding debts for electricity purchased at the WEM.

According to this Article 30, the transmission of electricity intended for export is based on a contract concluded with *Ukrenergo*. The contracts on capacity rights for interconnection capacity are awarded by way of auctions. After the auction has taken place, *Ukrenergo* enters into an agreement on the access to the cross-border transmission capacity for export of electricity with the winner of the auction. The terms and conditions of these contracts are be approved by NERC.

As regards the procedure for import of electricity, according to Article 15 of the Electricity Sector Law of 1998 as amended by the Electricity Market Law of 2013 and the WEM Rules, all imported electricity is to be sold to *Energorynok* at prices defined by NERC.

[18] Paragraph 30 of the Title VI 'Final and transitional provisions' of the Law of Ukraine № 663-VII 'On the principles of the functioning electricity market in Ukraine' as from 24.10.2013.
[19] The deadline for transposing the Third Energy Package expired on 1 January 2015.
[20] Law of Ukraine No.4493: 'On electricity market', adopted on 13 April 2017 by Verkhovna Rada.
[21] See Final and transitional provisions in Law No.4493.

Neither the Electricity Sector Law of 1998 nor the Electricity Market Law of 2013 define the term transit of electricity, or govern the procedure for allocation of cross-border capacity for the purpose of transit.

b. Secondary legal framework

The allocation of cross-border capacity for export at all interconnectors in the Burshtyn island as well as with Moldova and Belarus is performed through auctions according to Auction Rules adopted by NERC. Based on the Electricity Sector Law, until December 2012, the auctions were held according to the Auction Rules adopted in 2009.[22] Afterwards, Auction Rules adopted by *NERC* in December 2012[23] have been applied. Under those Rules, the interconnectors' capacity was sold at a price regardless of whether congestion occurs.[24]

The Auction Rules from 2012 were amended several times before being replaced by the Auction Rules from February 2015.[25] On 28 March 2017, the successor of NERC, the National Commission for State Energy and Public Utilities Regulation (NEURC) amended the Auction Rules of 2015. The Auction Rules of 2017 amending the Auction Rules of 2015 have been adopted on the basis of Article 30 of the Electricity Sector Law of 1998 as amended by Electricity Market Law from 2013, and they entered into force on 12 May 2017.[26].

The Auction Rules of 2017 define the procedure for organizing and performing electronic auctions on access to cross-border capacity of electricity networks for export and/or import of electricity.[27] The auction office, which is defined as "*enterprise providing centralized dispatching control over Interconnected Power System of Ukraine*", i.e. *Ukrenergo*, is responsible for organization and holding the electronic auctions.[28] Yearly, monthly and daily explicit auctions are to be organized.[29] In case of no congestion, the capacity is allocated free of charge, whereas in case of congestion, the marginal price is equal to the minimum bid price satisfied of all bids. [30]

Those rules– as the previous ones - are closely linked with and depend on the electricity market model currently in place in Ukraine as explained above, and as defined in the Electricity Sector Law of 1998 still applied to date. Only energy suppliers are allowed to participate in auctions, and in order

[22] Decree on approval of the Procedure of Auctions Relating to the Access to the Transmitting Capacity of Ukraine's International Power Grids for the Purpose of Electric Power Export adopted by National Power Industry Regulatory Committee of Ukraine, No.1207, 22 October 2009 (hereinafter, Auction Rules from 2009).
[23] Resolution on approval of the Procedure of holding auctions for access to the cross border capacity of cross border electric networks of Ukraine for export of electric energy No.1450, 8 November 2012, that became effective on 17 November 2012 after being registered in the Ministry of Justice and being published on the official website (hereinafter, Auction Rules of 2012).
[24] Article 1(2) Auction Rules of 2012.
[25] NEURC, "On approval of the Rules of electronic auctions on capacity allocation of cross-border electricity lines" No. 176 dated 12.02.2015.
[26] ANNEX 14: NEURC 'On approval of the Rules of electronic auctions on capacity allocation of cross-border electricity lines' No. 426 dated 28.03.2017. The Rules were published on 11 May 2017 in the 'Governmental Courier' (***"Урядовий кур'єр"***) and entered into force on 12 May 2017 (next day after publication). The text of the 2017 Auction Rules was made available to the public on the NEURC's website starting from 31.03.2017, awaiting publication in the 'Governmental Courier' to enter into force.
[27] Article 1.1 Auction Rules of 2017.
[28] Article 2 Auction Rules of 2017.
[29] Article 4 Auction Rules of 2017.
[30] Article 10.1 Auction Rules of 2017.

to participate they have to acquire the status of allocation participant.[31] *Ukrenergo*, verifies if the supplier has the status of WEM participant and whether it has open debts for electricity bought from the WEM.[32] Participating in the auctions also depends on the provision of a warranty deposit.[33] which takes the form of a bank guarantee[34] and/or a fee defined as "*funds, paid by auction participants in yearly, monthly and/or daily auctions and which in case of non-fulfillment of the obligations by the auction participant become ownership of the auction office as a fine*."[35] Approved allocation participants are not allowed to take part in auctions in case they have financial obligations towards the auction office, or existing debts for electricity purchased at the WEM of Ukraine, or in case if the status of WEM member of the participant has been canceled.[36] In case the allocation participant has not made any bid in any auction during a period of a year from the date of registration, its registration as allocation participant is withdrawn.[37]

If the applicant has been successful with its bids in the auctions, and has been allocated certain cross-border capacity on the yearly or monthly auctions, it can lose that capacity in case it has a debt towards the auction office or if it loses its status as WEM participant.[38] The participant also loses the allocated capacity if it does not submit its daily hourly schedule.[39] Use of allocated capacity is made by submitting daily hourly schedules for export of electricity to the auction office, and are subject to its approval.[40] The costs paid for the unused capacity, which have not been approved by the submission of daily hourly schedules of electricity export/import are not returned to the participant.[41] Moreover, in case a participant has been allocated capacity in a yearly auction, and during one month uses the allocated capacity for less than 70% of the booked capacity, it loses its right of access to the cross-border capacity of electricity network that it has obtained for the rest of the year, and the lost capacity is allocated at monthly and daily auctions.[42] Finally, in case the successful auction participant does not pay for the allocated cross-border capacity allocated, that participant also loses the allocated capacity, and the costs of its bank guarantee or fee are paid as a fine amounting to 100 minimal wages as described above. [43]
The Auction Rules of 2015 provide also for the possibility for successful participants to the auctions to transfer the acquired capacity to another allocation participant, provided that they have informed and registered the transfer with the auction office.[44] In case of technical problems with the electronic

[31] Article 5 Auction Rules of 2017.
[32] Article 2.2 Auction Rules of 2017.
[33] Article 6 Auction Rules of 2017.
[34] Defined as "type of ensuring fulfillment of obligations where the bank undertakes the cash obligations towards the auction office in case the auction participant does not fulfill in full or partially its obligations," The guarantee is to be provided no later than 13:00 Kyiv time on the day preceding the date of the gate opening of the yearly and/or monthly and/or daily auction.
[35] Article 1.2 Auction Rules of 2017, emphasis added. The fee is due no later than the day preceding the day of the gate opening of respective yearly and/or monthly and/or daily auction. The fee and/or the bank guarantee shall consist of an amount that exceeds or is equal to 100 (one hundred) minimal wages as defined in the applicable legislation of Ukraine on the date prior of the date of the opening of bids for the respective auction.[35] The minimal wage in Ukraine for the year of 2017 is 3 200 UAH per month (or 19.34 UAH per hour),[35] which amounts to 111, 49 EUR.[35] This means that the fee and/or bank guarantee is not less than approx. 11.000 EUR for the participation in annual, monthly or even daily auctions.
[36] Article 6.11 Auction Rules of 2017.
[37] Article 5.11 Auction Rules of 2017.
[38] Article 6.12 Auction Rules of 2017.
[39] Article 12.4 and 12.8 Auction Rules of 2017.
[40] Article 12.2 Auction Rules of 2017.
[41] Article 12.8 Auction Rules 2017.
[42] Article 12.9 Auction Rules of 2017.
[43] Article 17.2 Auction Rules of 2015.
[44] Article 13 Auction Rules of 2017

platform, a fallback mode is applied, which means auctions are to be performed via e-mail and fax.[45] However, until now the fallback mode was the default solution as electronic auction were not taking place. On 23 May 2017, first electronic auctions were performed by *Ukrenergo*.[46]

The Auction Rules of 2017, as also the previous rules, do not define or govern transit and allocation of cross-border capacity for transit as a separate category.

3. The complaint and relevant facts concerning allocation of interconnectors' capacities for transit of electricity

On 27 August 2015, the Energy Community Secretariat received a complaint submitted by Private Enterprise Energy Resources of Ukraine (*ERU Trading*) from Ukraine.[47] The complaint was registered under Case ECS-8/15.[48] The complainant alleges non-compliance by Ukraine concerning the cross-border capacity allocation related to transit of electricity organized and performed by the Ukrainian transmission system operator, *Ukrenergo*. The complaint was supplemented by a letter submitted on 26.10.2015[49] and by a list of additional documents that will be referred to in the following paragraphs.

In particular, the complainant alleges that Ukraine breaches Energy Community law by requiring approval from the Ministry of Energy and Coal Industry of applications for access to interconnectors for the purpose of transit of electricity, and thus treating transit of electricity differently than export. For export, as explained above, auctions for allocation of interconnectors' capacity are held by the transmission system operator *Ukrenergo* in accordance with the Auction Rules of 2015 without any involvement of the Ministry.

a. The right to perform transit of electricity

Approval from the Ministry has only ever been granted to one State owned undertaking, State Foreign Trade Company *Ukrinterenergo*,[50] at a meeting held in the Ministry, between NEURC, *Ukrenergo*, *Energorynok* and *Ukrinternerego,* dedicated to electricity export and transit via the Burshtyn island on 17.06.2014. Based on the minutes of the meeting,[51] the Ministry entrusted the State owned company *Ukrinterenergo* with performing transit of electricity. By a letter to *Ukrenergo*,[52] the Ministry further entrusted *Ukrenergo* to ensure the performance of the full volumes of electricity transit through electricity lines of the Burshtyn Island under the current power supply contracts with foreign entities to which the electricity will be sold (which was a precondition for participation to

[45] Article 11 Auction Rules of 2017.
[46] See, Ukrenergo website https://auctions.ua.energy/Public/Default.aspx?UC_CODE=UC001SysNews (23.05.2017).
[47] Letter of complaint submitted by *Ukrenergo* to the Secretariat, No. 1/01-1326, 27.08.2015.
[48] Acknowledgment of receipt submitted by the Secretariat to *Ukrenergo*, ECS-8/15/01-09-2015, 01.09.2015 per email.
[49] Letter submitted by *Ukrenergo* to the Secretariat, No. 1/01-1397, 26.10.2015.
[50] *Ukrinternero* was established in January 1993 with the purpose of ensuring, among the rest, that the interests of the state in foreign trade exchange are ensured.
[51] Copy of the Minutes of the meeting concerning electricity transport and transit via the transmission network in Burshtyn island, dated 17.06.2014.
[52] Letter from the Ministry was sent to *Ukrenergo*, No.01/32-1577 as from 30.07.2014.

allocation of cross-border of capacity in 2014, under the Auction Rules of 2009 and later of 2012)[53] concluded by *Ukrinterenergo*. The period for which *Ukrinterenergo* was entrusted with performing transit was not clearly defined, and instead the minutes of the meeting contained that such entrustment would be "*for period of settlement of issues on capacity allocation of electricity networks of Burshtyn Island for transit*." *Ukrinterenergo* declares providing electricity transit through the electricity network of Ukraine as well as performing export and/or import of electricity as its key commercial activity. [54] It was actually established to provide electricity transit through power transmission lines of Burshtyn Island and to ensure the maximum use of transit potential of Ukraine, resulting in the income and flow of foreign currency to the country and increasing contributions to the budget.[55]

The complainant, *ERU Trading*, which had a license from *NEURC* for supply of electricity under unregulated tariff dated 16.2.2015[56] and is a member of the WEM of Ukraine, has applied for receiving cross-border capacity to be used for transit of electricity through Ukraine at several occasions in 2015. The applications submitted by the complainant concern transit along the following routes:

- power system of Hungary => power system of Slovakia and/or Romania
- power system of Slovakia => power system of Hungary and/or Romania
- power system of Romania => power system of Slovakia and/or Hungary.

When assessing the application for transit of electricity in May 2015, *Ukrenergo* checked and confirmed that the applicant has concluded contracts with: foreign economic entities (the subject of which was transit of electricity via the transmission network in the Burshtyn island in western Ukraine),[57] with *Ukrenergo*[58] - a contract that was approved by *NEURC* as a regulated contract for transmission - [59] and with *Energorynok* – for covering the losses of electricity.[60] However, it noted that an undertaking could apply for interconnectors' capacity for the purpose of transit only if it has approval from the Ministry.[61]

[53] The Auction Rules of 2012 required that those contracts are coordinated and approved by *Ukrenergo,* including a very detailed assessment of the clauses of the contract, after which *Ukrenergo* demanded amendments to individual contracts. For details, see Opening Letter in Case ECS-1/12, p.4.
[54] See the website of *Ukrinterenergo*: http://www.uie.kiev.ua/?lang=2&change=232 (23.05.2017).
[55] See the website of *Ukrinterenergo*: http://www.uie.kiev.ua/en/main/work (23.05.2017).
[56] License No. AE575g19.
[57] Contracts with foreign companies for the export or import of electricity from or to Ukraine, with Energy Financing Team (Switzerland) AG[57] and GEN-I, doo (Slovenia) [Contract between *ERU Trading* and GEN-I, dated 24.04.2015, No. 1/1008 is submitted as a reference]. The contracts have been approved by *Ukrenergo* in the technical part (the approval did not cover the commercial terms for buying/selling electricity): Letter from *Ukrenergo* to *ERU Trading*, No. 02-2/02-2-4-2/5209, dated 07.05.2015.
[58] Contract between *ERU Trading* and *Ukrenergo*, No. 01/1711-15, dated 26.06.2015: on the provision of dispatching and electricity transmission services via the Burshtyn island, to execute the foreign economic contracts for transit with GEN-I doo and Energy Financing Team AG. The agreement was approved by NEURC as a regulated contract for transmission.
[59] NEURC letter, No. 688/174/61-15, date 14.07.2015.
[60] Contract between *ERU Trading*and Energorynok, No. 11482/07, dated 17.07.2015 for the sale and purchase of electricity needed for compensation of technical losses occurring during the electricity transit via the Burshtyn island, which was agreed with *Ukrenergo.*
[61] Letter from *Ukrenergo* to *ERU Trading*, No. 02-2/02-2-4-2/5209, dated 07.05.2015.

The Ministry, despite being addressed by the complainant in July 2015,[62] never issued such approval. In July 2015, *Ukrenergo*[63] rejected all schedules for transit submitted on 17.07,[64] 20.07,[65] 21.07,[66] 22.07,[67] 23.07[68] and 27.07.[69] *Ukrenergo* explained that according to the minutes of the meeting in June 2014 only *Ukrinterenergo* is entrusted with performing transit of electricity. In the absence of any exemption approved by the Ministry, only *Ukrinternerego* could use cross-border capacities for transit, as it has been entrusted with the right to transit by the Ministry.[70]

In reply to a similar request for using interconnectors' capacities for transit in August 2015,[71] *Ukrenergo* changed its view as to the applicability *rationae temporis* of the capacity allocation rules. In contrast to its earlier views, not the Auction Rules of 2015[72] but those of 2012 were to be applied.[73] Import and transit of electricity through Ukraine, however, were not considered subject to the Auction Rules of 2012 by *Ukrenergo*, because those rules were only governing allocation of cross-border capacity for export of electricity. As legal basis for its actions, *Ukrenergo* referred to a letter from the Ministry from December 2012 in which the Ministry stipulated that the use of available transmission capacity of interconnectors for transit and import of electricity has to be determined by instructions of the Ministry.[74]

b. Minutes of a meeting as a binding public act

In September 2015,[75] Kyiv Economic Court of Appeal decided a case of a trader concerning a refusal by *Ukrenergo* for transit of electricity. The refusal was also based on the minutes of the meeting in the Ministry of Energy and Coal Industry of Ukraine of 17.06.2014. In that judgment, the Kyiv Economic Court of Appeal ruled that the minutes of the meeting were not an administrative or legal act issued by the Ministry, but represented a report on the progress of the meeting. It lacked any binding force upon the undertakings signing it. Furthermore, the Court ruled that in the minutes of the meeting, there was no exclusive entrustment of *Ukrinterenergo* as the only undertaking in charge of performing transit of electricity via Ukraine. The Court finally decided that by refusing the schedules for transit, *Ukrenergo* violated the contract that it had signed with that company governing the provision of dispatching and electricity transmission services via the Burshtyn island, and concluded to execute foreign economic contracts for transit.

[62] *ERU Trading* letter to the Ministry of Energy and Coal Industry of Ukraine, No. 1/01-1153, dated 16.07.2015.
[63] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1159, dated, 16.07.2015; *ERU Trading* letter to *Ukrenergo*, No. 1/01-1179, dated 23.07.2015.
[64] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1160, dated, 17.07.2015.
[65] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1161, dated, 20.07.2015.
[66] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1174, dated, 21.07.2015.
[67] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1175, dated, 22.07.2015.
[68] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1179, dated, 23.07.2015.
[69] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1187, dated, 27.07.2015.
[70] On 04.08.2015, *Ukrenergo* replied to *ERU Trading* with a reference to its letter dated 27.07.2015.The substance of the answer was identical to the reply in the letter dated 23.07.2015.
[71] *ERU Trading* letter to *Ukrenergo* and the Ministry of Energy and Coal Industry of Ukraine, No.1/01-1214/1, dated 27.08.2015.
[72] *Ukrenergo* letter to *ERU Trading*, No. 01/01-6/10429, dated 09.09.2015.
[73] Based on the time when applications for using interconnectors' capacity were submitted, and even though the 2015 Rules date from February 2015.
[74] Ministry of Energy and Coal Industry of Ukraine letter to *Ukrenergo*, No. 03/32-5487, dated 12.12.2012.
[75] Kyiv Economic Court of Appeal, No. 910/28218/14, dated 16.09.2015.

Ukrenergo filed an appeal to the Supreme Economic Court of Ukraine with a request to cancel the decision of the Court of Appeal from September 2015, which the Supreme Economic Court did. On 12 January 2016, the Supreme Economic Court of Ukraine decided that based on the Record Keeping Instructions of central office of the Ministry as approved by Decree of the Ministry of Energy and Coal Industry,[76] minutes of a meeting (or protocols) are among the forms of adoption and record decisions of a Ministry.[77] They thus qualify as a legal basis for *Ukrenergo*'s follow-up actions. The Supreme Economic Court of Ukraine also decided that pursuant to the Electricity Sector Law[78] and the fact that *Ukrenergo* is a state undertaking subordinated to the Ministry, the latter's decisions are binding on *Ukrenergo*. The Court concluded that the decision of the Ministry imposing obligation on *Ukrinterenergo* for ensuring the performance of transit of electricity constituted **an inevitable circumstance** [emphasis added] for the state undertaking *Ukrenergo*, i.e. an event that did not depend on *Ukrenergo* and that the latter could not foresee at the time of entering in agreement with the trader concerned.[79] The Ministry's act constitutes force majeure (a definition including „acts of Government") that allowed *Ukrenergo* to terminate the contract with the claimant without any liability for not performing its obligations under that contract.[80]

On 12 April 2016 the claimant appealed to the Supreme Court of Ukraine to review the Decision adopted by Supreme Economic Court. As a court of final instance, the Supreme Court of Ukraine dismissed the appeal and upheld the judgment of the Supreme Economic Court of Ukraine.[81]

c. The licensing regime

According to Article 30 of the Electricity Sector Law of 1998 as amended by the Electricity Market Law of 2013 as well as Article 5 of the Auction Rules of 2017, a supply license is a precondition for access to transmission grids, including interconnectors, NEURC is the responsible authority for licensing energy undertakings, pursuant to the Law of Ukraine on Licensing of the Types of Economic Activities,[82] the Electricity Sector Law of 1998 and the Licensing Rules established by Resolutions of NEURC. The Licensing Law has been amended in September 2016. Now it stipulates only that economic activities conducted in the electricity sector are subject to licensing *as specified in the Electricity Sector Law*.[83] Pursuant to Article 13 of the latter, the types of economic activities requiring a license in the electricity sector of Ukraine include electricity production, transmission, distribution, supply and performing the functions of guaranteed buyer, system operator and market operator.[84] In the period before the latest amendments of 2016, licenses were canceled by the

[76] Decree of Ministry of Energy, No.603 as of 09.08.2012.
[77] Points 48-51 of the Decision of the Supreme Economic Court in case No.910/28218/14 as from 12.01.2016 available at: http://reyestr.court.gov.ua/Review/55047776 (23.05.2017).
[78] Namely Article 8(1) of the Electricity Sector Law, according to which state regulation in the electricity sector is performed by the Ministry of Energy and Coal Industry.
[79] Point 59 of the Decision of Supreme Economic Court of Ukraine in case No.910/28218/14, *supra.*
[80] Based on para.7.1 of the agreement between *Ukrenergo* and LLC Trade Electricity Company, No.3 01/5579-13, dated 30.12.2013 which was beforehand approved by the letter of the Ministry of Energy, No. 04/13-4779, dated 24.12.2013.
[81] The judgment is available at: http://reyestr.court.gov.ua/Review/57403129 (23.05.2017).
[82] The Law of Ukraine No. 222-19 'On Licensing of the Types of Economic Activities' adopted on 02.03.2015 (with latest amendments as from 01.01.2017), available at: http://zakon0.rada.gov.ua/laws/show/222-19 (17.05.2017).
[83] Article 7(5)(1) of the Law of Ukraine No. 222-19 'On Licensing of the Types of Economic Activities' (as from 02.03.2015) and Article 13 of the Law of Ukraine No. 575/97 'On Electricity Sector' (as form 16.10.1997). Emphasis added.
[84] In addition to those activities, the new Electricity Market Law of 2017 includes also trading as activity which requires a license. See Article 8 of Law No. 4493.

amendments to the Licensing Law (28.7.2015 and 22.9.2016) non-regulated suppliers were allowed to supply electricity and to access the electricity networks without license.[85] Nonetheless, after the latest changes of the Licensing Law, NEURC has yet to start issuing licenses for supply.[86] Therefore, currently in Ukraine, no undertaking has a valid supply license, even though such a license is a precondition for access to transmission grids, including interconnectors,[87] not even *Ukrinterenergo.*

d. Other facts

In addition to the applications for transit to *Ukrenergo*, as well as to the Ministry for obtaining an approval for transit, a complaint has also been lodged to the Antimonopoly Committee (*AMCU*) of Ukraine in August 2015.[88] The complaint alleged that by refusing the schedules for transit of electricity submitted by *ERU Trading*, *Ukrenergo* violated the competition rules and abused its dominant position.[89] In December 2015, *AMCU* informed the complainant that it has addressed the Ministry requesting clarification concerning the transit of electricity, but too date, no reply has been received by the Ministry and no further action has been taken by the *AMCU*.

On 3 February 2017, the Secretariat addressed requests for information and explanation concerning transit of electricity to the Ministry of Energy and Coal Industry to which the Ministry replied on 4 April 2017. In its reply,[90] the Ministry explained that *Ukrenergo* has to allocate all available capacity, but that imports are performed only in cases where the Ministry decides that there is a need for importing electricity in the annual balance. Therefore, since the Ministry decided in the annual balance that there is no need to import electricity, no allocation of capacity has been performed for the purpose of import for 2017. Regarding transit, the Ministry explained that an undertaking applying for interconnectors' capacity for the purposes of transit has to have contracts with foreign undertakings, agreement with *Ukrenergo* as well as an agreement with *Energorynok*. Due to the fact that the Auction Rules of 2015 and their amendments of 2017 do not stipulate a procedure for allocation of cross-border capacity for the purpose of transit, *Ukrenergo* has to follow the Decision of the Ministry, i.e. the minutes of the meeting of 2014. Those Minutes provide for a Ministry's

[85] Before 2015, supply of electricity at non-regulated tariff was subject to licensing in accordance with the Electricity Sector Law. With the adoption of the Licensing Law in 2015, this requirement was cancelled (Article 7 of the Licensing Law). After amendments to the Licensing Law in September 2016, and all energy activities as specified in Article 13 of the Electricity Sector Law are subject to licensing again, including supply of electricity. See: Letter from NEURC to the operators of distribution networks No.12914/28/61-15, 30.11.2015: http://www.nerc.gov.ua/?id=18306 (23.05.2017).

[86] On 22.03.2017, NEURC has approved Resolution No.309 'On approval of licensing conditions for economic activities on electricity production' published on 31.01.2017, available at: http://www.nerc.gov.ua/?id=23483 (23.05.2017), and on 13.04.2017, NEURC has approved Resolution No. 504' On approval of licensing conditions for economic activities on electricity supply' published on 31.01.2017, available at: http://www.nerc.gov.ua/?id=23485 (23.05.2017).

[87] Pursuant to Article 20 of the Licensing Law, no liability is prescribed for conducting economic activity without a license, in the event of absence of licensing conditions for such an economic activity, which in accordance with the Law requires a license, meaning that performing activity without a valid license is not penalized if licensing conditions are not in place.

[88] *ERU Trading* complaint to the Antimonopoly Committee of Ukraine, No. 1/01-1200, dated 06.08.2015

[89] On 25.08.2015, the AMCU requested additional documents from *ERU Trading* (Antimonopoly Committee of Ukraine letter to *ERU Trading*, No. 128-29/01-8881, dated 25.08.2015,) which the latter submitted on 21.09.2015 (*ERU Trading* supplement to the complaint to the Antimonopoly Committee of Ukraine, No. 1/01-1315, dated 06.08.2015).

[90] Letter from the Minister, Information from the Ministry of Energy and Coal Industry of Ukraine on cases No. ECS-1/12 and No. ECS-8/15 concerning the issue of cross-border allocation of transmission capacities relating to electricity import and transit organized and implemented by transmission system operator NEC *Ukrenergo* SE, dated 04.04.2017.

decision to entrust *Ukrinterenergo* with performing electricity transit for the period until the settlement of the issue relating to allocation of transmission capacity through the network in the Burshtyn Island.

II. Relevant Energy Community Law

Energy Community law is defined in Article 1 of the Dispute Settlement Procedures as "*a Treaty obligation or* […] *a Decision or Procedural Act addressed to* [a Party]".

A violation of Energy Community law occurs if "[a] *Party fails to comply with its obligations under the Treaty if any of these measures (actions or omissions) are incompatible with a provision or a principle of Energy Community law*".[91] In the following, a selection of provisions of Energy Community law relevant for the present case is compiled. This compilation is for convenience only and does not imply that no other provisions may be of relevance for legal assessment hereto. Energy Community law is defined in Article 1 of the Dispute Settlement Procedures as "*a Treaty obligation or* […] *a Decision or Procedural Act addressed to* [a Party]".

Article 6 of the Treaty reads:

> *The Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. The Parties shall facilitate the achievement of the Energy Community's tasks. The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.*

Articles 7 of the Energy Community Treaty reads:

> *Any discrimination within the scope of this Treaty shall be prohibited.*

Articles 11 of the Energy Community Treaty reads:

> *The "acquis communautaire on energy", for the purpose of this Treaty, shall mean the acts listed in Annex I of this Treaty.*[92]

Article 41 of the Energy Community Treaty reads:

> *1. Customs duties and quantitative restrictions on the import and export of Network Energy and all measures having equivalent effect, shall be prohibited between the Parties. This prohibition shall also apply to customs duties of a fiscal nature.*
>
> *2. Paragraph 1 shall not preclude quantitative restrictions or measures having equivalent effect, justified on grounds of public policy or public security; the protection of health and life of humans, animals or plants, or the protection of industrial and commercial property. Such restrictions or*

[91] Article 3(1) of the Dispute Settlement Procedures.
[92] Amended by Article 1 of Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011 on the implementation of Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 and amending Articles 11 and 59 of the Energy Community Treaty.

measures shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties.

Article 3(1) of Directive 2009/72/EC ("Public service obligations and customer protection") reads:

1. Contracting Parties shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in electricity, and shall not discriminate between those undertakings as regards either rights or obligations.

Article 12(f) of Directive 2009/72/EC ("Tasks of transmission system operators") reads:

Each transmission system operator shall be responsible for:

(f) ensuring non-discrimination as between system users or classes of system users, particularly in favour of its related undertakings.

Article 32(1) of Directive 2009/72/EC ("Third-party access") reads:

1. Contracting Parties shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Contracting Parties shall ensure that those tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 37 and that those tariffs, and the methodologies - where only methodologies are approved - are published prior to their entry into force.

Article 37(1)a) of Directive 2009/72/EC ("Duties and powers of the regulatory authority") reads:

1. The regulatory authority shall have the following duties:

(a) fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies.

Article 1 of Regulation (EC) 714/2009 reads:

This Regulation aims at:

(a) setting fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal market in electricity, taking into account the particular characteristics of national and regional markets. This will involve the establishment of a compensation mechanism for cross-border flows of electricity and the setting of harmonised principles on cross-border transmission charges and the allocation of available capacities of interconnections between national transmission systems.

(b) facilitating the emergence of a well-functioning and transparent wholesale market with a high level of security of supply in electricity. It provides for mechanisms to harmonise vthe rules for cross-border exchanges in electricity.

Article 2(1) of Regulation (EC) 714/2009 reads:

- "interconnector" means a transmission line which crosses or spans a border between Contracting Parties and which connects the national transmission systems of the Contracting Parties.

Article 16(1) of Regulation (EC) 714/2009 ("General principles of congestion management") reads:

1. Network congestion problems shall be addressed with non-discriminatory market-based solutions which give efficient economic signals to the market participants and transmission system operators involved. Network congestion problems shall preferentially be solved with non-transaction based methods, i.e. methods that do not involve a selection between the contracts of individual market participants.

Article 19 of Regulation (EC) 714/2009 ("Regulatory authorities") reads:

The regulatory authorities, when carrying out their responsibilities, shall ensure compliance with this Regulation and the Guidelines adopted pursuant to Article 18.[93]

Section 2.1 of the Congestion Management Guidelines („Congestion-management methods") reads:

2.1. Congestion-management methods shall be market-based in order to facilitate efficient crossborder trade. For that purpose, capacity shall be allocated only by means of explicit (capacity) or implicit (capacity and energy) auctions. Both methods may coexist on the same interconnection. For intra-day trade continuous trading may be used.

Article 3(2) of the Dispute Settlement Procedures reads:

Failure by a Party to comply with Energy Community law may consist of any measure by the public authorities of the Party (central, regional, local as well as legislative, administrative or judicative), including undertakings within the meaning of Article 19 of the Treaty, to which the measure is attributable.

III. Preliminary legal assessment

The subject-matter of Case ECS-8/15 consists in several instances of non-compliance by the existing legislation and its application in Ukraine with the Energy Community *acquis communautiare* related to allocation of cross-border capacity for transit. In concrete, linking the allocation of cross-border capacity with the undertakings' participation to, and the functioning of, the WEM the different treatment of interconnectors' capacities allocation for export on the one hand, and import and transit

[93] As adopted by the Permanent High Level Group under Procedural Act No 01/2012 PHLG-EnC of the Permanent High Level Group.

on the other hand, as well as requiring the Ministry's approval for the latter two activities constitute breaches of Energy Community law in the Secretariat's preliminary assessment.

1. Relation between Case ECS-8/15 and Case ECS-1/12

At the outset, the Secretariat recalls that it has already expressed itself on the compliance of different treatment of electricity imports and exports under Ukrainian law with Energy Community law in Case ECS-1/12. [94] That case concerns different rules applicable to the allocation of capacity on interconnectors depending on the directions of electricity flow. The domestic provisions under scrutiny in the Opening Letter of Case ECS-1/12 are Article 30(1) of the Electricity Sector Law of Ukraine, as well as Article 1(1) and 1(12) of the Auction Rules of 2012. In the Opening Letter sent on 26 February 2013, the Secretariat preliminarily concluded that by establishing a special, non-market based regime for electricity imports, Article 30(1) Electricity Sector Law of Ukraine and Article 1(1) and 1(12) of the Auction Rules encroach upon Articles 7 and 41 of the Treaty as well as Articles 20(1) and 23(2)(a) of Directive 2003/54/EC, Articles 1, 2(1) and 6(1) of Regulation (EC) 1228/2003 and Section 2.1 of the Congestion Management Guidelines. While this breach has been partially rectified by the adoption of the new Auction Rules of December 2015, in practice, imports are still only performed upon approval by the Ministry of Energy and Coal Industry of Ukraine based on approval of the energy balance. [95] Therefore, on 14 March 2017, the Secretariat submitted a Reasoned Request to Ukraine based on the fact that the amendments to the Auction Rules as well as amendments to Article 30 of the Electricity Sector Law by the Electricity Market Law of 2013 are not applied and implemented in practice. Finally, on 19 May 2017, the Secretariat submitted a Reasoned Request to the Ministerial Council requesting a decision that by maintaining and applying a separate, non-market based regime for electricity imports Ukraine fails to comply with Articles 12(f) and 32 of Directive 2009/72/EC read in conjunction with Article 7 of the Treaty, Article 16(1) of Regulation (EC) 714/2009 and Section 2.1 of the Congestion Management Guidelines, as well as Article 41 of the Treaty.

Allocation of cross-border capacity for transit of electricity has not been subject to Case ECS-1/12. While under Energy Community rules, allocating capacity for transit would consist of nominating capacity for import and export at the same time, [96] in Ukraine transit is considered a separate category[97] to which a procedure and approval different than for export applies. In particular, the actions of *Ukrenergo* and its refusals to allocate capacity for the purpose of transit are based on Ministry's letter of 2012 and minutes of a meeting from 2014, which are not relevant for the actions of *Ukrenergo* concerning export and import, as scrutinized in Case ECS-1/12. Another peculiarity of the present case concerns the fact that *Ukrinterenergo* was given the exclusive right to obtain interconnectors' capacity for transit.

[94] Reasoned Request in Case ECS-1/12, Section IV.2.a., p.15 et seq.
[95] This has been confirmed also by the Letter from the Ministry of Energy and Coal Industry to the Secretariat, dated 04.04.2017
[96] Transit of electricity is defined by Article 2(e) of Regulation (EC) 714/2009 as a „circumstance where a declared export of electricity occurs and where the nominated path for the transaction involves a country in which neither the dispatch nor the simultaneous corresponding take-up of the electricity will take place."
[97] The entrustment of *Ukrinterenergo* with right to access cross-border capacity for the purpose of transit is done with a Ministry's decision in the minutes of the meeting of 2014 because the Auction Rules do not govern transit, and such entrustment is done „for the period until the issue with transit is settled."

The two cases could not be joined under Article 6 of the Dispute Settlement Rules[98] without expanding the scope of Case ECS 1/12 in excess of what is allowed under the case-law of the Court of Justice[99] In exercising its discretion in deciding whether to join the two cases or not,[100] the Secretariat decided to pursue the present case separately from Case ECS-1/12.

2. Individual breaches

a. Article 7 of the Treaty and Articles 3(1), 12(f) and 32(1) of Directive 2009/72/EC

In the Secretariat's view, the allocation of interconnection capacity for transit based on a unilateral administrative action of the Ministry[101] fails to respect the principle of third party access to the transmission network as stipulated by Articles 12(f) and 32(1) of Directive 2009/72/EC. These provisions require that access to the networks is granted without discrimination and based on published tariffs.

The principle of non-discrimination requires that comparable situations are not treated differently unless such difference in treatment is objectively justified.[102] As a fundamental and overriding principle of Energy Community law, it is reflected throughout the *acquis communautaire*. Article 7 of the Treaty *prohibits any discrimination* within the scope of the Treaty. As "*specific expressions of the general principle of equality*",[103] the *acquis* places further obligations not to discriminate on both the transmission system operator and on the State.[104] In the present case, discrimination occurs in two instances:

Firstly, allocation of cross-border capacity for export is performed by *Ukrenergo* under the Auction Rules of 2017. On the other hand, allocation of electricity for import is performed subject to approval by the Ministry of Energy and Coal Industry and only in case the electricity balance requires import of electricity for satisfying the domestic demand, thus excluding allocation of cross-border capacity for commercial imports.[105] This amounts to discrimination which forms the subject-matter of Case ECS-1/12. Similarly, allocation of cross-border capacity for transit of electricity is only performed by the State-owned undertaking *Ukrinterenergo* without performing auctions, because this is the only

[98] Article 6 Dispute Settlement Procedure reads: *"If several pending cases concern the same subject matter, they may be consolidated and processed under the same case number."*

[99] The Opening Letter „*delimits the subject-matter of the dispute, so that it cannot thereafter be extended, ... the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure.*", C-51/83 *Commission v Italy*, [1984] ECR, paras.4-5; Case C 191/95 *Commission v Germany* [1998] ECR I 5449, para. 55, Case C 422/05 *Commission v Belgium* [2007] ECR I 0000, para. 25; Case C 186/06, *Commission v. Spain,* (2007) I-12093, para. 15.

[100] Joined Cases 209/78 and 218/78, *Heintz van Landewyck SARL and* others (FEDETAB) v Commission of the European Communities, [1980] ECR 3125, paras 29 and 32

[101] Legal value of the minutes of the meeting of 2014, as an administrative act, has been confirmed by the highest court of Ukraine, as well as by the Ministry in its Reply to the Secretariat in a letter dated 04.04.2017.

[102] C-17/03 *Vereniging voor Energie, Milieu en Water* (VEMW) [2005] ECR I-4983, para. 48.

[103] Case C-17/03 *VEMW* [2005] ECR I-4983, para. 47.

[104] Case C-17/03 *VEMW* [2005] ECR I-4983, paras. 35 and 36.

[105] Despite the changes in the applicable legal framework, in practice such approval is still required. See Reasoned Opinion in Case ECS-1/12, p.18, para.102. See also Ministry's Letter to the Secretariat dated 04.04.2017

undertaking entrusted to execute its contracts with foreign undertakings for the purpose of transit of electricity, and *Ukrenergo* is tasked to accept only its requests for interconnectors' capacity for transit. Based on the Ministry's decision (contained in the minutes of the meeting of 2014), *Ukrenergo* thus applies different procedure for allocating cross-border's capacity for transit than for export. Allocation of cross-border capacity is performed through different procedures based on the directions of the flow of electricity. While for export *Ukreenro* holds auctions as market-based procedures and accepts bids from different undertakings, for transit, *Ukrenergo* applies a non-market based procedures. According to the case law of the Court of Justice, "*elements which characterize the comparability of different situations must be assessed in the light of the subject matter and purpose of the Community act which makes the distinction in question*."[106] As explained above, Energy Community law considers the flow of electricity, irrespective of the direction (import, export or transit), as a flow of electricity crossing borders (interconnectors) between two Parties of the Treaty. Therefore, energy undertakings applying for using the interconnector capacity must be treated equally irrespective of the direction and the flow of electricity.

Secondly, the procedure for allocating interconnector capacities for the purpose of transit in Ukraine is in itself discriminatory. The decision taken in the form of minutes of a meeting held in the Ministry to *Ukrinterenergo* constitute preferential access to interconnectors' capacity in Ukraine granted to that company. The Court of Justice of the European Union, whose case law is the point of reference for the interpretation of Energy Community law under Article 94 of the Treaty, held in a judgment concerning preferential capacity allocation on electricity interconnectors that such priority access amounts to different treatment, and that such treatment could not be justified on account of the underlying long-term electricity supply contracts concluded in performing a public service obligation.[107] According to the Court of Justice, reserving capacity to the benefit of certain system users deprives all other actual or potential system users of the possibility to access the network for that particular capacity. It thus puts them at significant disadvantage in comparison to the undertakings benefiting from the preferential access to the system. Maintaining in practice a procedure under which the available interconnector capacity necessary for transit of electricity is allocated to only one system user, *Ukrinterenergo*, encroaches upon the non-discriminatory principle as it treats that particular system user differently in conferring it an advantage to the detriment of all other actual or potential users.

Both instances result in a breach of Energy Community law, namely Article 7 of the Treaty; Article 3(1) of Directive 2009/72/EC which requires Contracting Parties *not to discriminate between electricity undertakings* as regards either rights or obligations; Article 32(1) of Directive 2009/72/EC which requires them *to ensure access to the transmission* system for all third parties in an objective manner and *without discrimination*; Article 12(f) Directive 2009/72/EC according to which the transmission system operator is responsible for *ensuring non-discrimination* as between system users or classes of system users, particularly in favor

[106] Case C-127/07 Société Arcelor Atlantique et Lorraine and Others v. Premier minister, ECLI: EU: C: 2008:728, para.26.
[107] Case C-17/03 *VEMW* [2005] ECR I-4983, paras. 50-56.

of its related undertakings. Under Article 3(2) of the Dispute Settlement Rules a violation of Energy Community law by *Ukrenergo* is attributable to Ukraine as a Contracting Party.

Consequently, the Secretariat concludes at this point that Ukraine has failed to comply with its obligations under Article 7 of the Treaty as well as Articles 3(1), 12(f) and 32(1) of Directive 2009/72/EC.

Within the scope of Directive 32(1) of Directive 2009/72/EC, Article 3(14) of that Directive provides a possibility for derogation from Article 32(1) of Directive 2009/72/EC[108] "*insofar as* [its] *application would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest and insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the Energy Community."* In order to be justifiable, any such obligation imposed in the general economic interest would also need to comply with Article 3(2) of Directive 2009/72/EC. In particular, any such obligation *"shall be clearly defined, transparent, non-discriminatory,[109] verifiable and shall guarantee equality of access for EU electricity companies to national consumers…."*, and would have to comply with the limits of the principle of proportionality. The latter requires priority capacity allocation to be suitable to achieve the public service objective in question, and not go beyond what is necessary to achieve that objective. Furthermore, the Court of Justice emphasised in its *VEMW* judgment that the effect of a discriminatory measure such as priority capacity allocation would significantly imperil and even block the access of new operators to the market, and protect the position of companies in the situation of *Ukrinterenergo* against competition. Granting priority access to transmission capacity thus jeopardises "*contrary to the objective of the Directive, the transition from a monopolistic and compartmentalised market in electricity to one that is open and competitive*." [110] Moreover, the Secretariat has serious doubts that minutes of a meeting held in the Ministry of Energy and Coal Industry could serve as a lawful basis for the imposition of any public service obligation to *Ukrinterenergo* for performing transit of electricity. In any event, it is for the Contracting Party concerned to not only invoke and sustain possible justification grounds for a discriminatory priority access scheme such as the one at issue, but also to show that all conditions required – in particular those set by Articles 3(14) and 3(2) of Directive 2009/72/EC – are fulfilled.

b. Article 16(1) of Regulation (EC) 714/2009 and Section 2.1. of the Congestion Management Guidelines

Article 16(1) of Regulation (EC) 714/2009 requires that network congestion problems are addressed with non-discriminatory, market-based solutions which give efficient economic signals to the market participants and transmission system operators. In addition, Section 2.1 of the Congestion Management Guidelines specifies that congestion management methods shall be market-based and capacity shall be allocated only by means of explicit (capacity) or implicit (capacity and energy) auctions.

[108] But not Article 12(f) of Directive 2009/72/EC.
[109] The Secretariat submits that, in the context of the present case, this criterion relates to how the wholesale public supplier and the retail public supplier, benefiting from preferential treatment, were assigned their respective functions.
[110] Case C-17/03 *VEMW* [2005] ECR I-4983, para. 62.

According to its Article 1, Regulation (EC) 714/2009 aims at setting fair rules for the allocation of available capacities of interconnections between national transmission systems, in line with objective of establishing a harmonised framework for cross-border exchanges of electricity. Article 2(1) of Regulation (EC) 714/2009 defines interconnector as "*a transmission line which crosses or spans a border between"* two Member States. When Regulation (EC) 714/2009 was adapted in line with Article 24 of the Treaty, and adopted as Energy Community law, the notion of Interconnectors in Article 1 was defined as transmission lines or pipelines crossing a border between Contracting Parties.[111] This excludes interconnectors between Contracting Parties and Member States, and thus all cross-border transactions from/to and via Ukraine (Burshtyn island) with EU Member States.

However, on 23 September 2014, the Ministerial Council adopted a legally binding[112] Interpretation under Article 94 of the Treaty[113] in which it explained "*that the different treatment of interconnections, cross-border flows, transactions or network capacities, depending on whether the border to be crossed is situated between two Member States of the European Union, two Contracting Parties or an EU Member State and a Contracting Party, frustrates the very idea of a single regulatory space for Network Energy and leads to barriers of trade*". Article 1 of the Interpretation stipulates that

> „*In any legal act of the Energy Community incorporating European Union legislation, any reference to*
>
> - energy flows, imports and exports as well as commercial and balancing transactions;
> - network capacity;
> - existing or new gas and electricity infrastructure (including interconnections and interconnectors)
>
> *crossing borders, zones, entry-exit or control areas* ***between Parties*** *and integrating the Contracting Party/Contracting Parties with the EU internal energy market,* ***shall be treated in the same way and be subject to the same provisions as the respective flows, imports, exports, transactions, capacities and infrastructure between Contracting Parties under Energy Community law****.*" [emphasis added]

Consequently, the definition of „interconnector" from Article 2(1) of the Regulation (EC) 714/2009 must be understood as „a transmission line which crosses or spans a border between **Parties to the Treaty** and which connects the national transmission systems of the **Parties to the Treaty**."[114]

As described above, the Electricity Sector Law of 1998,[115] as well as Article 1(1) of the Auction Rules of 2017 stipulate that the auctions are to be held for access to cross-border capacity for export and/or import of electricity. The Electricity Sector Law and the Auction Rules do not govern the transit of electricity or the allocation of cross-border capacity at interconnectors for the purpose of transit as a

[111] Article 2(1) Regulation (EC) 714/2009 as adapted by Ministerial Council Decision No 2011/02/MC-EnC based on Article 4(1)a) of Ministerial Council Decision No 2011/02/MC-EnC: 'the term 'Member States' shall be replaced by 'Contracting Parties."
[112] Article VIII(4), Energy Community Ministerial Council Internal Rules of Procedure, Amended by Article 1 of the Procedural Act 2015/02/MC-EnC of 16 October 2015 amending Procedural Act No. 2006/01/MC-EnC.
[113] Emphasis added. See: Ministerial Council, Interpretation under Article 94 of the Treaty No 2014/01/MC-EnG, 23.09.2014.
[114] Emphasis added. Parties to the Treaty meaning: between Contracting Parties and between Contracting Parties and Member States.
[115] Article 30(1) Electricity Sector Law of Ukraine.

separate category. As explained above, such a separate norm is not required under Energy Community law.

For the transit of electricity, as detailed above, the Ministry of Energy and Coal Industry of Ukraine is tasked to give an approval. Based on a letter from the Ministry addressed to *Ukrenergo* and the minutes of the meeting from 2014, the latter does not allow private parties' access to interconnectors and prevents participation to auctions for cross-border capacity to energy undertakings without Ministry's approval. To require a unilateral administrative decision by a Ministry as a basis for the allocation of interconnectors, and not via competitive procedures such as explicit or implicit auctions, amounts to maintaining a non-market based method for capacity allocation that does not give efficient economic signals to the market participants and transmission system operators. It thus fails to comply with Article 16(1) of the Regulation (EC) 714/2009 and Section 2.1 of the Congestion Management Guidelines.

c. Article 41 of the Treaty

The prohibition of measures having an effect equivalent to a quantitative restriction, laid down in Article 41 of the Treaty, conflicts with any rule or measure enacted by a Party capable of directly or indirectly, actually or potentially, hindering trade among the Parties.[116] Measures requiring prior authorization, [117] even as a pure formality, [118] have been considered by the Court of Justice of the European Union as measures having equivalent effect to import restrictions. Making the transit of electricity depending on prior approval by the Ministry makes the transit of electricity in Ukraine more difficult than purely domestic supply and thus constitutes a measure prohibited by Article 41 of the Treaty in principle. Already in the early years of liberalization of the EU energy markets, the Court has also held that even though monopolies are not illegal *per se* they could be required to be abolished[119] if restricting free movement of goods unless such restrictions could be justified for provision of services of general economic interest, under Article 106(2) TFEU corresponding to Article 19 of the Treaty.[120] As a matter of fact, the requirement for Ministry's approval excludes the possibility of any system user from one Party of the Energy Community Treaty to sell electricity to customers in another Party via Ukraine.
According to the Court fo Justice case law, it is incumbent on Ukraine to show that their rules fulfill the conditions for application of the derogating rules in Article 41(2) of the Treaty or legitimate reasons in the general interest.[121] This corresponds to the second sentence of

[116] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, para. 5.
[117] Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-09171, para.21, 31, 35; Case C-170/04 *Rosengren and Others*, [2007] ECR I-0407, paras. 17, 18, 25, 38, 50; Case C-254/98 *TK-Heimdienst*, [2000] ECR I-00151, para.26; Case C-389/96 *Aher-Waggon v Bundesrepublik Deutschland*, [1998] ECR I-04473, para. 20.
[118] C-54/05 *Commission of the European Communities v Republic of Finland*, [2007] ECR I- 02473, para.32; Case C-150/11 *Commission v Belgium,* [2012] ECLI:EU:C:2012:539, para.51; Case C-443/10 *Bonnarde* [2011] ECR I-09327. para.26-30.
[119] **Case C-393/92 *Gemeente Almelo and others v Energiebedrijf IJsselmij* [1994] ECR I-01477.**
[120] See the energy monopolies cases: Case C-157/94, *Commission* v *The Netherlands* (1997) ECR I-5699; Case C-158/94, *Commission* v *Italy* (1997) ECR I-5789; Case C-159/94, *Commission* v *France* (1997) ECR I-5815 and Case C-160/94, *Commission* v *Spain* (1997) ECR I-5851.
[121] Case C-159/94 *Commission v France* [1997] ECR I-5815, para. 94.

Article 4 of the Rules of Procedure for Dispute Settlement whereby "where, however, a *Party invokes an exemption to a rule or general principle of Energy Community law, it is incumbent upon the Party concerned to prove that the requirements for such exemption are fulfilled*."

d. Article 19 Regulation (EC) 714/2009

Under Article 19 of Regulation (EC) 714/2009, the national regulatory authority has an obligation to ensure compliance with that Regulation, including its Congestion Management Guidelines. *NEURC* has not taken later any effective remedial action to ensure compliance of the implementation of the Auction Rules by *Ukrenergo* with the *acquis communautaire*. Therefore, the Secretariat must conclude at this point that Ukraine has failed to fulfil its obligation under Article 19 of the Regulation (EC) 714/200 by the failure to remedy the violation of the infringed articles of the *acquis*. Under Article 2(2) of the Dispute Settlement Rules, a violation of Energy Community law by public authorities such as *NEURC* is attributable to Ukraine as a Contracting Party to the Treaty.

IV. Conclusion

Under the Dispute Settlement Procedures, the Secretariat may initiate a preliminary procedure against a Party before seeking a decision by the Ministerial Council under Article 91 of the Treaty. According to Article 13 of these rules, such a procedure is initiated by way of an Opening Letter.

It follows from the assessment above that, Ukraine failed to comply with its obligations under the Treaty related to non-discriminatory and market based allocation of cross-border capacity, in particular Articles 7 and 41 of the Treaty, Articles 3(1), 12(f) and 32(1) of Directive 2009/72/EC and Articles 16(1) and 19 of Regulation (EC) 714/2009 as well as Section 2.1 of the Congestion Management Guidelines.

In accordance with Article 13 of the Dispute Settlement Procedures, Ukraine is requested to submit its observations on the points of fact and of law raised in this letter within two months, i.e. by

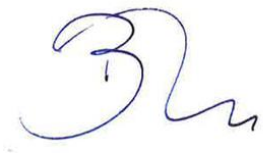
24 July 2017.

to the Secretariat.

It is recalled that, according to Article 11(2) of the Dispute Settlement Procedures, the purpose of the procedure hereby initiated is to establish the factual and legal background of the case, and to give the Party concerned ample opportunity to be heard. In this respect, the preliminary procedure shall enable the Ukraine to comply of its own accord with the requirements of the Treaty or, if appropriate, justify its position. In the latter case, the Republic of Serbia is invited to provide the Secretariat with all factual and legal information relevant to the case at hand.

Should Ukraine wish to comply with the Treaty, the Secretariat, acting under Article 67 of the Treaty, is prepared to help in rectifying the identified cases of non-compliance and providing concrete assistance.

Vienna, 24 May 2017



Janez Kopač
Director

Dirk Buschle
Deputy Director/Legal Counsel

МІНІСТЕРСТВО ЕНЕРГЕТИКИ ТА ВУГІЛЬНОЇ ПРОМИСЛОВОСТІ УКРАЇНИ

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MINISTRY OF ENERGY AND COAL INDUSTRY OF UKRAINE

30 Khreshchatyk,
Kyiv, 01601, Ukraine

_____ №_____

Шановний пане Копаче,

Користуючись цією нагодою, Міністерство енергетики та вугільної промисловості України поновлює Секретаріату Енергетичного Співтовариства запевнення у своїй високій повазі та повідомляє.

Міненерговугілля опрацювало листи Секретаріату Енергетичного Співтовариства від 19 травня 2017 року та від 24 травня 2017 року № UA/MIN/jko/10/24-05-2017 щодо справ ECS-1/12 та ECS-8/15 та надає інформацію щодо впровадження реформ в сфері електроенергетики в Україні та роз'яснення щодо імпорту та експорту електричної енергії, а також доступу до пропускної спроможності міждержавних перетинів для здійснення транзиту електричної енергії.

Сподіваємося на Вашу підтримку та плідну співпрацю.

З повагою

Перший заступник Міністра **Галина Карп**

Його високоповажності
Директору Секретаріату
Енергетичного Співтовариства

Янезу Копачу

м. Відень

Додаток: на 3 арк. в 1 прим.

Додаток до листа Міненерговугілля
від_____№_____

Інформація Міненерговугілля стосовно справ ECS-1/12 та ECS-8/15 щодо впровадження реформ в сфері електроенергетики в Україні та роз'яснення щодо імпорту та експорту електричної енергії, а також доступу до пропускної спроможності міждержавних перетинів для здійснення транзиту електричної енергії

Міненерговугілля, в межах компетенції, опрацювало перелік документів, які необхідні для закриття справи ECS-1/12 та справи ECS-8/15 та інформує щодо реалізації положень Закону України «Про ринок електричної енергії», який імплементує правила третього енергетичного пакету.

Закон України «Про ринок електричної енергії» прийнятий Верховною Радою України 13.04.2017 № 2019-19 та набрав чинності 11.07.2017.

19 липня 2017 року на засіданні Кабінету Міністрів України було схвалено План організації підготовки проектів актів, необхідних для забезпечення реалізації Закону України від 13 квітня 2017 року № 2019-VIII «Про ринок електричної енергії».

Згідно з положенням Закону України «Про ринок електричної енергії» ДП «НЕК «Укренерго» у шестимісячний строк з дня набрання чинності Закону (до 11.12.2017) необхідно розробити та подати на затвердження НКРЕКП проекти Правил ринку, Кодексу системи передачі, Кодексу комерційного обліку, Правил управління обмеженнями та Порядку розподілу пропускної спроможності міждержавних електричних мереж та інші документи вторинного законодавства.

За результатами відкритого засідання НКРЕКП (протокол № 71 від 10.08.2017) було узгоджено графік підготовки проектів нормативно-правових актів на виконання Закону України «Про ринок електричної енергії», дотримання термінів якого є обов'язковим за рішенням Комісії.

Спеціалістами ДП «НЕК «Укренерго» наразі проводиться активна робота щодо фінального опрацювання зазначених проектів документів, зокрема до НКРЕКП направлено проекти наступних документів:

- Правила управління обмеженнями та порядок розподілу пропускної спроможності міждержавних перетинів (лист від 17.08.2017 № 01/9083);
- Методика визначення доступної пропускної спроможності міждержавних електричних мереж (лист від 21.08.2017 № 01/9243);
- Механізм функціонування нової моделі ринку електричної енергії України (лист від 18.08.2017 № 01/9139)

ДП «НЕК «Укренерго» листом від 01.06.2017 № 01/5990 направило на адресу НКРЕКП проекти Кодексу системи передачі, Кодексу комерційного обліку та Правил ринку електричної енергії. Наразі, спільно із спеціалістами НКРЕКП проводиться фінальне доопрацювання зазначених проектів нормативно-правових актів.

Відповідно до положень Закону України «Про ринок електричної енергії» аукціони з розподілу вільної пропускної спроможності міждержавних перетинів із застосуванням положень статей 38-41, 42 цього

Закону проводяться з відповідних дат, визначених Регулятором, але не пізніше аукціонів з розподілу вільної пропускної спроможності міждержавних перетинів на 2019 рік.

До цієї дати аукціони з розподілу вільної пропускної спроможності міждержавних перетинів проводяться відповідно до порядку, затвердженого Регулятором.

По справі ECS-1/12:

а) Різний підхід до імпорту та експорту електричної енергії.

I) Імпорт та експорт електричної енергії в Україні.

Починаючи з місячного аукціону на червень 2017 року, проведеного на електронній аукціонній платформі, ДП «НЕК «Укренерго» розподіляє і розподілятиме в майбутньому пропускну спроможність міждержавних електричних мереж України в напрямку імпорту.

Пропонуємо Секретаріату Енергетичного Співтовариства зняти зазначене питання із тих, які порушені проти України по цій справі.

II) Порушення статті 41 Договору (залежність імпорту електричної енергії від дозволу Міністерства).

Відповідно до діючого законодавства України повний обсяг імпортованої електричної енергії повинен бути проданий в оптовий ринок електричної енергії (ДП «Енергоринок»). Для здійснення продажу електричної енергії в умовах діючих правил ринку необхідна визначена регулятором (НКРЕКП) ціна, по якій ДП «Енергоринок» має придбати цю електроенергію.

Отже чинним законодавством України передбачено, що імпортована електроенергія купується ДП «Енергоринок» за ціною, яка окремо встановлюється НКРЕКП. Станом на сьогодні відсутня визначена НКРЕКП ціна продажу такої електричної енергії в ОРЕ. Міністерство енергетики та вугільної промисловості України не передбачало в прогнозному балансі електричної енергії імпорт електричної енергії, тому що покриття попиту на електричну енергію в Україні та експорт забезпечується енергогенеруючими потужностями країни.

Також інформуємо, що відповідно до Закону України «Про ринок електричної енергії» після запровадження нового ринку електричної енергії дане питання буде зняте.

б) Обмеження доступу до міждержавних електричних мереж для експорту.

I) Обмеження категорій учасників аукціонів з розподілу пропускної спроможності міждержавних електричних мереж.

Статтею 30 Закону України «Про електроенергетику» було визначено, що доступ до пропускної спроможності міждержавних електричних мереж з метою здійснення операцій з експорту та/або імпорту електричної енергії мають енергопостачальники, які є членами оптового ринку електричної енергії України, мають ліцензію на здійснення діяльності з постачання електричної енергії та не мають простроченої

заборгованості за електричну енергію, закуплену на оптовому ринку електричної енергії України».

Зазначені вимоги були відображені і у діючому Порядку проведення електронних аукціонів (далі - Порядок).

Враховуючи, що в Законі України «Про ринок електричної енергії», зазначені вимоги для учасників аукціону відсутні, ДП «НЕК «Укренерго» ініціюватиме внесення відповідних змін до Порядку при першому розгляді зауважень та пропозицій до нього, які, згідно з протокольним рішенням НКРЕКП від 09.02.2017, розглядатимуться через місяць після введення електронної аукціонної платформи в промислову експлуатацію.

II) Наявність ухвалених договорів купівлі/ постачання як одна з вимог для участі у процедурах розподілу пропускної спроможності міждержавних електричних мереж.

Зазначена вимога була усунута в діючому Порядку.

III) Наслідки невідповідності критеріям отримання статусу учасника розподілу та втрати реєстрації як учасника розподілу.

Враховуючи, що в Законі України «Про ринок електричної енергії», щодо обов'язкового використання набутої в результаті річного аукціону пропускної спроможності на рівні не менше ніж на 70% відсутня, ДП «НЕК «Укренерго» ініціюватиме внесення відповідних змін до Порядку при першому розгляді зауважень та пропозицій до нього.

Щодо анулювання реєстрації учасника розподілення в разі неподання жодної цінової заявки протягом календарного року, зазначаємо, що зазначена вимога не є принциповою для ДП «НЕК «Укренерго» та вона може бути також усунута при першому розгляді додаткових зауважень та пропозицій до Порядку.

По справі ECS-08/15:

II) Порушення статей 1 та 2(1) Регламенту (СС) 1228/2003 використання різних процедур розподілу для експорту, імпорту та транзиту електроенергії).

Починаючи з місячного аукціону на червень 2017 року, проведеного на електронній аукціонній платформі, ДП «НЕК «Укренерго» розподіляє і розподілятиме в майбутньому пропускну спроможність міждержавних електричних мереж України в напрямку імпорту.

Оскільки порядком проведення електронних аукціонів з розподілення пропускної спроможності міждержавних електричних мереж, який затверджений постановою НКРЕКП від 12.02.2015 року № 176, не передбачений механізм розподілення доступу до пропускної спроможності міждержавних електричних мереж для здійснення транзиту електроенергії, на даний час ДП «НЕК «Укренерго» керується рішенням Міненерговугілля України, відповідно до якого уся невикористана учасниками ринку пропускна спроможність надається ДПЗД «Укрінтеренерго» для здійснення транзитних операцій з метою максимального використання пропускної

спроможності.

Питання розподілу пропускної спроможності для здійснення транзиту електроенергії обговорювалося під час наради, яка була проведена в м. Відень (Австрія) 18.07.2017 року з представниками Секретаріату Енергетичного Співтовариства. Експерти Енергетичного Співтовариства відзначили, що розподіл пропускної спроможності міждержавних перетинів слід здійснювати за ринковими принципами на основі аукціонів, у тому числі і транзит електроенергії, а також існує потреба в прийнятті українською стороною відповідного рішення, яке дозволить проводити розподіл пропускної спроможності для транзиту електроенергії за ринковими принципами на основі аукціонів.

Також, Секретаріат Енергетичного Співтовариства вказав на доцільність надання постачальнику можливості використовувати право на доступ до пропускної спроможності міждержавних перетинів для здійснення транзиту у разі наявності у нього відповідних прав для здійснення імпорту та експорту електроенергії.

ДП «НЕК «Укренерго» врахувало зазначену пропозицію Секретаріату при підготовці проекту Правил управління обмеженнями та порядку розподілу пропускної спроможності міждержавних перетинів, направленого до НКРЕКП листом від 17.08.2017 № 01/9083.

Dear Mr. Kopač,

Taking this opportunity, the Ministry of Energy and Coal Industry of Ukraine will renew the Energy Community Secretariat's assurances in its high regard and inform.

The Ministry of Energy and Coal worked on letters from the Energy Community Secretariat dated May 19, 2017 and May 24, 2017, UA / MIN / jko / 10 / 24-05-2017 concerning ECS-1/12 and ECS-8/15 cases, and provides information on the implementation of reforms in the field of electricity in Ukraine and clarification on the import and export of electric energy, as well as access to the throughput of intergovernmental crossings for the transit of electric energy.

We look forward to your support and fruitful cooperation.

Kind regards,

First Deputy Minister **Halyna Karp**

To the attention of
Janez Kopač
Director of the Energy Community Secretariat

Vienna

Information regarding Ministry of Energy and Coal industry of Ukraine Affairs ECS-1/12 and ECS-8/15 on the implementation of reforms in the electricity sector in Ukraine and clarification on the import and export of electricity, as well as access to transmission capacity interstate crossings for transit of electricity

Ministry of Energy and Coal industry of Ukraine, within the competence worked out a list of documents required for closing the case ECS-1/12 and the case ECS-8/15 and informs on realization of the Law of Ukraine "On Electricity Market", which implements the rules of the Third Energy Package.

The Law of Ukraine "On the Electricity Market" was adopted by the Verkhovna Rada of Ukraine on April 13, 2017 No. 2019-19 and came into force on July 11, 2017.

On July 19, 2017 at the meeting of the Cabinet of Ministers of Ukraine approved the organization plan drafting regulations necessary for the implementation of the Law of Ukraine on April 13, 2017 № 2019-VIII «On Electricity Market."

In accordance with the provisions of the Law of Ukraine "On the Electricity Market", SE "NEC" Ukrenergo "within six months from the date of entry into force of the Law (until 11.12.2017) is required to develop and submit for approval of the NERC (National Commission for Energy State Regulation) the draft Rules of the Market, Code of the System of Transmission, Code of Commercial Accounting, The Rules for the management of restrictions and the Procedure for the distribution of capacity of intergovernmental electricity networks and other secondary legislation.

According to the results of the open meeting of the NERC (Minutes No. 71 dated August 10, 2017), a timetable for the preparation of draft regulatory acts for the implementation of the Law of Ukraine "On the Electricity Market" was agreed upon, the observance of which terms is mandatory by the Commission's decision.

Specialists of the SE "NPC" Ukrenergo" are currently actively working on the final processing of these draft documents, in particular, the following documents were sent to the NERC:

- Constraints management rules and the procedure for the allocation of the throughput capacity of interstate crossings (letter dated August 17, 2017, No. 01/9083);

- Method of determining the available throughput capacity of interstate electric networks (letter dated August 21, 2017, No. 01/9243);

- The mechanism of functioning of the new model of the electricity market in Ukraine (Letter dated August 18, 2017 No. 01/9139)

SE "NEC" Ukrenergo "sent letter dated 01.06.2017 № 01/5990 to the NERC the draft Code of the transmission system, the Code of Commercial Accounting and the Rules of the Electricity Market. At present, in cooperation with the NERC specialists, the final revision of the said draft normative acts is being finalized.

In accordance with the provisions of the Law of Ukraine "On the Electricity Market", auctions on the distribution of free capacity of interstate sections with the

application of the provisions of Articles 38-41, 42 of this Law shall be conducted from the relevant dates specified by the Regulator, but not later than the auctions on the allocation of free capacity of interstate crossings 2019 year

By this date, auctions on the distribution of free capacity of interstate sections shall be conducted in accordance with the procedure approved by the Regulator.

In the case of ECS-1/12:

a) Different approach to the import and export of electricity.

I) Import and export of electric energy in Ukraine.

Beginning with the monthly auction of June 2017 held on the electronic auction platform, SE "NEC" Ukrenergo "distributes and will distribute in the future the throughput capacity of the interstate electric networks of Ukraine in the direction of import.

We propose to the Energy Community Secretariat to remove this issue from those brought against Ukraine in this case.

II) Violation of Article 41 of the Treaty (dependence of import of electricity from the permit of the Ministry).

In accordance with the current legislation of Ukraine, the full amount of imported electricity should be sold to the wholesale electricity market (SE "Energorynok"). In order to realize the sale of electric energy in the conditions of the current rules of the market, the price determined by the regulator (NERC) must be determined by the State Enterprise "Energorynok" to purchase this electricity.

Thus, the current legislation of Ukraine states that imported electricity is purchased by SE "Energorynok" at a price, which is separately established by NERC. As of today, the NERC's price for the sale of such electric energy in the Wholesale market of electric energy is not specified. The Ministry of Energy and Coal Industry of Ukraine does not envisage the import of electricity in the forecast balance of electricity because the coverage of demand for electric energy in Ukraine and export is provided by the power generating capacities of the country.

We also inform that according to the Law of Ukraine "On the Electricity Market" after the introduction of a new market of electric energy, this issue will be removed.

b) Restriction of access to interstate electricity networks for export.

I) Restrictions on the categories of participants in the auctions for the allocation of capacity of interstate electric networks.

Article 30 of the Law of Ukraine "On Electricity" stipulates that access to the throughput capacity of interstate electric networks for the purpose of carrying out export and / or import operations of electric energy shall be provided by energy suppliers who are members of the wholesale electricity market of Ukraine and have a license for the provision of activities of electric power and have no overdue debts for electric energy purchased on the wholesale electricity market of Ukraine. "

These requirements were also reflected in the current Electronic Auctions Procedure (hereinafter referred to as the Order).

Taking into account that in the Law of Ukraine "On the Electricity Market" there are no specified requirements for the auction participants, the State Enterprise "NEC" Ukrenergo "will initiate the respective amendments to the Procedure upon first consideration of the comments and proposals to it, which, according to the NERC protocol decision of 09.02.2017 years, will be considered one month after the introduction of the electronic auction platform for commercial exploitation.

II) The existence of approved purchase / supply contracts as one of the requirements for participation in procedures for the allocation of capacity of intergovernmental electricity networks.

This requirement was removed in the current Order.

III) Consequences of non-compliance with the criteria for obtaining the status of a participant in the distribution and loss of registration as a participant in the distribution.

Taking into account that in the Law of Ukraine "On the Electricity Market", in relation to mandatory use of at least 70% of the annual auctioned throughput at auction, the State Enterprise "NEC" Ukrenergo "will initiate the respective amendments to the Procedure at the first consideration comments and suggestions to it.

Concerning cancellation of registration of a participant of distribution in case of failure to submit any price application within a calendar year, we note that the specified requirement is not essential for SE "NEC" Ukrenergo "and it may also be removed at the first consideration of additional comments and proposals to the Procedure.

Case ECS-08/15:

II) Violation of Articles 1 and 2 (1) of Regulation (EC) 1228/2003, the use of different distribution procedures for the export, import and transit of electricity).

Beginning with the monthly auction of June 2017 held on the electronic auction platform, SE "NEC" Ukrenergo "distributes and will distribute in future the throughput capacity of the interstate electric networks of Ukraine in the direction of import.

Since the order of conducting electronic auctions for the distribution of interconnection power networks, approved by the resolution of the NERC of February 12, 2015, No. 176, does not provide for a mechanism for distributing access to the throughput of inter-state electricity networks for the transit of electricity, currently the State Enterprise "NEC" Ukrenergo " is guided by the decision of the Ministry of Energy and Coal Industry of Ukraine, according to which all unused transmission capacity of market participants are provided by the SFTC "Ukrinterenergo" for the implementation of the transit operations to maximize transmission capacity.

The question of the allocation of capacity for electricity transit was discussed during a meeting held in Vienna (Austria) on 18.07.2017 with representatives of the Energy Community Secretariat. Energy Community experts noted that the distribution of interstate crossings capacity should be based on market principles on the basis of auctions, including transit of electricity, and also there is a need for the Ukrainian side to adopt an appropriate solution that would allow the allocation of capacity for the transit of electricity by market principles on auctions basis.

Also, the Energy Community Secretariat has indicated that it is expedient to allow the supplier to use the right to access the throughput of inter-state crossings for transit if he has the appropriate rights to import and export electricity.

The State Enterprise "NEC" Ukrenergo "took into account the said proposal of the Secretariat in preparation of the draft Rules on the management of the restrictions and the procedure for allocating the throughput capacity of the interstate sections, sent to NERC by letter dated 17.08.2017 No. 01/9083.

Minutes of the Meeting

Location: Vienna	
Date: 18th July 2017, morning session	
Participants:	*Andriy Nemyrovskyi, Ukrenergo* *Volkov Oleksandr, Ukrenergo* *Dirk Buschle, ECS* *Arben Klokoqi, ECS* *Rozeta Karova, ECS* *Simon Uzunov, ECS* *Svitlana Karpyshyna, ECS* *Yuliana Onishchuk, ECS* *Nenad Šijaković, ECS*
Subject:Meeting with Ukrenergo and Moldelectrica	

Agenda

10:00h-12:00h ECS - Ukrenergo

Introduction	10:00 – 10:15	ECS
Bursthyn Island integration into ITC mechanism: • Legal background: Article 13 of the Regulation 714/2009 and Regulation 838/2010 • ITC mechanism – process and methodology • Data availability, • Proposed implementation process timeline	10:15 – 12:00	ECS, Ukrenergo
Coffee break	12:00 – 13:00	

1. ECS introductory presentations

First part of the morning session has been dedicated to the presentations prepared and delivered by ECS. Presentations attached to the document.

2. Discussion conclusions and recomendations

Bursthyn Island – ITC mechanism integration (morning session)

1. Ukrenergo agreed with the ECS that proper legal basis exists in order to impose integration of the Bursthyn Island into European ITC-Inter TSO Compensation mechanism but also Ukrenergo mentioned that it would become possible after approval of Ukrainian Regulator of such measures.
2. ECS is of opinion that all necessary data/measurements and other technical preconditions exists in Ukrenergo in order to integrate the Bursthyn Island into European ITC-Inter TSO Compensation mechanism.
3. ECS to prepare the Letter for ENTSO-E and organise trilateral meeting between ECS, ENTSO-E and Ukrenergo (beginning of August in Kiev or after 11th September, any location).
4. ECS to prepare the letter for Ukrainian NRA, initiating necessary changes/accommodations of the transmission tariff, related to the integration of the Bursthyn Island into European ITC-Inter TSO Compensation mechanism.

5. ECS to send presented materials to Ukrenergo, including calculation applications and tables.
6. In order to allow transit flow nominations and existence, changes are needed in the capacity allocation rules but also in separating the functioning of the electricity market and capacity allocation. It was proposed that the following wording to be introduced in the national allocation rules: "Market participants which get allocation capacity rights for import and export in one synchronous zone can use this capacity for providing transit operation." The Secretariat explained that even though that might solve some of the problems related to transit of electricity, it is not addressing fully the breach identified in the open dispute settlement procedure in Case ECS-8/15.

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Reasoned Opinion
in Case ECS-8/15

I. Introduction

(1) According to Article 90 of the Treaty establishing the Energy Community ("the Treaty" or "EnC"), the Secretariat may bring a failure by a Party to comply with Energy Community law to the attention of the Ministerial Council. Pursuant to Article 11 of the Rules of Procedure for Dispute Settlement under the Treaty (hereinafter: "the Dispute Settlement Procedures"),[1] the Secretariat shall carry out a preliminary procedure before submitting a reasoned request to the Ministerial Council.

(2) On 27 August 2015, the Secretariat received a complaint concerning allocation of interconnectors' capacities for transit of electricity by Private Enterprise Energy Resources of Ukraine (ERU Trading). The complaint under Article 90 of the Treaty was registered under Case ECS-8/15. The complainant alleges non-compliance by Ukraine concerning the cross-border capacity allocation related to transit of electricity organized and performed by the Ukrainian transmission system operator, *Ukrenergo*,

(3) Given the importance of non-discriminatory and market based allocation of cross-border capacity for the establishment of an internal market as pursued by the Treaty establishing the Energy Community, and it has been discussed at several occasions with the Ukrainian authorities[2] on 24 May 2017, the Secretariat sent an Opening Letter to Ukraine under Article 12 of the Dispute Settlement Procedures. In the Opening Letter, the Secretariat preliminarily concluded that Ukraine fails to comply with Articles 7 and 41 of the Treaty, Articles 1, 2(1), 16(1) and 19 of Regulation (EC) 714/2009 as well as Section 2.1 of the Congestion Management Guidelines and Articles 3(1), 12(f), 32(1) and 37(1)(a) of Directive 2009/72/EC..

(4) The Opening Letter set a deadline of two months for a reply by the Government of Ukraine, i.e. by 24 July 2017. The Ministry of Energy and Coal Industry of Ukraine sent a letter to the Secretariat on 27 September 2017. In its reply to the Opening Letter, the Government did not contest the presentation of the national legal and factual situation. The Secretariat's preliminary assessment expressed in the Opening Letter has not been refuted and the concerns related to non-compliance of the procedure for allocation of cross-border capacity have not been contested. The Ukrainian reply acknowledged that the Auction Rules adopted and approved by NERC of 2015, do not provide for a mechanism for allocating interconnectors' capacity for transit. Instead, *Ukrenergo* "*is guided by the decision of the Ministry of Energy and Coal Industry of Ukraine, according to which all unused transmission capacity of market participants are provided by the SFTC "Ukrinterenergo" for the implementation of the transit operations to maximize transmission capacity*."

[1] Consolidated Rules of Procedure for Dispute Settlement under the Treaty, as adopted by PA/2015/04/MC-EnC of 16 October 2015.
[2] In addition to the issues of allocation of cross-border capacity for import, the subject of Case ECS-1/12.

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(5) The question of the allocation of capacity for electricity transit has also been discussed during a meeting held in Vienna on 18 July 2017 with representatives of *Ukrenergo* and the Energy Community Secretariat. Both the minutes of the meeting held on 18 July 2017 and the Government's reply, acknowledge the need to base the allocation of cross-border capacity for transit on market principles on the basis of auctions. "*There is a need for the Ukrainian side to adopt an appropriate solution that would allow the allocation of capacity for the transit of electricity by market principles on auctions basis*," including via amendment to the Auction Rules.

(6) Having assessed the information and arguments put forward in the Reply, as well as all the follow-up activities undertaken after the Opening Letter, the Secretariat considers that the argumentation provided therein as well as the development in electricity sector reform until today do not change its finding of an infringement of Energy Community law.[3]

(7) Under these circumstances, the Secretariat decided to submit the present Reasoned Opinion.

II. Factual background

(1) The electricity sector in Ukraine

(8) The electricity market of Ukraine is organized according to a single buyer model (the wholesale electricity market of Ukraine: "the WEM") on the basis of the Electricity Sector Law of 1998.[4] The WEM is based on an agreement between the participants of the wholesale electricity market of Ukraine ("the WEM Agreement") and the conditions and requirements of the WEM Rules.[5] The Agreement and its amendments have been approved by the National Electricity Regulatory Commission (NERC) as well as by the Antimonopoly Committee of Ukraine. There are no direct bilateral contracts between generators/suppliers and consumers, and there is no functioning balancing market or market for ancillary services. They are an integral part of the WEM Agreement. The same goes for the WEM Rules which define the mechanism of functioning of the WEM, the procedure of load allocation between generating units, the procedure of setting the electricity generation price and the electricity wholesale market price.[6]

(9) All participants of WEM must sign the WEM Agreement with the administrator of the market, the State owned enterprise *Energorynok,* as a precondition for obtaining the status of a member to the WEM. The WEM Agreement defines the conditions of engaging in energy activities as well as the rights and obligations of WEM participants towards the WEM. The

[3] The Secretariat will make a reference to the Reply as well as to the amendments to the legislative framework in the Legal Assessment in Section IV of the Reasoned Opinion where appropriate.
[4] Law of Ukraine 'On electricity' No. 575/97-BP, VR, 6 October 1997, published in Verkhovna Rada news, 1998 with the last amendments and additions from 16.07.2015.
[5] Rules on the Wholesale Electricity Market of Ukraine as Annex 2 from 2015 to the Agreement between members to the Wholesale Electricity Market of Ukraine, 15.11.1996 as amended last time on 17.02.2012.
[6] Article 15 of Electricity Sector Law of 1998.

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WEM is the exclusive wholesale market place in Ukraine, any other wholesale trade in electricity is (still) prohibited.[7]

(10) *Energorynok* purchases all the electricity produced by the generators or imported for sale in Ukraine, except for the electricity used by generators for their own needs, electricity produced by CHPs and supplied to consumers on their territory, and electricity produced in small power units.[8] *Energorynok* also sells electricity for export to the winners of auctions for access to cross-border transmission capacity organized by the transmission system operator *Ukrenergo*, under prices regulated by NERC.

(11) The Ministry ensures the long-term and medium-term planning of the WEM through elaboration and update of a projected balance of electricity of the Integrated Power System of Ukraine,[9] pursuant to an Order of the Ministry of 2016 approving the procedure for preparing the annual and monthly balance of electricity.[10] This Order defines the imbalance of electricity as the difference between the volume of production and import of electricity, on the one hand, and consumption and export of electricity, on the other. If the proposals by the generation companies do not lead to a balance of production and consumption, no later than 25 October of the year preceding the settlement, the Ministry shall decide on balancing generation with demand of electricity, based on a draft electricity balance from the transmission system operator *Ukrenergo*. This balance may be done via:

- increase/decrease of generation from nuclear power plants (if technical possible),
- increase/decrease of generation from thermal power plants(if technical possible),
- increase/decrease of export,
- organize import,
- limitation the volume of electricity consumption by energy suppliers.

(12) *Ukrenergo* owns and operates the high voltage network including cross-border interconnection lines. The power system of Ukraine is interconnected as a part of the Integrated Power System in synchronous parallel mode with the Unified Power System of the Russian Federation, Belarus and Moldova. *Ukrenergo* operates export transmission capacities primarily with Russia (3000 MW), Moldova (700 MW) and Belarus (900 MW).[11] A smaller part of the Ukrainian power system is linked with the synchronized European ENTSO-E network through the isolated Burshtyn island in western Ukraine which disposes of an installed generation capacity of 1950 MW.[12] After internal consumption, the Burshtyn island's export capacity

[7] Subparagraph 15 of paragraph 4 of Title VI of the Electricity Market Law of 2013 amends the Article 15 of the Electricity Sector Law1998.
[8] There are a number of exceptions as to the sale of electricity on wholesale electricity market, introduced by changes of the Electricity Sector Law as well as Cabinet of Minister's decrees.
[9] Para.4.5 of Regulation of the Ministry, approved by Decree of the President of Ukraine No382/2011, dated 06.04.2011.
[10] Order of the Ministry, "On approval of the preparation procedure of annual and monthly forecast balance of electricity of IPS of Ukraine", No.521, dated 26.08.2016. See: http://zakon2.rada.gov.ua/laws/show/z1224-16 (13.03.2018)
[11] Annual Report of NEURC for 2015 (table 2.2.3.)
http://www.nerc.gov.ua/data/filearch/Catalog3/Richnyi_zvit_NKREKP_2015.pdf (13.03.2018)
[12] Burshtyn power plant (2351 MW), Kaluska Combined Heat and Power plant (200 MW) and Tereblya-Rikska hydroelectric power plant (27 MW) are the generation plants installed in this area.

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ranges between 500 MW and 650 MW (550 MW in summer).[13] The NTC values for the interconnection capacity of Burtshtyn island are Ukraine – Hungary: 800 MW; Ukraine – Slovakia: 400 MW and Ukraine – Romania: 400 MW. However, out of approx.1600 MW of the total interconnectors' capacities only around 550 MW are used for export.

(13) Hence, in Ukraine cross-border capacity is used for export to European Union Member States only in the amount of electricity available for export; i.e. electricity produced locally in the Burshtyn island after satisfying the demand of the domestic customers located in that territory.

(14) As stipulated in the Reasoned Request in Case ECS-1/12[14] in the period 2011-2017 there was more demand for interconnection capacity than was actually put on auction, and only a small part of the total interconnectors' capacity was auctioned because the auctioning was always linked with the available electricity for export.

(15) In relation to the interconnection with Moldova, the situation is different. The two electricity systems operate synchronously, the interconnection lines are also not congested and the interconnection capacity between the two countries is sufficient for an increased cross-border trade. Those interconnectors are also used for export of electricity to Moldova.[15]

(2) The legal framework governing the allocation of cross-border capacities in Ukraine

a. Primary legal framework

(16) Before the adoption of the Electricity Market Law of 2013,[16] the Electricity Sector Law of 1998[17] was governing the allocation procedure and was providing a legal basis for adoption of Auction Rules by NERC.

(17) The Electricity Market Law adopted in 2013 came into force on 1 January 2014.[18] Article 10 of the Electricity Market Law governed the allocation of cross-border capacity. However, the Law was structured in a manner that the main part of the Law, introducing a new electricity market model, enters into force only on 1 July 2017. According to the Law's transitional provisions, Article 10 of the Electricity Market Law governing the cross-border allocations of capacity would come into force only three years after entry into force of the Law, on 1 July 2017, when

[13] http://www.nerc.gov.ua/data/filearch/Catalog3/Richnyi_zvit_NKREKP_2015.pdf (13.03.2018)
[14] Reasoned Request in Case ECS-1/12, p.3.
[15] Reasoned Request in Case ECS-1/12, p.3.
[16] Law of Ukraine No. 663-VII 'On the principles of the functioning electricity market in Ukraine' as from 24.10.2013.
[17] Law of Ukraine 'On electricity' No. 575/97-BP, VR, 6 October 1997, published in Verkhovna Rada news, 1998 with the last amendments and additions from 16.07.2015. It is still relevant for the present case because of the market model that it develops, that is still in place at the moment of sending this Reasoned Opinion.
[18] According to Section VI – Final and transitional provisions – the Law comes into force on the first day of the month following the month of publication, and the first publication was in "The Voice of Ukraine" on 07.12.2013.

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the new market model was supposed to become effective. However, the Electricity Market Law of 2013 has not been implemented and the new electricity market model, the precondition for enforcing Article 10, has never been set up.

(18) In this situation, i.e. until a new market model is implemented, the transitional provisions of the Electricity Market Law amended Article 30 of the Electricity Sector Law of 1998 and that provision still governs the allocation procedures. The changes to Article 30 of the Electricity Sector Law entered into force on 1 December 2014 and were to be applied by 1 July 2017, provided that the new electricity market model was introduced by then.

(19) Pursuant to Article 30 of the Electricity Law 1998, as amended by the Electricity Market Law of 2013,[19] applicable still today, an electricity supplier intending to export electricity must purchase the required volume on the WEM of Ukraine under WEM prices, established by the WEM Rules and approved by NERC. Moreover, in order to export (or import) electricity, the energy undertaking in question needs a license for electricity supply and may not have any outstanding debts for electricity purchased at the WEM.

(20) Article 30 of the Electricity Law of 1998 as amended by the Electricity Market Law of 2013, also stipulates that the transmission of electricity intended for export is based on a contract concluded with *Ukrenergo*. The contracts on capacity rights are awarded by way of auctions. After the auction takes place, *Ukrenergo* enters into an agreement on the access to the cross-border transmission capacity for export of electricity with the winner of the auction. The terms and conditions of these contracts are to be approved by NERC.

(21) As regards the procedure for import of electricity, Article 15 of the Electricity Sector Law of 1998 as amended by the Electricity Market Law of 2013 and the WEM Rules stipulate that, all imported electricity must be sold to *Energorynok* at prices defined by NERC. Any other wholesale electricity market is prohibited.

(22) In parallel to the delayed implementation of the Electricity Market Law 2013, a new Electricity Market Law transposing the Third Energy Package was drafted. The new Law was adopted by the Ukrainian Parliament on 13 April 2017.[20]

(23) Even after entry into force of the new Electricity Market Law, its new provisions related the allocation of interconnector capacity, together with a new market model, would only take effect from July 2019 onwards.[21] Until then, the transitional provision governing the allocation of cross-border capacities (Section VII of the Law), still stipulates (as do the currently applicable Articles 30 and 15 of the Electricity Sector Law of 1998) that volumes of electricity required for export and/or import shall be purchased and/or sold at *Energorynok* at prices determined by the WEM Rules.

[19] Paragraph 30 of the Title VI 'Final and transitional provisions' of the Law of Ukraine № 663-VII 'On the principles of the functioning electricity market in Ukraine' as from 24.10.2013.
[20] Law of Ukraine No.4493: 'On electricity market', adopted on 13 April 2017 by Verkhovna Rada.
[21] See Final and transitional provisions in Law No.4493.

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(24) Neither the Electricity Sector Law of 1998 nor the Electricity Market Law of 2017 define the term transit of electricity, or govern the procedure for allocation of cross-border capacity for the purpose of transit.

b. Secondary legal framework

(25) The allocation of cross-border capacity for export at all interconnectors in the Burshtyn island as well as with Moldova and Belarus is performed through auctions according to Auction Rules adopted by NERC. Based on the Electricity Sector Law, until December 2012, the auctions were held according to the Auction Rules adopted in 2009.[22] Afterwards, Auction Rules adopted by NERC in December 2012[23] have been applied. Under those Rules, the interconnectors' capacity was sold at a price regardless of whether congestion occurs.[24]

(26) The Auction Rules from 2012 were amended several times before being replaced by the Auction Rules from February 2015.[25] On 28 March 2017, the successor of NERC, the National Commission for State Energy and Public Utilities Regulation (NEURC) amended the Auction Rules of 2015. The Auction Rules of 2017 amending the Auction Rules of 2015 have been adopted on the basis of Article 30 of the Electricity Sector Law of 1998 as amended by Electricity Market Law from 2013, and they entered into force on 12 May 2017.[26]

(27) The Auction Rules of 2017 define the procedure for organizing and performing electronic auctions on access to cross-border capacity of electricity networks for export and/or import of electricity.[27] The auction office, which is defined as "*enterprise providing centralized dispatching control over Interconnected Power System of Ukraine*", i.e. *Ukrenergo*, is responsible for organization and holding the electronic auctions.[28] Yearly, monthly and daily explicit auctions are to be organized.[29] In case of no congestion, the capacity is allocated free of charge, whereas in case of congestion, the marginal price is equal to the minimum bid price satisfied of all bids.[30]

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[22] Decree on approval of the Procedure of Auctions Relating to the Access to the Transmitting Capacity of Ukraine's International Power Grids for the Purpose of Electric Power Export adopted by National Power Industry Regulatory Committee of Ukraine, No.1207, 22 October 2009 (hereinafter, Auction Rules from 2009)
[23] Resolution on approval of the Procedure of holding auctions for access to the cross border capacity of cross border electric networks of Ukraine for export of electric energy No.1450, 8 November 2012, that became effective on 17 November 2012 after being registered in the Ministry of Justice and being published on the official website (hereinafter, Auction Rules of 2012).
[24] Article 1(2) Auction Rules of 2012.
[25] NEURC, "On approval of the Rules of electronic auctions on capacity allocation of cross-border electricity lines" No. 176 dated 12.02.2015.
[26] NEURC 'On approval of the Rules of electronic auctions on capacity allocation of cross-border electricity lines' No. 426 dated 28.03.2017. The Rules were published on 11 May 2017 in the 'Governmental Courier' ("**Урядовий кур'єр**") and entered into force on 12 May 2017 (next day after publication). The text of the 2017 Auction Rules was made available to the public on the NEURC's website starting from 31.03.2017, awaiting publication in the 'Governmental Courier' to enter into force.
[27] Article 1.1 Auction Rules of 2017.
[28] Article 2 Auction Rules of 2017.
[29] Article 4 Auction Rules of 2017.
[30] Article 10.1 Auction Rules of 2017.

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(28) Those rules – as the previous ones - are closely linked with and depend on the electricity market model currently in place in Ukraine as explained above, and as defined in the Electricity Sector Law of 1998 still applicable to date. Only energy suppliers are allowed to participate in auctions, and in order to participate they have to acquire the status of allocation participant. [31] *Ukrenergo*, verifies if the supplier has the status of WEM participant and whether it has open debts for electricity bought from the WEM.[32] Participating in the auctions also depends on the provision of a warranty deposit[33], which takes the form of a bank guarantee[34] and/or a fee defined as "*funds, paid by auction participants in yearly, monthly and/or daily auctions and which in case of non-fulfillment of the obligations by the auction participant become ownership of the auction office as a fine*."[35] Approved allocation participants are not allowed to take part in auctions in case they have financial obligations towards the auction office, or existing debts for electricity purchased at the WEM of Ukraine, or in case if the status of WEM member of the participant has been canceled.[36] In case the allocation participant has not made any bid in any auction during a period of a year from the date of registration, its registration as allocation participant is withdrawn.[37]

(29) If the applicant has been successful with its bids in the auctions, and has been allocated certain cross-border capacity on the yearly or monthly auctions, it can lose that capacity in case it has a debt towards the auction office or if it loses its status as WEM participant.[38] The participant also loses the allocated capacity if it does not submit its daily hourly schedule.[39] Use of allocated capacity is made by submitting daily hourly schedules for export of electricity to the auction office, and are subject to its approval.[40] The costs paid for the unused capacity, which have not been approved by the submission of daily hourly schedules of electricity export/import are not returned to the participant.[41] Moreover, in case a participant has been allocated capacity in a yearly auction, and during one month uses the allocated capacity for less than 70% of the booked capacity, it loses its right of access to the cross-border capacity of electricity network that it has obtained for the rest of the year, and the lost capacity is allocated at monthly

[31] Article 5 Auction Rules of 2017.
[32] Article 2.2 Auction Rules of 2017.
[33] Article 6 Auction Rules of 2017.
[34] Defined as "*type of ensuring fulfillment of obligations where the bank undertakes the cash obligations towards the auction office in case the auction participant does not fulfill in full or partially its obligations*," The guarantee is to be provided no later than 13:00 Kyiv time on the day preceding the date of the gate opening of the yearly and/or monthly and/or daily auction.
[35] Article 1.2 Auction Rules of 2017, emphasis added. The fee is due no later than the day preceding the day of the gate opening of respective yearly and/or monthly and/or daily auction. The fee and/or the bank guarantee shall consist of an amount that exceeds or is equal to 100 (one hundred) minimal wages as defined in the applicable legislation of Ukraine on the date prior of the date of the opening of bids for the respective auction.[35] The minimal wage in Ukraine for the year of 2017 is 3 200 UAH per month (or 19.34 UAH per hour),[35] which amounts to 111, 49 EUR.[35] This means that the fee and/or bank guarantee is not less than approx. 11.000 EUR for the participation in annual, monthly or even daily auctions.
[36] Article 6.11 Auction Rules of 2017.
[37] Article 5.11 Auction Rules of 2017.
[38] Article 6.12 Auction Rules of 2017.
[39] Article 12.4 and 12.8 Auction Rules of 2017.
[40] Article 12.2 Auction Rules of 2017.
[41] Article 12.8 Auction Rules 2017.

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and daily auctions.[42] Finally, in case the successful auction participant does not pay for the allocated cross-border capacity allocated, that participant also loses the allocated capacity, and the costs of its bank guarantee or fee are paid as a fine amounting to 100 minimal wages as described above. [43]

(30) The Auction Rules of 2015 provided already for the possibility for successful participants to the auctions to transfer the acquired capacity to another allocation participant, provided that they have informed and registered the transfer with the auction office.[44]

(31) In case of technical problems with the electronic platform, a fallback mode is applied, which means auctions are to be performed via e-mail and fax.[45] During 2015-2017 the fallback mode turned out to be the default solution, as electronic auction were not taking place. On 23 May 2017, first electronic auctions were performed by *Ukrenergo*.[46] Now, *Ukrenergo* performs yearly, monthly and daily auctions for capacity allocation.

(32) The Auction Rules of 2017, as also the previous rules, do not define or govern transit and allocation of cross-border capacity for transit as a separate category.

(3) The complaint and relevant facts concerning allocation of interconnectors' capacities for transit of electricity

(33) The present case ECS-8/15 has been initiated upon receiving a complaint submitted by Private Enterprise Energy Resources of Ukraine (ERU Trading) from Ukraine on 27 August 2015. The complainant alleged non-compliance by Ukraine concerning the cross-border capacity allocation related to transit of electricity organized and performed by the Ukrainian transmission system operator, *Ukrenergo*. The complaint was supplemented by a letter submitted on 26 October 2015[47] and by a list of additional documents that will be referred to in the following paragraphs.

(34) The complainant alleges that Ukraine breaches Energy Community law by requiring approval from the Ministry of Energy and Coal Industry of applications for access to interconnectors for the purpose of transit of electricity, and thus treating transit of electricity differently than export. For export, as explained above, auctions for allocation of interconnectors' capacity are held by the transmission system operator *Ukrenergo* in accordance with the Auction Rules of 2015 without any involvement of the Ministry.

[42] Article 12.9 Auction Rules of 2017.
[43] Article 17.2 Auction Rules of 2015.
[44] Article 13 Auction Rules of 2015
[45] Article 11 Auction Rules of 2015
[46] See, *Ukrenergo* website https://auctions.ua.energy/Public/Default.aspx?UC_CODE=UC001SysNews (13.03.2018).
[47] Letter submitted by *Ukrenergo* to the Secretariat, No. 1/01-1397, 26.10.2015.

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a. The right to perform transit of electricity

(35) Approval from the Ministry has only ever been granted to one State owned undertaking, State Foreign Trade Company *Ukrinterenergo*.[48] This happened at a meeting held in the Ministry, between NEURC, *Ukrenergo*, *Energorynok* and *Ukrinterenergo,* dedicated to electricity export and transit via the Burshtyn island on 17 June 2014. Based on the minutes of the meeting,[49] the Ministry entrusted the State owned company *Ukrinterenergo* with performing transit of electricity. By a letter to *Ukrenergo*,[50] the Ministry further entrusted *Ukrenergo* to ensure the performance of the full volumes of electricity transit through electricity lines of the Burshtyn Island under the current power supply contracts with foreign entities to which the electricity will be sold (which was a precondition for participation to allocation of cross-border of capacity in 2014, under the Auction Rules of 2009 and later of 2012)[51] concluded by *Ukrinterenergo*.

(36) The period for which *Ukrinterenergo* was entrusted with performing transit was not clearly defined. Instead the minutes of the meeting concluded that such entrustment would be "*for period of settlement of issues on capacity allocation of electricity networks of Burshtyn Island for transit*." *Ukrinterenergo* declares providing electricity transit through the electricity network of Ukraine as well as performing export and/or import of electricity as its key commercial activity.[52] It was actually established to provide electricity transit through power transmission lines of Burshtyn Island and to ensure the maximum use of transit potential of Ukraine, resulting in the income and flow of foreign currency to the country and increasing contributions to the budget.[53]

(37) The complainant, *ERU Trading*, which has a license from *NEURC* for supply of electricity under unregulated tariff dated 16.2.2015[54] and is a member of the WEM of Ukraine, has applied for receiving cross-border capacity to be used for transit of electricity through Ukraine at several occasions in 2015. The applications submitted by the complainant concern transit along the following routes:

- power system of Hungary => power system of Slovakia and/or Romania
- power system of Slovakia => power system of Hungary and/or Romania
- power system of Romania => power system of Slovakia and/or Hungary.

(38) When assessing the application for transit of electricity in May 2015, *Ukrenergo* checked and confirmed that the applicant has concluded contracts with: foreign economic entities (the

[48] *Ukrinternero* was established in January 1993 with the purpose of ensuring, among the rest, that the interests of the state in foreign trade exchange are ensured.
[49] Copy of the Minutes of the meeting concerning electricity transport and transit via the transmission network in Burshtyn island, dated 17.06.2014.
[50] Letter from the Ministry was sent to *Ukrenergo*, No.01/32-1577 as from 30.07.2014.
[51] The Auction Rules of 2012 required that those contracts are coordinated and approved by *Ukrenergo,* including a very detailed assessment of the clauses of the contract, after which *Ukrenergo* demanded amendments to individual contracts. For details, see Opening Letter in Case ECS-1/12, p.4.
[52] See the website of *Ukrinterenergo*: http://www.uie.kiev.ua/?lang=2&change=232 (13.03.2018).
[53] See the website of *Ukrinterenergo*: http://www.uie.kiev.ua/en/main/work (13.03.2018).
[54] License No. AE575g19.

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subject of which was transit of electricity via the transmission network in the Burshtyn island in western Ukraine),[55] with *Ukrenergo*[56] - a contract that was approved by *NEURC* as a regulated contract for transmission - [57] and with *Energorynok* – for covering the losses of electricity.[58] However, it noted that an undertaking could apply for interconnectors' capacity for the purpose of transit only if it has approval from the Ministry.[59]

(39) The Ministry, despite being addressed by the complainant in July 2015,[60] never issued such approval. In July 2015, *Ukrenergo*[61] rejected all schedules for transit submitted on 17.07,[62] 20.07,[63] 21.07,[64] 22.07,[65] 23.07[66] and 27.07.[67] *Ukrenergo* explained that according to the minutes of the meeting in June 2014 only *Ukrinterenergo* is entrusted with performing transit of electricity. In the absence of any exemption approved by the Ministry, only *Ukrinternerego* could use cross-border capacities for transit, as it has been entrusted with the right to transit by the Ministry.[68]

(40) In reply to a similar request for using interconnectors' capacities for transit in August 2015,[69] *Ukrenergo* changed its view as to the applicability *rationae temporis* of the capacity allocation rules. In contrast to its earlier views, not the Auction Rules of 2015[70] but those of 2012 were to be applied.[71] Import and transit of electricity through Ukraine, however, were not considered subject to the Auction Rules of 2012 by *Ukrenergo*, because those rules were only governing allocation of cross-border capacity for export of electricity. As legal basis for its actions, *Ukrenergo* referred to a letter from the Ministry from December 2012 in which the Ministry

[55] Contracts with foreign companies for the export or import of electricity from or to Ukraine, with Energy Financing Team (Switzerland) AG[55] and GEN-I, doo (Slovenia) [Contract between *ERU Trading* and GEN-I, dated 24.04.2015, No. 1/1008 is submitted as a reference]. The contracts have been approved by *Ukrenergo* in the technical part (the approval did not cover the commercial terms for buying/selling electricity): Letter from *Ukrenergo* to *ERU Trading*, No. 02-2/02-2-4-2/5209, dated 07.05.2015.
[56] Contract between *ERU Trading* and *Ukrenergo*, No. 01/1711-15, dated 26.06.2015: on the provision of dispatching and electricity transmission services via the Burshtyn island, to execute the foreign economic contracts for transit with GEN-I doo and Energy Financing Team AG. The agreement was approved by NEURC as a regulated contract for transmission.
[57] NEURC letter, No. 688/174/61-15, date 14.07.2015.
[58] Contract between *ERU Trading* and *Energorynok*, No. 11482/07, dated 17.07.2015 for the sale and purchase of electricity needed for compensation of technical losses occurring during the electricity transit via the Burshtyn island, which was agreed with *Ukrenergo.*
[59] Letter from *Ukrenergo* to *ERU Trading*, No. 02-2/02-2-4-2/5209, dated 07.05.2015.
[60] *ERU Trading* letter to the Ministry of Energy and Coal Industry of Ukraine, No. 1/01-1153, dated 16.07.2015.
[61] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1159, dated, 16.07.2015; *ERU Trading* letter to *Ukrenergo*, No. 1/01-1179, dated 23.07.2015.
[62] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1160, dated, 17.07.2015.
[63] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1161, dated, 20.07.2015.
[64] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1174, dated, 21.07.2015.
[65] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1175, dated, 22.07.2015.
[66] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1179, dated, 23.07.2015.
[67] *ERU Trading* letter to *Ukrenergo*, No. 1/01-1187, dated, 27.07.2015.
[68] On 04.08.2015, *Ukrenergo* replied to *ERU Trading* with a reference to its letter dated 27.07.2015.The substance of the answer was identical to the reply in the letter dated 23.07.2015.
[69] *ERU Trading* letter to *Ukrenergo* and the Ministry of Energy and Coal Industry of Ukraine, No.1/01-1214/1, dated 27.08.2015.
[70] *Ukrenergo* letter to *ERU Trading*, No. 01/01-6/10429, dated 09.09.2015.
[71] Based on the time when applications for using interconnectors' capacity were submitted, and even though the 2015 Rules date from February 2015.

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stipulated that the use of available transmission capacity of interconnectors for transit and import of electricity has to be determined by instructions of the Ministry.[72]

b. Minutes of a meeting as a binding public act

(41) In September 2015,[73] Kyiv Economic Court of Appeal decided a case of a trader concerning a refusal by *Ukrenergo* for transit of electricity. The refusal was also based on the minutes of the meeting in the Ministry of Energy and Coal Industry of Ukraine of 17 June 2014. In that judgment, the Kyiv Economic Court of Appeal ruled that the minutes of the meeting were not an administrative or legal act issued by the Ministry, but represented a report on the progress of the meeting. It lacked any binding force upon the undertakings signing it. Furthermore, the Court ruled that in the minutes of the meeting, there was no exclusive entrustment of *Ukrinterenergo* as the only undertaking in charge of performing transit of electricity via Ukraine. The Court finally decided that by refusing the schedules for transit, *Ukrenergo* violated the contract that it had signed with that company governing the provision of dispatching and electricity transmission services via the Burshtyn Island, and concluded to execute foreign economic contracts for transit.

(42) *Ukrenergo* filed an appeal to the Supreme Economic Court of Ukraine with a request to cancel the decision of the Court of Appeal from September 2015, which the Supreme Economic Court did. On 12 January 2016, the Supreme Economic Court of Ukraine decided that based on the Record Keeping Instructions of central office of the Ministry as approved by Decree of the Ministry of Energy and Coal Industry,[74] minutes of a meeting (or protocols) are among the forms of adoption and record decisions of a Ministry.[75] They thus qualify as a legal basis for *Ukrenergo*'s follow-up actions.

(43) The Supreme Economic Court of Ukraine also decided that pursuant to the Electricity Sector Law[76] and the fact that *Ukrenergo* is a state undertaking subordinated to the Ministry, the latter's decisions are binding on *Ukrenergo*. The Court concluded that the decision of the Ministry imposing obligation on *Ukrinterenergo* for ensuring the performance of transit of electricity constituted "*an inevitable circumstance"* for the state undertaking *Ukrenergo*, i.e. an event that did not depend on *Ukrenergo* and that the latter could not foresee at the time of entering in agreement with the trader concerned.[77] The Ministry's act constitutes *force majeure* (a definition including „acts of Government") that allowed *Ukrenergo* to terminate the contract with the claimant without any liability for not performing its obligations under that contract.[78]

[72] Ministry of Energy and Coal Industry of Ukraine letter to *Ukrenergo*, No. 03/32-5487, dated 12.12.2012.
[73] Kyiv Economic Court of Appeal, No. 910/28218/14, dated 16.09.2015.
[74] Decree of Ministry of Energy, No.603 as of 09.08.2012.
[75] Points 48-51 of the Decision of the Supreme Economic Court in case No.910/28218/14 as from 12.01.2016 available at: http://reyestr.court.gov.ua/Review/55047776 (13.03.2018).
[76] Namely Article 8(1) of the Electricity Sector Law, according to which state regulation in the electricity sector is performed by the Ministry of Energy and Coal Industry.
[77] Point 59 of the Decision of Supreme Economic Court of Ukraine in case No.910/28218/14, *supra.*
[78] Based on para.7.1 of the agreement between *Ukrenergo* and LLC Trade Electricity Company, No.3 01/5579-13, dated 30.12.2013 which was beforehand approved by the letter of the Ministry of Energy, No. 04/13-4779, dated 24.12.2013.

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(44) On 12 April 2016, the claimant appealed to the Supreme Court of Ukraine to review the Decision adopted by Supreme Economic Court. As a court of final instance, the Supreme Court of Ukraine dismissed the appeal and upheld the judgment of the Supreme Economic Court of Ukraine.[79]

c. Other facts and status quo in the aftermath of the Opening Letter

(45) In addition to the applications for transit to *Ukrenergo*, as well as to the Ministry for obtaining an approval for transit, a complaint has also been lodged to the Antimonopoly Committee (*AMCU*) of Ukraine in August 2015.[80] The complaint alleged that by refusing the schedules for transit of electricity submitted by *ERU Trading*, *Ukrenergo* violated the competition rules and abused its dominant position.[81] In December 2015, *AMCU* informed the complainant that it has addressed the Ministry requesting clarification concerning the transit of electricity, but too date, no reply has been received by the Ministry and no further action has been taken by the AMCU.

(46) On 3 February 2017, the Secretariat addressed requests for information and explanation concerning transit of electricity to the Ministry of Energy and Coal Industry to which the Ministry replied on 4 April 2017. In its reply,[82] the Ministry explained that *Ukrenergo* has to allocate all available capacity, but that imports are performed only in cases where the Ministry decides that there is a need for importing electricity in the annual balance. Therefore, since the Ministry decided in the annual balance that there is no need to import electricity, no allocation of capacity has been performed for the purpose of import for 2017. Such approval from the Ministry is necessary in order for *Ukrenergo* to allocate capacity for import, and to accept nomination of capacity for flow of electricity towards Ukraine (import).

(47) The Order of the Ministry of 2016 approving the procedure for preparing the annual and monthly balance of electricity is still in force.[83] The Ministry has changed the yearly forecast balance three times for 2017,[84] no import was envisaged.[85] No import has been planned in any of the monthly balances adopted by the Ministry either.[86]

(48) Despite the fact that no import was planned in the Ministry's approved balances, during several months of 2017, the results of auctions organized for allocating cross-border capacity

[79] The judgment is available at: http://reyestr.court.gov.ua/Review/57403129 (13.03.2018).
[80] *ERU Trading* complaint to the Antimonopoly Committee of Ukraine, No. 1/01-1200, dated 06.08.2015
[81] On 25.08.2015, the AMCU requested additional documents from *ERU Trading* (Antimonopoly Committee of Ukraine letter to *ERU Trading*, No. 128-29/01-8881, dated 25.08.2015,) which the latter submitted on 21.09.2015 (*ERU Trading* supplement to the complaint to the Antimonopoly Committee of Ukraine, No. 1/01-1315, dated 06.08.2015).
[82] Letter from the Minister, Information from the Ministry of Energy and Coal Industry of Ukraine on cases No. ECS-1/12 and No. ECS-8/15 concerning the issue of cross-border allocation of transmission capacities relating to electricity import and transit organized and implemented by transmission system operator NEC *Ukrenergo* SE, dated 04.04.2017.
[83] Order of the Ministry, No.521, dated 26.08.2016, *supra*.
[84] See: http://mpe.kmu.gov.ua/minugol/control/uk/publish/officialcategory?cat_id=245183250 (13.03.2018)
[85] The changes concerned: the forecast of the generation volumes from NPPs, HPPs was increased and volumes of generation from TPPs and CHPS was decreased in December's version of balance; the export was decreased.
[86] See: http://mpe.kmu.gov.ua/minugol/control/uk/publish/officialcategory?cat_id=245183250 (13.03.2018)

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published on the website of *Ukrenergo* show that capacity was allocated for import as well. Namely, in the months from June to September 2017 some allocation of capacity was taking place for import as well.[87] Nonetheless, no nomination could be done for using the interconnectors' capacity in direction of import, which in fact deprived simultaneous use of capacity allocated for import and export for transit purposes. This has also been confirmed by an audit report from the audit chamber of the Ukrainian Parliament from December 2017 (the Audit Report).[88] Namely, the Audit Report noted that imports have only been carried in 2015, by *Ukrinterenergo* based on an order from the Cabinet of Ministers,[89] and capacity was provided by *Ukrenergo* based on an Order from the Ministry of Energy and Coal Industry.[90]

(49) Regarding transit, the Ministry explained that an undertaking applying for interconnectors' capacity for the purposes of transit has to have contracts with foreign undertakings, agreement with *Ukrenergo* as well as an agreement with *Energorynok*. Due to the fact that the Auction Rules of 2015 and their amendments of 2017 do not stipulate a procedure for allocation of cross-border capacity for the purpose of transit, *Ukrenergo* has to follow the Decision of the Ministry, i.e. the minutes of the meeting of 2014. Those Minutes provide for a Ministry's decision to entrust *Ukrinterenergo* with performing electricity transit for the period until the settlement of the issue relating to allocation of transmission capacity through the network in the Burshtyn Island. Moreover, the Audit Report of December 2017 confirmed that *Ukrinterenergo* was the only company that performed transit of electricity from / to Romania, Slovakia, Hungary and the cost of dispatching services and the transportation of electricity corresponded to the tariff set for by NEURC Regulations.[91]

(50) The auctions results performed by Ukrenergo, in few months (June – August 2017) reveal that capacity has been allocated for both export and import to the same undertaking (other than *Ukrinterenergo*) at times.[92]

(51) However, the complainant *ERU Trading* confirmed that no commercial transit in practice has taken place in practice because the allocated capacity for import could not be nominated, and no capacity could be nominated for transit (i.e. simultaneous export and import). *Ukrenergo* does not accept nominations for import (electricity flow to Ukraine) or transit (simultaneous nomination of export and import) because no undertaking, besides *Ukrinterenergo* has an agreement with *Energorynok* for purchasing electricity from imports, if the imports are not planned from the Ministry of Energy and Coal Industry. In addition, a template contract for dispatching of transit has been prepared by *Ukrenergo* and has been submitted to NEURC for

[87] See: https://auctions.ua.energy/Public/Default.aspx?UC_CODE=UC001SysNews (13.03.2018)
[88] Audit Chamber "REPORT on results of the audit of the effectiveness of the management by Ministry of energy and coal industry of Ukraine objects of state property in the field of transit, export and import of energy carriers", approved by Decision of Audit Chamber No. 26-5, dated 19.12.2017.
[89] Cabinet of Ministers of Ukraine, No.1188-p, 05.12.2014.
[90] Ministry of Energy and Coal Industry, "On some measures on the market of electric energy, No. 887 from 26.12.2014. The Ministry ordered *Ukrenergo* to provide the possibility of importing electricity from a parallel operating grid Russia in the amount of up to 1500 MW for the period from 27.12.2014 to 31.12.2015.
[91] Audit Report, p. 29.
[92] See results for months June, July and August 2017.

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approval. Such contract would need to be signed by the market participants and *Ukrenergo* so that they could accept nominations for transit of electricity when capacity is allocated for both import and export. No legal basis for such a template contract for transit exists in the primary and secondary legal acts in Ukraine.

(52) The Audit Report from December 2017 however, revealed that transit was taking place each year in the investigated period 2015 - first nine months of 2017. The largest volume of transit was in direction Slovakia - Hungary (1718.9 thousand MWh in the amount of 1022.4 thousand euros), whereas the smallest transit was in the direction of Romania-Slovakia (16.0 thousand MWh at an amount of 83.4 thousand euros).[93] Total transit of electricity during the investigated period amounted to 2314.3 thousand MWh. For the provision of transit of electricity, *Ukrinterenergo* received 14.2 million euros.[94]

(53) To sum up, only export of electricity is being performed at the moment on commercial basis and in a market-based procedure. Even *Ukrinterenergo* participates to capacity allocation auctions for export of electricity.[95] In addition, based on the minutes of the meeting from July 2014, as confirmed by the Ministry of Energy and Coal Industry in its Reply to the Opening Letter, only *Ukrinterenergo* can perform transit and can obtain all unused capacity at daily auctions for free (without participating to auctions and requiring capacity). *Ukrinterenergo* could decide whether it needs the capacity for transit or not, meaning that transit of electricity is still not performed on a commercial basis. Since only a maximum of 650 MW of electricity could be exported from Burshtyn island and on the other hand capacity at interconnectors is much higher (amounting to 1600 MW as explained above), in cases where more electricity is exported less capacity is available after daily auctions, whereas in cases where there is less export, *Ukrinterenergo* obtains more capacity for free.

(54) As noted in the minutes of the meeting that took place in Vienna on 18 July 2017, even though the Auction Rules could further be amended by adding "[M]*arket participants which get allocation capacity rights for import and export in one synchronous zone can use this capacity for providing transit operation*," the breaches identified by the Secretariat in the Opening Letter in the present case could not be fully rectified, because of the link of capacity allocation for transit with the electricity market model in place.

III. Relevant Energy Community Law

(55) In the following, a selection of provisions of Energy Community relevant for the present case is compiled. This compilation is for convenience only and does not imply that no other provisions may be of relevance for its assessment.

[93] Audit Report, p.29.
[94] *Ibid,* p.40.
[95] See auction results for December 2017.

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(56) Energy Community Law is defined in Article 1 of the Rules of Procedure for Dispute Settlement under the Treaty ("Dispute Settlement Procedures")[96] as "*a Treaty obligation or* […] *a Decision addressed to* [a Party]". A violation of Energy Community Law occurs if "[a] *Party fails to comply with its obligations under the Treaty if any of these measures (actions or omissions) are incompatible with a provision or a principle of Energy Community Law*" (Article 2(1) Dispute Settlement Procedures).

(57) Article 6 of the Treaty reads:

> *The Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. The Parties shall facilitate the achievement of the Energy Community's tasks. The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.*

(58) Article 11 of the Treaty reads:[97]

> *The "acquis communautaire on energy", for the purpose of this Treaty, shall mean (i) the Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity […] and (iii) the Regulation 1228/2003/EC of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity.*

(59) Article 41 of the Treaty reads:

> *1. Customs duties and quantitative restrictions on the import and export of Network Energy and all measures having equivalent effect, shall be prohibited between the Parties. This prohibition shall also apply to customs duties of a fiscal nature.*
>
> *2. Paragraph 1 shall not preclude quantitative restrictions or measures having equivalent effect, justified on grounds of public policy or public security; the protection of health and life of humans, animals or plants, or the protection of industrial and commercial property. Such restrictions or measures shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties.*

(60) Article 3(1) of Directive 2003/54/EC ("Public service obligations and customer protection") reads:

> *Contracting Parties shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive,*

[96] Procedural Act No 2008/01/MC-EnC of 27 June 2008.
[97] Article 11 EnCT has been amended by Decision of the Ministerial Council of the Energy Community D/2011/02/MC-EnC and it introduces an obligation for the Contracting Parties to adopt Directive 2009/72/EC and Regulation (EC) No714/2009 by 1 January 2015. By then, the Contracting Parties have to comply with Directive 2003/54/EC and Regulation (EC) No 1228/2003.

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secure and environmentally sustainable market in electricity, and shall not discriminate between those undertakings as regards either rights or obligations.

(61) Article 12(f) of Directive 2009/72/EC ("Tasks of transmission system operators") reads:

Each transmission system operator shall be responsible for:

[…]

(f) ensuring non-discrimination as between system users or classes of system users, particularly in favour of its related undertakings.

(62) Article 32(1) of Directive 2009/72/EC ("Third-party access") reads:

Contracting Parties shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Contracting Parties shall ensure that those tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 37 and that those tariffs, and the methodologies - where only methodologies are approved - are published prior to their entry into force.

(63) Article 37(1)a) of Directive 2009/72/EC ("Duties and powers of the regulatory authority") reads:

The regulatory authority shall have the following duties:

(a) fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies.

(64) Article 1 of Regulation (EC) 714/2009 reads:

This Regulation aims at:

(a) setting fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal market in electricity, taking into account the particular characteristics of national and regional markets. This will involve the establishment of a compensation mechanism for cross-border flows of electricity and the setting of harmonised principles on cross-border transmission charges and the allocation of available capacities of interconnections between national transmission systems.

(b) facilitating the emergence of a well-functioning and transparent wholesale market with a high level of security of supply in electricity. It provides for mechanisms to harmonise the rules for cross-border exchanges in electricity.

(65) Article 2(1) of Regulation (EC) 714/2009 reads:

"interconnector" means a transmission line which crosses or spans a border between Contracting Parties and which connects the national transmission systems of the Contracting Parties.

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(66) Article 16(1) of Regulation (EC) 714/2009 ("General principles of congestion management") reads:

> *Network congestion problems shall be addressed with non-discriminatory market-based solutions which give efficient economic signals to the market participants and transmission system operators involved. Network congestion problems shall preferentially be solved with non-transaction based methods, i.e. methods that do not involve a selection between the contracts of individual market participants.*

(67) Article 19 of Regulation (EC) 714/2009 ("Regulatory authorities") reads:

> *The regulatory authorities, when carrying out their responsibilities, shall ensure compliance with this Regulation and the Guidelines adopted pursuant to Article 18.*[98]

(68) Section 2.1 of the Congestion Management Guidelines („Congestion-management methods") reads:

> *Congestion-management methods shall be market-based in order to facilitate efficient crossborder trade. For that purpose, capacity shall be allocated only by means of explicit (capacity) or implicit (capacity and energy) auctions. Both methods may coexist on the same interconnection. For intra-day trade continuous trading may be used.*

(69) Article 3(2) of the Dispute Settlement Procedures reads:

> *Failure by a Party to comply with Energy Community law may consist of any measure by the public authorities of the Party (central, regional, local as well as legislative, administrative or judicative), including undertakings within the meaning of Article 19 of the Treaty, to which the measure is attributable.*

IV. Legal Assessment

(70) According to Article 2(2) of the Dispute Settlement Procedures, a failure by a Party to comply with Energy Community law may consist of any measure by the public authorities of the Party, including undertakings within the meaning of Article 19 of the Treaty. Therefore, the actions of *Ukrenergo* are attributable to Ukraine and may constitute an infringement of Energy Community law by that Party.

(71) In the following, the Secretariat will assess the legal framework as well as the actions by *Ukrenergo* in light of Ukraine's obligations under the Treaty. It will thereby take into consideration the Ukrainian Reply to the Opening Letter.

[98] As adopted by the Permanent High Level Group under Procedural Act No 01/2012 PHLG-EnC of the Permanent High Level Group.

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(1) Introduction and relationship between Cases ECS-8/15 and ECS-1/12

(72) The subject-matter of Case ECS-8/15 consists of several instances of non-compliance by the existing legislation and its application in Ukraine with the Energy Community *acquis communautiare* related to allocation of cross-border capacity as identified in the Opening Letter. In concrete terms, linking the allocation of cross-border capacity with the undertakings' participation to, and the functioning of, the WEM the different treatment of interconnectors' capacities allocation for export on the one hand, and import and transit on the other hand, as well as requiring the Ministry's approval for the latter two activities constitute breaches of Energy Community law in the Secretariat's assessment.

(73) The Secretariat further notes that despite the adoption of the new Electricity Market Law of 2017, and in particular the amendments to Article 30 of the Electricity Sector Law of 1998, as well as the adoption of Auction Rules in 2017, their application by *Ukrenergo* in line with the electricity market model in place in Ukraine fails to comply with Energy Community law. The Ministerial Council has already expressed itself on the compliance of the current regime for allocation of cross-border capacity for electricity in Ukraine in Case ECS-1/12.[99]

(74) Case ECS-1/12 concerned different rules applicable to the allocation of capacity on interconnectors depending on the directions of electricity flow. The domestic provisions under scrutiny in the Opening Letter of Case ECS-1/12 are Article 30(1) of the Electricity Sector Law of Ukraine, as well as Article 1(1) and 1(12) of the Auction Rules of 2012. While this breach has been partially rectified by the adoption of the new Auction Rules of December 2015, and then amended in 2017 in practice, imports are still to be performed upon approval by the Ministry of Energy and Coal Industry of Ukraine based on approval of the energy balance.[100] Based on a Reasoned Request by the Secretariat,[101] and following the Opinion of the Advisory Committee dated 25 September 2017, the Ministerial Council adopted a decision that "*by maintaining in force its current regime for allocation of cross-border capacity for electricity, Ukraine failed to fulfil its obligations under the Energy Community Treaty, and in particular Article 41 thereof, Articles 3(1), 12(f) and 32 of Directive 2009/72/EC, Article 16(1) of Regulation (EC) 714/2009 as well as Sections 1.1; 1.6; 2.1; 2.5, 2.10 and 2.13 of the Congestion Management Guidelines as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011*."

(75) Allocation of cross-border capacity for transit of electricity has not been subject to Case ECS-1/12. While under Energy Community rules, allocating capacity for transit would consist of

[99] Ministerial Council Decision 2018/02/MC-EnC on the failure of Ukraine to comply with the Energy Community Treaty in Case ECS-1/12, 02.02.2018.
[100] This has been confirmed also by the Letter from the Ministry of Energy and Coal Industry to the Secretariat, dated 04.04.2017, as well as by the Reply to the Opening Letter in Case ECS-8/15.
[101] Reasoned Request in Case ECS-1/12, 19.05.2017.

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nominating capacity for import and export at the same time,[102] in Ukraine transit is considered a separate category[103] to which a procedure and approval different than for export applies. The actions of *Ukrenergo* and its refusals to allocate capacity for the purpose of transit are based on Ministry's letter of 2012 and minutes of a meeting from 2014, which are not relevant for the actions of *Ukrenergo* concerning export and import, as decided by the Ministerial Council in Case ECS-1/12. Another peculiarity of the present case concerns the fact that *Ukrinterenergo* was given the exclusive right to obtain interconnectors' capacity for transit.

(76) The two cases could not be joined under Article 6 of the Dispute Settlement Rules[104] without expanding the scope of Case ECS 1/12 in excess of what is allowed under the case-law of the Court of Justice.[105] Hence the Secretariat decided to pursue the present case separately from Case ECS-1/12. [106]

(2) Issues of non-compliance with Energy Community law

(77) In the following, the Secretariat further elaborates on several breaches of Energy Community law already identified in the Opening Letter.

a. Breach of Articles 3(1), 12(f) and 32(1) of Directive 2009/72/EC

(78) The allocation of interconnection capacity for transit based on a unilateral administrative action of the Ministry[107] fails to respect the principle of third party access to the transmission network as stipulated by Articles 12(f) and 32(1) of Directive 2009/72/EC. These provisions require that access to the networks is granted without discrimination and based on published tariffs.

(79) The principle of non-discrimination requires that comparable situations are not treated differently unless such difference in treatment is objectively justified.[108] As an overriding principle of Energy Community law, it is reflected throughout the *acquis communautaire*. Article

[102] Transit of electricity is defined by Article 2(e) of Regulation (EC) 714/2009 as a „circumstance where a declared export of electricity occurs and where the nominated path for the transaction involves a country in which neither the dispatch nor the simultaneous corresponding take-up of the electricity will take place."
[103] The entrustment of *Ukrinterenergo* with right to access cross-border capacity for the purpose of transit is done with a Ministry's decision in the minutes of the meeting of 2014 because the Auction Rules do not govern transit, and such entrustment is done „for the period until the issue with transit is settled."
[104] Article 6 Dispute Settlement Procedure reads: *"If several pending cases concern the same subject matter, they may be consolidated and processed under the same case number."*
[105] The Opening Letter „*delimits the subject-matter of the dispute, so that it cannot thereafter be extended, ... the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure.*", C-51/83 *Commission v Italy*, [1984] ECR, paras.4-5; Case C 191/95 *Commission v Germany* [1998] ECR I 5449, para. 55, Case C 422/05 *Commission v Belgium* [2007] ECR I 0000, para. 25; Case C 186/06, *Commission v. Spain,* (2007) I-12093, para. 15.
[106] Joined Cases 209/78 and 218/78, *Heintz van Landewyck SARL and* others (FEDETAB) v Commission of the European Communities, [1980] ECR 3125, paras 29 and 32
[107] Legal value of the minutes of the meeting of 2014, as an administrative act, has been confirmed by the highest court of Ukraine, as well as by the Ministry in its Reply to the Secretariat in a letter dated 04.04.2017.
[108] C-17/03 *Vereniging voor Energie, Milieu en Water* (VEMW) [2005] ECR I-4983, para. 48.

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7 of the Treaty *prohibits any discrimination* within the scope of the Treaty. As "*specific expressions of the general principle of equality*",[109] the *acquis* places further obligations not to discriminate on both the transmission system operator and on the State.[110] In the present case, discrimination occurs in two instances:

(80) Firstly, allocation of cross-border capacity for export is performed by *Ukrenergo* under the Auction Rules of 2017. On the other hand, allocation of electricity for import is performed subject to approval by the Ministry of Energy and Coal Industry and only in case the electricity balance requires import of electricity for satisfying the domestic demand, thus excluding allocation of cross-border capacity for commercial imports.[111] This amounts to discrimination and was deemed unlawful by the Ministerial Council in Case ECS-1/12.

(81) Similar to imports, cross-border capacity for transit of electricity is exclusively provided to the State-owned undertaking *Ukrinterenergo* without performing auctions, because this is the only undertaking allowed to execute contracts with foreign undertakings for the purpose of transit of electricity, and *Ukrenergo* was instructed to accept only its requests for interconnectors' capacity for transit.

(82) Based on the Ministry's decision (contained in the minutes of the meeting of 2014), *Ukrenergo* thus applies different procedures for allocating cross-border's capacity for transit than for exports. Allocation of cross-border capacity is thus performed through different procedures based on the directions of the flow of electricity. While for export *Ukrenergo* conducts auctions as market-based procedures and accepts bids from different undertakings, for transit, *Ukrenergo* applies a non-market based procedure. According to the case law of the Court of Justice, "*elements which characterize the comparability of different situations must be assessed in the light of the subject matter and purpose of the Community act which makes the distinction in question*."[112] As explained above, Energy Community law considers the flow of electricity, irrespective of the direction (import, export or transit), as a flow of electricity crossing borders (interconnectors) between two Parties of the Treaty. Therefore, energy undertakings applying for using the interconnector capacity must be treated equally irrespective of the direction and the flow of electricity.

(83) Even though since June 2017, *Ukrenergo* started allocating capacity for import no simultaneous capacity is awarded for import and export (i.e. transit) is performed. Namely, *Ukrenergo* cannot accept nominations for transit (or import in general) because this right has been exclusively given to *Ukrinterenergo*, and also because no energy undertaking (other than *Ukrinterenergo*) has contracts with *Energorynok* (for selling the imported electricity in the case of imports or for purchasing for losses in the case of transit via Burshtin island). As the Audit Report of the Ukrainian Parliament from December 2017 indicated, transit has only been performed by *Ukrinterenergo* without being subject to any competitive allocation of capacity and on non-commercial basis.

[109] Case C-17/03 *VEMW* [2005] ECR I-4983, para. 47.
[110] Case C-17/03 *VEMW* [2005] ECR I-4983, paras. 35 and 36.
[111] Despite the changes in the applicable legal framework, in practice such approval is still required. See Reasoned Opinion in Case ECS-1/12, p.18, para.102. See also Ministry's Letter to the Secretariat dated 04.04.2017
[112] Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others v. Premier minister,* ECLI: EU: C: 2008:728, para.26.

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(84) Secondly, the procedure for allocating interconnector capacities for the purpose of transit in Ukraine is in itself discriminatory. The decision taken in the form of minutes of a meeting held in the Ministry to *Ukrinterenergo* constitute preferential access to interconnectors' capacity in Ukraine granted to that company. The Court of Justice of the European Union, whose case law is the point of reference for the interpretation of Energy Community law under Article 94 of the Treaty, held in a judgment concerning preferential capacity allocation on electricity interconnectors that such priority access amounts to different treatment, and that such treatment could not be justified on account of the underlying long-term electricity supply contracts concluded in performing a public service obligation.[113]

(85) According to the Court of Justice, reserving capacity to the benefit of certain system users deprives all other actual or potential system users of the possibility to access the network for that particular capacity. It thus puts them at significant disadvantage in comparison to the undertakings benefiting from the preferential access to the system. Maintaining in practice a procedure under which the available interconnector capacity necessary for transit of electricity is allocated to only one system user, *Ukrinterenergo*, encroaches upon the non-discriminatory principle as it treats that particular system user differently in conferring it an advantage to the detriment of all other actual or potential users.

(86) Both instances result in a breach of Energy Community law, namely Article 3(1) of Directive 2009/72/EC which requires Contracting Parties *not to discriminate between electricity undertakings* as regards either rights or obligations; Article 32(1) of Directive 2009/72/EC which requires them *to ensure access to the transmission* system for all third parties in an objective manner and *without discrimination*; Article 12(f) Directive 2009/72/EC according to which the transmission system operator is responsible for *ensuring non-discrimination* as between system users or classes of system users, particularly in favor of its related undertakings. These actions also encroach upon Article 7 of the Treaty, which as the Advisory Committee held in its Opinion in Case ECS-1/12, is a "*subsidiary remedy if there are no more specific Treaty provisions available*."

(87) Under Article 3(2) of the Dispute Settlement Rules, a violation of Energy Community law by *Ukrenergo* is attributable to Ukraine as a Contracting Party. Consequently, the Secretariat concludes at this point that Ukraine has failed to comply with its obligations under Articles 3(1), 12(f) and 32(1) of Directive 2009/72/EC. The Secretariat recalls that that conclusion has already been supported with regard to different treatment of exports and imports by the Advisory Committee, in its Opinion in Case ECS-1/12.[114]

(88) Within the scope of Directive 32(1) of Directive 2009/72/EC, Article 3(14) of that Directive provides a possibility for derogation from Article 32(1) of Directive 2009/72/EC[115] "*insofar as* [its] *application would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest and insofar as the development of*

[113] Case C-17/03 *VEMW* [2005] ECR I-4983, paras. 50-56.
[114] Advisory Committee Opinion in Case ECS-1/12, p.5.
[115] But not Article 12(f) of Directive 2009/72/EC.

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trade would not be affected to such an extent as would be contrary to the interests of the Energy Community."

(89) In order to be justifiable, any such obligation imposed in the general economic interest would also need to comply with Article 3(2) of Directive 2009/72/EC. In particular, any such obligation *"shall be clearly defined, transparent, non-discriminatory,*[116] *verifiable and shall guarantee equality of access for EU electricity companies to national consumers…."*, and would have to comply with the limits of the principle of proportionality. The latter requires priority capacity allocation to be suitable to achieve the public service objective in question, and not go beyond what is necessary to achieve that objective.

(90) Furthermore, the Court of Justice emphasised in its *VEMW* judgment that the effect of a discriminatory measure such as priority capacity allocation would significantly imperil and even block the access of new operators to the market, and protect the position of companies in the situation of *Ukrinterenergo* against competition. Granting priority access to transmission capacity thus jeopardises "*contrary to the objective of the Directive, the transition from a monopolistic and compartmentalised market in electricity to one that is open and competitive*."[117] Moreover, the Secretariat has serious doubts that minutes of a meeting held in the Ministry of Energy and Coal Industry could serve as a lawful basis for the imposition of any public service obligation to *Ukrinterenergo* for performing transit of electricity.

(91) It is to be noted that even throughout the preliminary procedure in Case ECS-1/12,[118] Ukraine did not invoke any exemption from the principle on non-discriminatory access to interconnectors for imports due to reasons of ensuring public service obligations. It has also not done so in its Reply to the Opening Letter in the present case. Yet it is for the Contracting Party concerned to not only invoke and sustain possible justification grounds for a discriminatory priority access scheme such as the one at issue, but also to show that all conditions required – in particular those set by Articles 3(14) and 3(2) of Directive 2009/72/EC – are fulfilled. In the Secretariat's view, even if a legitimate public interest in banning commercial imports existed, satisfying the conditions of Article 3(2) of Directive 2009/72/EC as well as proportionality and non-discrimination would not be possible in the case at hand.

(92) Furthermore, the Court of Justice emphasized in its *VEMW* judgment that the effect of a discriminatory measure such as priority capacity allocation would significantly imperil and even block the access of new operators to the market, and protect the position of companies, *in casu* the ones based on the territory of the Burshtyn island, against competition. Granting priority access to transmission capacity thus jeopardises "*contrary to the objective of the Directive, the transition from a monopolistic and compartmentalised market in electricity to one that is open and competitive*."[119]

[116] The Secretariat submits that, in the context of the present case, this criterion relates to how the wholesale public supplier and the retail public supplier, benefiting from preferential treatment, were assigned their respective functions.
[117] Case C-17/03 *VEMW* [2005] ECR I-4983, para. 62.
[118] As noted in the Reasoned Request in Case ECS-1/12, para.90.
[119] Case C-17/03 *VEMW* [2005] ECR I-4983, para. 62.

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b. Breach of Article 16(1) of Regulation (EC) 714/2009 and Section 2.1. of the Congestion Management Guidelines

(93) Article 16(1) of Regulation (EC) 714/2009 requires that network congestion problems are addressed with non-discriminatory, market-based solutions which give efficient economic signals to the market participants and transmission system operators. In addition, Section 2.1 of the Congestion Management Guidelines specifies that congestion management methods shall be market-based and capacity shall be allocated only by means of explicit (capacity) or implicit (capacity and energy) auctions.

(94) According to its Article 1, Regulation (EC) 714/2009 aims at setting fair rules for the allocation of available capacities of interconnections between national transmission systems, in line with objective of establishing a harmonised framework for cross-border exchanges of electricity. Article 2(1) of Regulation (EC) 714/2009 defines interconnector as "*a transmission line which crosses or spans a border between*" two Member States. When Regulation (EC) 714/2009 was adapted in line with Article 24 of the Treaty, and adopted as Energy Community law, the notion of Interconnectors in Article 1 was defined as transmission lines or pipelines crossing a border between Contracting Parties. This excludes interconnectors between Contracting Parties and Member States, and thus all cross-border transactions from/to and via Ukraine (Burshtyn island) with EU Member States.

(95) However, on 23 September 2014, the Ministerial Council adopted a legally binding Interpretation under Article 94 of the Treaty in which it explained "that the different treatment of interconnections, cross-border flows, transactions or network capacities, depending on whether the border to be crossed is situated between two Member States of the European Union, two Contracting Parties or an EU Member State and a Contracting Party, frustrates the very idea of a single regulatory space for Network Energy and leads to barriers of trade". Article 1 of the Interpretation stipulates that

„*In any legal act of the Energy Community incorporating European Union legislation, any reference to*

i. energy flows, imports and exports as well as commercial and balancing transactions;
i. network capacity;
ii. existing or new gas and electricity infrastructure (including interconnections and interconnectors)

crossing borders, zones, entry-exit or control areas ***between Parties*** *and integrating the Contracting Party/Contracting Parties with the EU internal energy market,* ***shall be treated in the same way and be subject to the same provisions as the respective flows, imports, exports, transactions, capacities and infrastructure between Contracting Parties under Energy Community law****.*" [emphasis added].

(96) Consequently, the definition of „interconnector" from Article 2(1) of the Regulation (EC) 714/2009 must be understood as „*a transmission line which crosses or spans a border between Parties to the Treaty and which connects the national transmission systems of the Parties to the Treaty*."

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(97) As described above, the Electricity Sector Law of 1998, as well as Article 1(1) of the Auction Rules of 2017 stipulate that the auctions are to be held for access to cross-border capacity for export and/or import of electricity. The Electricity Sector Law and the Auction Rules do not govern the transit of electricity or the allocation of cross-border capacity at interconnectors for the purpose of transit as a separate category. As explained above, such a separate norm is not required under Energy Community law.

(98) For the transit of electricity, as detailed above, the Ministry of Energy and Coal Industry of Ukraine is tasked to give an approval. Based on a letter from the Ministry addressed to *Ukrenergo* and the minutes of the meeting from 2014, the latter does not allow private parties' access to interconnectors and prevents participation to auctions for cross-border capacity to energy undertakings without Ministry's approval. To require a unilateral administrative decision by a Ministry as a basis for the allocation of interconnectors, and not via competitive procedures such as explicit or implicit auctions, amounts to maintaining a non-market based method for capacity allocation that does not give efficient economic signals to the market participants and transmission system operators.

(99) It thus fails to comply with Article 16(1) of the Regulation (EC) 714/2009 and Section 2.1 of the Congestion Management Guidelines. This has also been held as "unquestionable" by the Advisory Committee in its Opinion in Case ECS-1/12, in relation to Ministry's approval of potential imports.[120]

c. Breach of Article 41 of the Treaty

(100) The prohibition of measures having an effect equivalent to a quantitative restriction, laid down in Article 41 of the Treaty, conflicts with any rule or measure enacted by a Party capable of directly or indirectly, actually or potentially, hindering trade among the Parties.[121] Measures requiring prior authorization, [122] even as a pure formality, [123] have been considered by the Court of Justice of the European Union as measures having equivalent effect to import restrictions. Making the transit of electricity depending on prior approval by the Ministry makes the transit of electricity in Ukraine more difficult than purely domestic supply and thus constitutes a measure prohibited by Article 41 of the Treaty in principle.

(101) Already in the early years of liberalization of the EU energy markets, the Court has also held that even though monopolies are not illegal *per se* they could be required to be abolished[124] if restricting free movement of goods unless such restrictions could be justified for provision of

[120] See: Advisory Committee Opinion in Case ECS-1/12, p.5.
[121] Case 8/74 *Procureur du Roi v Dassonville*, [1974] ECR 837, para. 5
[122] Case C-434/04 - *Ahokainen and Leppik*, [2006] ECR I-09171, para.21, 31, 35; Case C-170/04 - *Rosengren and Others*, [2007] ECR I-0407, para. 17, 18, 25, 38, 50; Case C-254/98 - *TK-Heimdienst*, [2000] ECR I-00151, para.26; Case C-389/96 - *Aher-Waggon v Bundesrepublik Deutschland*, [1998] ECR I-04473, para. 20
[123] C-54/05, *Commission v Republic of Finland*, [2007] ECR I- 02473, para.32; Case C-150/11 - *Commission v Belgium*, [2012] ECLI:EU:C:2012:539, para.51; Case C-443/10 – *Bonnarde* [2011] ECR I-09327. para.26-30
[124] **Case C-393/92 Gemeente Almelo and others v Energiebedrijf IJsselmij [1994] ECR I-01477.**

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services of general economic interest, under Article 106(2) TFEU corresponding to Article 19 of the Treaty.[125] As a matter of fact, the requirement for Ministry's approval excludes the possibility of any system user from one Party of the Energy Community Treaty to sell electricity to customers in another Party via Ukraine.

(102) According to case law, it is incumbent on Ukraine to show that their rules fulfil the conditions for application of the derogating rules in Article 41(2) of the Treaty or legitimate reasons in the general interest.[126] This corresponds to the second sentence of Article 4 of the Rules of Procedure for Dispute Settlement whereby "*where, however, a Party invokes an exemption to a rule or general principle of Energy Community law, it is incumbent upon the Party concerned to prove that the requirements for such exemption are fulfilled*."

(103) The Secretariat therefore concludes that Ukraine is breaching Article 41 of the Treaty because its system of Ministry's approval amounts to a measure having equivalent effect to quantitative restriction. The Advisory Committee has accepted this argument in relation to Ministry's approval for imports in its Opinion in Case ECS-1/12.[127]

d. Article 19 Regulation (EC) 714/2009

(104) Under Article 19 of Regulation (EC) 714/2009, the national regulatory authority has an obligation to ensure compliance with that Regulation, including its Congestion Management Guidelines. *NEURC* has not taken later any effective remedial action to ensure compliance of the implementation of the Auction Rules by *Ukrenergo* with the *acquis communautaire*. Therefore, the Secretariat concludes that Ukraine has failed to fulfil its obligation under Article 19 of the Regulation (EC) 714/200 by the failure to remedy the violation of the infringed articles of the *acquis*. Under Article 2(2) of the Dispute Settlement Rules, a violation of Energy Community law by public authorities such as *NEURC* is attributable to Ukraine as a Contracting Party to the Treaty.

V. Conclusion

(105) In the light of the foregoing, the Secretariat concludes that, Ukraine failed to comply with its obligations under the Treaty related to non-discriminatory and market based allocation of cross-border capacity, in particular Article 41 of the Treaty, Articles 3(1), 12(f) and 32(1) of Directive 2009/72/EC and Articles 16(1) and 19 of Regulation (EC) 714/2009 as well as Section 2.1 of the Congestion Management Guidelines.

125 See the energy monopolies cases: Case C-157/94, *Commission* v *The Netherlands* (1997) ECR I-5699; Case C-158/94, *Commission* v *Italy* (1997) ECR I-5789; Case C-159/94, *Commission* v *France* (1997) ECR I-5815 and Case C-160/94, *Commission* v *Spain* (1997) ECR I-5851.
126 Case C-159/94 Commission v France [1997] ECR I-5815, para. 94.
127 Advisory Committee Opinion in Case ECS-1/12, p.5.

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(106) In accordance with Article 13(2) of the Dispute Settlement Procedures, Ukraine is requested to rectify the breaches identified in the present Reasoned Opinion, or at least make clear and unequivocal commitments in that respect, within a time-limit of two months, i.e. by

15 May 2018.

and notify the Secretariat of all steps undertaken in that respect.

Furthermore, in accordance with Article 15 of the Dispute Resolution and Negotiation Centre Rules, Ukraine may also request that the present dispute is mediated by a neutral third-party mediator. Should Ukraine wish to benefit from this option, it shall notify the Legal Counsel of such a request in line with Article 15(1) of the Dispute Resolution and Negotiation Centre Rules by

27 March 2018

Vienna, 15 March 2018

Janez Kopač
Director

Dirk Buschle
Legal Counsel/Deputy Director

Bank Raiffeisenlandesbank
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Unofficial translation

Dear Mr. Kopač,

The Ministry of Energy and Coal Industry would like to take this opportunity to assure the Energy Community Secretariat of its highest consideration and to inform on the following.

The MECI has examined the letter of the Energy Community Secretariat of 15 March, 2008 No. UA-MIN/O/jko/12/15-03-2018 in reference to Case ECS-8/15 concerning the issue of allocation of cross-border capacity for electricity transit and import and attaches hereto the relevant information on the aforesaid issue.

We hope for your support and fruitful cooperation.

Yours faithfully,

Minister **Ihor Nasalyk**

Director of the Energy Community Secretariat

Janez Kopač

Vienna

Attachments: on ___ in 1 copy.

Attachment to the MECI's letter
of _____ No. _____

Information of the Ministry of Energy and Coal Industry concerning the Case ECS-8/15 as regards electricity sector reform in Ukraine and comments on electricity import and export, as well as access to cross-border capacities for the purposes of electricity transit

The Ministry of Energy and Coal Industry within its competence has examined the list of documents, which are necessary to settle the Case ECS-8/15 and hereby informs on implementation of provisions of the Law of Ukraine "On Electricity Market" transposing the Third Energy Package.

Breach of Articles 1 and 2(1) of Regulation (EC) 1228/2003, namely application of different capacity allocation procedures for electricity export, import and transit

In accordance with Article 2 of the Protocol on the Accession of Ukraine to the Energy Community Treaty, Ukraine undertook to liberalize the cross-border capacity allocation market by 1 January 2012.

To fulfil the aforesaid obligations and implement provisions of Directive 2009/72/EC concerning common rules for the internal market in electricity and Regulation (EC) 714/2009 on conditions for access to the network for cross-border exchanges in electricity, the Law of Ukraine No. 663-VII "On the Principles of Electricity Market Functioning in Ukraine" was adopted in October 2013 (hereinafter, the Law No. 663-VII).

Regulation 714/2009 clearly defines the terms "declared export", "declared import" and "declared transit" (Article 2 [e]) and establishes the principle of equality of all the transit parties (Article 14, paragraph 5).

Therewith, the aforesaid terms and the principle were not set out in the Law No. 663-VII and the Law of Ukraine "On Electricity Sector". Only the Section V of the Customs Code of Ukraine defines such terms as export, import, transit and so on, while Section II part 2.6 of the Procedure and Terms of the Customs Control and Customs Clearance of Goods Transmitted Through Power Lines approved by the Order of the Ministry of Finance of Ukraine of 30.05.2012 No. 629 clearly defines that export, import and transit are the directions of electricity transmission across the customs border of Ukraine.

In pursuance to the Law No. 663-VII, the Rules of electronic auctions for cross-border electricity networks' capacity allocation" were developed and approved by the NEURC's Resolution No. 176 of 12.02.2015 (hereinafter, the Rules). Assessment of the aforesaid regulation shows the lack of provisions regulating transit issues.

First indent of Article 30 of the Law of Ukraine "On Electricity Sector" envisaged the following: "Energy suppliers, which are the members of the wholesale electricity market of Ukraine, have a license to perform activities related to the electricity supply and have no overdue debt for electricity purchased on the wholesale electricity market of Ukraine, shall have access to transmission capacity

of cross-border electricity networks in order to conduct electricity export and/ or import operations."

Thus, the legislator envisaged that an exclusive access to capacities for the purposes of export and/ or import belongs to energy suppliers.

At the same time, the seventh and eights indents of Article 30 of the Law of Ukraine "On the Electricity Sector" envisaged that: "Free transmission capacity shall be allocated by the enterprise carrying out centralized dispatching control over the United Energy System of Ukraine and electricity distribution through local and international networks according to the rules of electronic auctions using e-documents and electronic digital signatures, unless otherwise is envisaged by the Law.

Energy suppliers obtain access to cross-border capacities based on auction results. The Rules of electronic auctions for cross-border electricity networks' capacity allocation are approved by the National Energy Regulatory Commission upon agreement with the Antimonopoly Committee of Ukraine".

Detailed analysis of Article 30 of the Law of Ukraine "On the Electricity Sector" suggested that allocation of cross-border capacity shall be carried out based on the results of an auction, unless otherwise is envisaged by the Law. Seventh and eighths indents of Article 30 of the Law of Ukraine "On the Electricity Sector" did not envisage any limitation as regards cross-border capacity allocation for the purposes of export/ import. While the Law did not contain any provision explicitly providing for allocation of cross-border capacity for the purposes of electricity transit, it also did not prohibited it.

Thus, taking into account that legislation of Ukraine did not prohibit the cross-border capacity allocation for the purposes of electricity transit and therewith required carrying out cross-border capacity allocation exclusively in accordance with electronic auction procedure, the Ministry of Energy and Coal Industry considered that there were the Rules of electronic auctions for cross-border electricity networks' capacity allocation to regulate the issues of cross-border electricity transit operations (the letter of the Ministry of Energy and Coal Industry No. 03/32-4415 of 19.08.2015 to the NEURC).

Unfortunately, in the process of refinement of the Rules of electronic auctions for cross-border electricity networks' capacity allocation (Rules No. 176), approved by the NEURC Resolution of 28.03.2017 No. 426, the MECI's position in terms of electricity transfer was not taken into account.

A similar situation had place in April 2017 when a new Law of Ukraine "On the Electricity Market" No. 2019 (hereinafter the Law No. 2019) was adopted by the Verkhovna Rada of Ukraine. The Law entered into force on 11.07.2017 and was agreed with the Energy Community Secretariat in due course.

According to the Law No. 2019, the majority of responsibilities for reforming the electricity sector of Ukraine, including approving Congestion management rules and interconnections' capacity allocation procedure were imposed on the independent Regulator (Article 6, paragraph 3, point 4).

The Law No. 2019 also envisages provision of access to interconnections for the purposes of electricity export and/ or import, however, as like as the

previous Law No. 633, it does not provide for limitation of capacity allocation for the purposes of export/ import, i.e. does not prohibit capacity allocation for the purposes of electricity transit and requires allocation of access to cross-border capacity exclusively based on the electronic auction procedure.

Allocation of cross-border capacity for electricity transit was discussed at the meeting with representatives of Energy Community Secretariat held in Vienna (Austria) on 18.07.2017. Energy Community experts noted that interconnections' capacity allocation, including for the purposes of electricity transit, shall be carried out according to the market principles based on auctions. Also, the Ukrainian part shall take a relevant decision allowing for cross-border capacity allocation for the purposes of electricity transit according to the market principles based on auctions.

Moreover, the Energy Community Secretariat stated that it was advisable to allow access to interconnections' capacity for the purposes of transit to suppliers having corresponding rights to electricity export and import.

It is impossible to settle the issue of electricity transit using simultaneous electricity export and import mechanism due to the need in the following execution of relevant customs and tax documents. In particular, according to the Tax Code of Ukraine, export and import operations envisage procedure of transfer of goods (electricity) from one owner to another in the customs territory of Ukraine or a relevant neighbouring state.

To be able to participate in auctions for the purposes of cross-border transit energy suppliers will have to carry out two operations in a row:

- import/ sale of electricity;
- purchase/ export of electricity.

In the framework of electricity transit operations goods are not transferred from one owner to another in the customs territory of Ukraine, i.e. they remain in possession of the same owner.

According to Section II part 2.6 of the Procedure and Terms of the Customs Control and Customs Clearance of Goods Transmitted Through Power Lines, obligations in terms of customs control and customs clearance of electricity transferred across the border of Ukraine through power lines are imposed on Ukrenergo NPC SE. Therefore, Ukrenergo NPC SE will be unable to execute customs documents for electricity transit by energy suppliers, which have access to interconnections for the purposes of export and import.

To settle differences in terms and definitions of "export" and "import" in the Customs Code of Ukraine and Energy Community law, Ukrenergo NPC SE envisaged differentiation of interconnections for carrying out transit operations in draft Congestion management rules and interconnections' capacity allocation procedure, which were sent to the NEURC with the letter of 17.08.2017 No. 01/9083.

Draft NEURC Resolution On approval of Congestion management rules and interconnections' capacity allocation procedure containing no provision on transit was approved at the NEURC's meeting on 5 October, 2017.

As regards the draft NEURC Resolution "On approval of Congestion management rules and interconnections' capacity allocation procedure"

Draft NEURC Resolution "On approval of Congestion management rules and interconnections' capacity allocation procedure" was approved on the NEURC's meeting, which took place on 5 October 2017 as a public hearing. According to Article 15 of the Law of Ukraine "On the National Energy and Utilities Regulatory Commission" and the Procedure for holding public discussions on draft decisions of the National Energy and Utilities Regulatory Commission approved by the Resolution of the NEURC of 30.06.2017 No. 866 (hereinafter, Public discussion procedure), draft Resolution of the NEURC "On approval of Congestion management rules and interconnections' capacity allocation procedure" (hereinafter, the draft Resolution) was published and subject to public discussion (minutes of the public discussion was published on the NEURC's web-site on 05.03.2018: http://www.nerc.gov.ua/?news=7382). During the public discussion, *inter alia*, a question on the need in transit regulation was raised. Participants of the public discussion agreed that it was necessary to refine the draft Resolution and make substantial amendments thereto aiming at taking into account Harmonised Allocation Rules (HAR), approved by the Agency for the Cooperation of Energy Regulators (ACER) on 2 October 2017.

On 13.04.2018 Ukrenergo NPC SE elaborated an updated version of the Rules taking into account the HAR requirements and providing for access to interconnections regardless of the purpose of their use and sent it by the letter No. 01/15563 to the NEURC for approval.

Pursuant to point 3.12 of the Public discussion procedure and considering the results of public discussion, the draft Resolution will be presented at a public meeting of the NEURC for approval according to established procedure.

As regards cross-border capacity allocation for the purposes of electricity import

Since the monthly auction for June 2017 carried out at the electronic auction platform, Ukrenergo NPC SE has been allocating cross-border capacity for the purposes of import.

МІНІСТЕРСТВО ЕНЕРГЕТИКИ ТА ВУГІЛЬНОЇ ПРОМИСЛОВОСТІ УКРАЇНИ

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MINISTRY OF ENERGY AND COAL INDUSTRY OF UKRAINE

30 Khreshchatyk,
Kyiv, 01601, Ukraine

_____ №_____

Шановний пане Копаче,

Користуючись цією нагодою, Міністерство енергетики та вугільної промисловості України поновлює Секретаріату Енергетичного Співтовариства запевнення у своїй високій повазі та повідомляє.

Міненерговугілля опрацювало лист Секретаріату Енергетичного Співтовариства від 15 березня 2018 року № UA-MIN/O/jko/12/15-03-2018 стосовно справи ECS-8/15, предметом якої є проблема транскордонного розподілу пропускної спроможності, пов'язаної з імпортом та транзитом електроенергії, та надсилає відповідну інформацію.

Сподіваємось на Вашу підтримку та плідну співпрацю.

З повагою,

Міністр **Ігор Насалик**

Директору Секретаріату
Енергетичного Співтовариства

Янезу Копачу

м. Відень

Додаток: на 5 в 1 прим.

Додаток до листа Міненерговугілля
від_____№_____

Інформація Міненерговугілля стосовно справи ECS-8/15 щодо впровадження реформ в сфері електроенергетики в Україні та роз'яснення щодо імпорту та експорту електричної енергії, а також доступу до пропускної спроможності міждержавних перетинів для здійснення транзиту електричної енергії

Міненерговугілля, в межах компетенції, опрацювало перелік документів, які необхідні для закриття справи ECS-8/15 та інформує щодо реалізації положень Закону України «Про ринок електричної енергії», який імплементує правила третього енергетичного пакету.

Порушення статей 1 та 2(1) Регламенту (СС) 1228/2003 використання різних процедур розподілу для експорту, імпорту та транзиту електроенергії).

Відповідно до статті 2 протоколу про приєднання України до Договору про заснування Енергетичного Співтовариства, Україна взяла на себе зобов'язання до 1 січня 2012 р. лібералізувати ринок розподілу міждержавного перетину України.

З метою виконання вищезазначених зобов'язань та імплементації норм директиви 2009/72/ЄС «Про спільні правила внутрішнього ринку електричної енергії» та Регламенту (ЄС) 714/2009 «Про умови доступу до мереж транспортування електричної енергії» у жовтні 2013 р. було прийнято Закон України № 663-VII «Про засади функціонування ринку електричної енергії України» (далі – Закон № 663-VII).

Регламент 714/2009 чітко визначає такі поняття, як «заявлений експорт», «заявлений імпорт», а також «заявлений транзит» (стаття 2[e]), та встановлює принцип рівноправності всіх учасників при здійсненні транзиту (стаття 14, пункт 5).

Разом з тим, вищевказані поняття та принципи в Законі № 663-VII та Законі України «Про електроенергетику» були відсутні. Лише розділ V Митного кодексу України визначає такі поняття, як експорт, імпорт, транзит та інше, а частина 2.6 розділу II Порядку та строків митного контролю та митного оформлення товарів, що переміщуються лініями електропередачі, затвердженого наказом Міністерства фінансів України від 30.05.2012 № 629, чітко визначає, що експорт, імпорт та транзит – це напрями переміщення електроенергії через митний кордон України.

На виконання вимог Закону № 663-VII розроблено Порядок проведення електронних аукціонів з розподілення пропускної спроможності міждержавних електричних мереж, затверджений постановою НКРЕКП від 12.02.2015 № 176 (далі – Порядок). Аналіз зазначеного регуляторного акту також дає підстави стверджувати про відсутність положень щодо врегулювання питань транзиту.

Абзацом першим статті 30 Закону України «Про електроенергетику»

було передбачено, що: «Доступ до пропускної спроможності міждержавних електричних мереж з метою здійснення операцій з експорту та/або імпорту електричної енергії мають енергопостачальники, які є членами оптового ринку електричної енергії України, мають ліцензію на здійснення діяльності з постачання електричної енергії та не мають простроченої заборгованості за електричну енергію, закуплену на оптовому ринку електричної енергії України».

Тобто законодавець передбачав, що доступ до пропускної спроможності з метою експорту та/або імпорту електричної енергії мають виключно енергопостачальники.

У свою чергу, абзацами сьомим та восьмим статті 30 Закону України «Про електроенергетику» було передбачено, що: «Розподілення вільної пропускної спроможності міждержавних електричних мереж здійснюється підприємством, яке здійснює централізоване диспетчерське управління об'єднаною енергетичною системою України і передачу електричної енергії магістральними та міждержавними електричними мережами, за процедурою електронного аукціону з використанням електронного документообігу та електронного цифрового підпису, крім випадків, встановлених Законом.

Доступ до пропускної спроможності міждержавних електричних мереж енергопостачальники отримують за результатами аукціону. Порядок проведення електронних аукціонів з розподілення пропускної спроможності міждержавних електричних мереж затверджується національною комісією, що здійснює державне регулювання у сфері енергетики, за погодженням з Антимонопольним комітетом України».

Ґрунтовний аналіз статті 30 Закону України «Про електроенергетику» давав підстави стверджувати, що розподіл пропускної спроможності міждержавних електричних мереж повинен здійснюватися за результатами аукціону, крім випадків, встановлених цим Законом. Абзаци сьомий та восьмий статті 30 Закону України «Про електроенергетику» не встановлювали виключних обмежень щодо розподілу пропускної спроможності для експорту/імпорту. Закон не містив положень, які прямо визначали, що розподіл пропускної спроможності здійснювався, в тому числі і для операцій з транзиту електричної енергії, однак він не містив і заборони.

Отже, оскільки законодавство України не містило заборони стосовно розподілу пропускної спроможності для здійснення операцій з транзиту електроенергії, а також вимагало розподілу доступу до пропускної спроможності міждержавних мереж виключно за процедурою електронного аукціону, Міненерговугілля вважало, що саме Порядок проведення електронних аукціонів з розподілення доступу до пропускної спроможності міждержавних електричних мереж повинен врегульовувати питання транзитних транскордонних операцій з електричною енергією (лист Міненерговугілля № 03/32-4415 від 19.08.2015 р. до НКРЕКП).

Нажаль, підчас доопрацювання Порядку № 176 позицію Міненерговугілля не було враховано у Порядку проведення електронних аукціонів з розподілення пропускної спроможності міждержавних

електричних мереж, затвердженого постановою НКРЕКП від 28.03.2017 № 426 в частині здійснення транзиту електроенергії.

Аналогічна ситуація виникла й після прийняття у квітні 2017 р. Верховною Радою України нового Закону України № 2019 «Про ринок електричної енергії» (далі – Закон № 2019), який набрав чинності 11.07.2017, та який свого часу був погоджений з Секретаріатом Енергетичного Співтовариства.

Відповідно до Закону № 2019 основна частина обов'язків щодо реформування енергетичної галузі України покладається на незалежного Регулятора, у тому числі й затвердження Правил управління обмеженнями та порядку розподілу пропускної спроможності міждержавних перетинів (пункт 4 частини 3 статі 6).

Закон № 2019 також визначає, що доступ до міждержавних перетинів надається для експорту та/або імпорту електричної енергії, але, як і попередній Закон № 633, не встановлює виключних обмежень щодо розподілу пропускної спроможності для експорту/імпорту, тобто не містить заборони стосовно розподілу пропускної спроможності для здійснення операцій з транзиту електроенергії, й також вимагає здійснювати розподіл доступу до пропускної спроможності міждержавних мереж виключно за процедурою електронного аукціону.

Питання розподілу пропускної спроможності для здійснення транзиту електроенергії обговорювалося під час наради, яка була проведена в м. Відень (Австрія) 18.07.2017 року з представниками Секретаріату Енергетичного Співтовариства. Експерти Енергетичного Співтовариства відзначили, що розподіл пропускної спроможності міждержавних перетинів слід здійснювати за ринковими принципами на основі аукціонів, у тому числі і транзит електроенергії, а також існує потреба в прийнятті українською стороною відповідного рішення, яке дозволить проводити розподіл пропускної спроможності для транзиту електроенергії за ринковими принципами на основі аукціонів.

Також, Секретаріат Енергетичного Співтовариства вказав на доцільність надання постачальнику можливості використовувати право на доступ до пропускної спроможності міждержавних перетинів для здійснення транзиту у разі наявності у нього відповідних прав для здійснення імпорту та експорту електроенергії.

Спроба вирішення питання транзиту електричної енергії через застосування механізму одночасних операцій з імпорту та експорту електричної енергії є неможливою, з причин подальшого оформлення митних та податкових документів, а саме відповідно до Митного кодексу України під час здійснення експортних та імпортних операцій передбачається процедура передачі товару (електричної енергії) від одного власника до іншого на митній території України чи сусідньої держави відповідно.

Для можливості брати участь в аукціоні для здійснення транзитних транскордонних операцій енергопостачальники будуть вимушені проводити дві послідовні операції:

- імпорт/продаж електричної енергії;
- купівля/експорт електричної енергії.

Під час здійснення транзитних операцій з електричною енергією передача товару від одного власника до іншого на митній території України не відбувається, тобто залишається у одного і того ж власника.

Частиною 2.6 розділу II Порядку щодо строків митного контролю та митного оформлення товарів, що переміщуються лініями електропередачі, на ДП «НЕК «Укренерго» покладаються обов'язки в частині здійснення митного контролю та митного оформлення електроенергії, що переміщується через митний кордон України лініями електропередачі. Таким чином, ДП «НЕК «Укренерго» не зможе оформити митні документи на транзит електричної енергії енергопостачальникам у разі отримання останніми доступу до міждержавних перетинів за напрямами експорт та імпорт.

З метою врегулювання розбіжностей в тлумаченнях та визначеннях «експорт» та «імпорт» у Митному кодексі України та законодавстві Енергетичного Співтовариства ДП «НЕК «Укренерго» передбачило розподіл перетинів для здійснення транзитних операцій при підготовці проекту Правил управління обмеженнями та порядку розподілу пропускної спроможності міждержавних перетинів, які були направлені до НКРЕКП листом від 17.08.2017 № 01/9083.

5 жовтня 2017 року на засіданні НКРЕКП був схвалений проект постанови НКРЕКП «Про затвердження Правил управління обмеженнями та порядку розподілу пропускної спроможності міждержавних перетинів», в якому також був відсутній транзит.

Щодо проекту постанови НКРЕКП «Про затвердження Правил управління обмеженнями та порядку розподілу пропускної спроможності міждержавних перетинів»

Проект постанови НКРЕКП «Про затвердження Правил управління обмеженнями та порядку розподілу пропускної спроможності міждержавних перетинів» схвалено на засіданні НКРЕКП, що відбулось у формі відкритого слухання 05 жовтня 2017 року. Відповідно до статті 15 Закону України «Про Національну комісію, що здійснює державне регулювання у сферах енергетики та комунальних послуг» та Порядку проведення відкритого обговорення проектів рішень НКРЕКП, затвердженого постановою НКРЕКП від 30.06.2017 № 866 (далі – Порядок відкритого обговорення), проект постанови НКРЕКП «Про затвердження Правил управління обмеженнями та порядку розподілу пропускної спроможності міждержавних перетинів» (далі – проект Постанови) був оприлюднений та пройшов відкрите обговорення (протокол відкритого обговорення опубліковано на веб-сайті НКРЕКП 05.03.2018 – http://www.nerc.gov.ua/?news=7382). Під час відкритого обговорення також порушувалося питання щодо необхідності врегулювання питання транзиту у Порядку. У ході обговорень учасниками відкритих слухань було прийнято узгоджене рішення щодо необхідності доопрацювання проекту Постанови та внесення до нього суттєвих змін для

врахування вимог проекту Гармонізованих Аукціонних Правил (HAR), які були затверджені Агенцією зі взаємодії регулюючих органів у сфері енергопостачання (ACER) 2 жовтня 2017 року.

13.04.2018 р. ДП «НЕК «Укренерго» доопрацювало та направило листом №01/15563 на погодження до НКРЕКП оновлену редакцію Правил, що враховують вимоги HAR та передбачають використання міждержавних перетинів не залежно від мети використання.

Відповідно до пункту 3.12 Порядку відкритого обговорення проектів та з урахуванням результату відкритого обговорення проект Постанови буде в установленому законодавством порядку наданий на відкрите засідання НКРЕКП для затвердження.

Щодо розподілу міждержавних перетинів для імпорту електричної енергії.

Починаючи з місячного аукціону на червень 2017 року, проведеного на електронній аукціонній платформі, ДП «НЕК «Укренерго» розподіляє пропускну спроможність міждержавних електричних мереж України в напрямку імпорту.