

**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-1/12

Submitted pursuant to Article 90 of the Treaty establishing the Energy Community (“the Treaty”) and Articles 14 and 28 of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 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 electricity, Ukraine fails to fulfil its obligations under the Energy Community Treaty, and in particular Articles 7 and 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.

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 Electricity Regulatory Commission (“NERC”).

¹ Procedural Act No. 2015/04/MC-EnC of 16 October 2015 amended the Dispute Settlement Procedures. However, as the present case was initiated prior to the adoption of the amended Dispute Settlement Procedures, the rules stipulated in Procedural Act No. 2008/01/MC-EnC are to be applied.

1. The electricity sector in Ukraine

- (2) The electricity market of Ukraine is organized according to a single buyer model, based on the Electricity Sector Law of 1998.² The wholesale electricity market of Ukraine (WEM) functions 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 NERC as well as by the Antimonopoly Committee of Ukraine. There are no direct bilateral contracts with consumers, and there is no functioning balancing market and market of ancillary services. Instead, they are an integral part of the WEM Agreement. All participants of WEM must sign the WEM Agreement with the administrator of the market, *Energorynok*, as a precondition for obtaining the status of a member to the WEM. This Agreement defines the target and conditions of energy activities, rights and obligations of WEM participants together with their responsibility towards the WEM. The WEM Rules are an integral part of the Agreement and 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) The WEM is the exclusive wholesale market place in Ukraine, any other wholesale trade in electricity is prohibited.⁵
- (4) The State owned enterprise *Energorynok* acts as market administrator for the WEM. It 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
- (6) 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

² ANNEX 1: Article 30 of 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. The whole text of the Law is available at <http://zakon5.rada.gov.ua/laws/show/575/97-%D0%B2%D1%80> (17.05.2017).

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 Law of Ukraine ‘On the principles of the functioning electricity market in Ukraine’ No. 663-VII as from 24.10.2013 amends the Article 15 of the Electricity Sector Law 1998.

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 No 382/2011, 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.

preceding the settlement, the Ministry shall decide on balancing generation with demand of electricity, based on a draft electricity balance from *Ukrenergo*. This balance may be done via:

- increase/decrease of generation from nuclear power plants (if technically possible),
 - increase/decrease of generation from thermal power plants (if technically possible),
 - increase/decrease of export,
 - organize import,
 - limitation the volume of electricity consumption by energy suppliers.
- (7) Electricity transmission is operated by the State owned company *Ukrenergo*, which owns and operates the high voltage network including cross-border interconnection lines.
- (8) 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. *Ukrenergo* operates export transmission capacities primarily with Russia (3000 MW), Moldova (700 MW) and Belarus (900 MW).⁹ These interconnections are used in the first place to provide security in the balancing of the system of Ukraine in cases of emergency. There is usually no commercial utilization of those capacities except of the interconnection with Moldova (including for transits through Moldova back to Ukraine to supply electricity in the region of Odessa).
- (9) Only 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 As regards the interconnector capacities linking the Burshtyn island to the ENTSO-E network, the NTC (net transfer capacity) values are Ukraine – Hungary: 800 MW; Ukraine – Slovakia: 400 MW and Ukraine – Romania: 400 MW. However, only around 550 MW of the total interconnectors' capacities are used for export.
- (10) Given the isolated situation of Burshtyn island, 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.
- (11) As detailed in the Opening Letter,¹² and in the Reasoned Opinion¹³ to which reference is made, in the period between 2011 and 2017 there was more demand for interconnection capacity than the capacity actually put on auction; only approximately 500MW of the available 1600MW capacity has been allocated at auctions.

⁹Annual Report of NEURC for 2015, p.36 (table 2.2.3.), see:

http://www.nerc.gov.ua/data/filearch/Catalog3/Richnyi_zvit_NKREKP_2015.pdf (17.05.2017).

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 Annual Report of NEURC for 2015, p.3, supra.

¹² ANNEX 6: Opening Letter in Case ECS-1/12, p.2.

¹³ ANNEX 13: Reasoned Opinion in Case ECS-1/12, pp.5-6.

- (12) 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 Opening Letter¹⁴ and the Reasoned Opinion.¹⁵

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

a. Primary legal framework

- (13) Before the adoption of the Electricity Market Law of 2013,¹⁶ the Electricity Sector Law of 1998 was governing the allocation procedure and was providing a legal basis for adoption of Auction Rules by NERC.
- (14) The Electricity Market Law adopted in 2013 came into force on 1 January 2014.¹⁷ Article 10 of the Electricity Market Law governs 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 comes 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.
- (15) 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 1998¹⁸ and that provision still governs the allocation procedures. Those 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.
- (16) 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.
- (17) 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.

¹⁴ ANNEX 6, *supra*, p.2.

¹⁵ ANNEX 13, *supra*, p.6.

¹⁶ ANNEX 2: Relevant excerpts of Electricity Market Law, No 663-VII, dated 24.10.2013 are submitted as ANNEX to this Reasoned Request. The whole text of the Law in Ukrainian is available at <http://zakon5.rada.gov.ua/laws/show/663-18> (17.05.2017), and print out of non-official translated English version is available at the Secretariat and can be submitted upon request.

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.

¹⁸ See: ANNEX 1 and ANNEX 2.

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.

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.

- (18) 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.
- (19) 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 has been voted in second reading by the Ukrainian Parliament on 13 April 2017.²⁰ At the moment of submitting the present Reasoned Request, however, 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.
- (20) 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.

b. Secondary legal framework

- (21) 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. Until December 2012, the auctions were held according to the Auction Rules adopted in 2009.²² Afterwards, Auction Rules adopted by NERC in December 2012²³ have been applied. Under those Rules, the interconnector capacity was auctioned regardless of whether congestion occurred.²⁴
- (22) The Auction Rules of 2012 were subject to the Opening Letter initiating the infringement proceedings against Ukraine in the present case. They were amended several times before being replaced by new Auction Rules in February 2015. Since the Auction Rules of 2015²⁵ entailed the same breaches as already identified in the Opening Letter, they were assessed in the Reasoned Opinion submitted in the present case. After the Reasoned Opinion has been sent on 14 March 2017, the successor of NERC, the National Commission for State Energy and Public Utilities Regulation (NEURC) amended the Auction Rules of 2015 on 28

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.

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.

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.

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.

March 2017. The amended rules were adopted on the basis of Article 30 of the Electricity Sector Law of 1998, as amended by the Electricity Market Law of 2013, and entered into force on 12 May 2017.²⁶ They form the basis of the present Reasoned Request.

- (23) The Auction Rules of 2017 define the procedure for organizing and performing electronic auctions for cross-border capacity for export and/or import of electricity.²⁷ An 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 (explicit) electronic auctions²⁸ for yearly, monthly and daily capacity.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
- (24) 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 may obtain the status of 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
- (25) Participating in the auctions also depends on the provision of a warranty deposit.³³ Under the 2012 Auction Rules, the warranty deposit³⁴ was calculated according to a formula which made the warranty for annual auction twelve times higher than in the previous Auction Rules of 2009. The Auction Rules of 2015 based the amount of the required deposit (bank guarantee) on “*multiplying the maximum value of Bid(s) price and maximum value of capacity in MW planned to be obtained by the allocation participant on the corresponding auction.*” The 2015 rules furthermore specified that the “*amount of guarantee fee and/or bank guarantee has to be equal or more than the total value of all Bids submitted by the auction participant on the corresponding auction and value of obtained and non-paid capacity at the moment of holding of the corresponding auction.*” The Secretariat, in the Reasoned Opinion, deemed this formula proportionate to the objective pursued by the warranty deposit requirement and dropped the charge related to the warranty deposit.³⁵
- (26) However, the new Auction Rules of 2017 changed again the regime on warranties. The Rules now require that auction participants provide a bank guarantee³⁶ and/or pay a fee. The

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.

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 a “*monetary payment that is deposited to the account of the system operator by the participant of an auction as a tool for securing his honesty and financial guarantee of payment for access to the cross border capacity of intergovernmental electric networks of Ukraine.*”

³⁵ ANNEX 13, *supra*, p.11.

³⁶ 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

newly introduced fee is 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**.”³⁷ 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.³⁸ The minimal wage in Ukraine for the year of 2017 is 3 200 UAH per month (or 19.34 UAH per hour),³⁹ which amounts to 111, 49 EUR.⁴⁰ 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.

- (27) Moreover, approved auction 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.⁴¹ In case the auction participant has not made any bid in any auction during a period of a year from the date of registration, its registration as auction participant is withdrawn.⁴²
- (28) 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 still lose that capacity in case it has a debt towards the auction office or if it loses its status as WEM participant.⁴³ The participant also loses the allocated capacity if it does not submit its daily hourly schedule.⁴⁴ 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.⁴⁵ 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.⁴⁶ 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.⁴⁷
- (29) 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.⁴⁸

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.

³⁷ 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.

³⁸ Article 6.2 Auction Rules of 2017.

³⁹ The minimal wage is defined in Article 8 of the Law on State Budget of 2017 available at: <http://zakon3.rada.gov.ua/laws/show/1801-viii> (17.05.2017).

⁴⁰ Based on the exchange rate provided at the website of the National Bank of Ukraine, <http://www.bank.gov.ua/control/en/> (17.05.2017).

⁴¹ Article 6.11 Auction Rules of 2017.

⁴² Article 5.11 Auction Rules of 2017.

⁴³ Article 6.12 Auction Rules of 2017.

⁴⁴ Article 12.4 and 12.8 Auction Rules of 2017.

⁴⁵ Article 12.2 Auction Rules of 2017.

⁴⁶ Article 12.8 Auction Rules 2017.

⁴⁷ Article 12.9 Auction Rules of 2017.

⁴⁸ Article 17.2 Auction Rules of 2015.

- (30) 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.⁴⁹ However, until now the fallback mode turned out to be the default solution, as electronic auctions are still not taking place. Even though *Ukrenergo* has purchased an electronic platform, it is still being tested and not used for performing auctions.

II. Relevant Energy Community Law

- (31) Energy Community Law is defined in Article 1 of the Dispute Settlement Procedures 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).

- (32) 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.

- (33) 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.

- (34) Article 7 of the Treaty reads:

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

- (35) Article 10 of the Treaty reads:

*Each Contracting Party shall implement the *acquis communautaire* on energy in compliance with the timetable for the implementation of those measures set out in Annex I.*

- (36) Article 11 of the Treaty reads:⁵⁰

*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.*

- (37) Article 41 of the Treaty reads:

⁴⁹ Article 11 Auction Rules of 2017.

⁵⁰ 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.

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.

(38) Article 2 of the Protocol concerning the accession of Ukraine to the Treaty establishing the Energy Community reads:

I. For the purpose of compliance with Title II of the Treaty establishing the Energy Community and its related Annexes, the timetable for implementation of the acquis communautaire is defined as follows:

Directive 2003/54/EC Concerning Common Rules for the Internal Market in Electricity by 1 January 2012

Regulation (EC) No 1228/2003 on the Conditions of the Access to the Network for Cross-Border Exchanges in Electricity by 1 January 2012.

Commission Decision 2006/770/EC amending the Annex to Regulation 1228/2003 on conditions for access to the network for cross-border exchanges in electricity by 1 January 2012

(39) Article 3(1) of Directive 2009/72/EC reads:

Member States ... shall not discriminate between these undertakings as regards either rights or obligations.

(40) Article 12 of Directive 2009/72/EC 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...

(41) Article 32 of Directive 2009/72/EC reads:

Member States shall ensure the implementation of a system of third party access to the transmission ... systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Member States 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.

The transmission ... operator may refuse access where it lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3, and based on objective and technically and economically justified criteria. The regulatory authorities where Member States have so provided or Member States shall ensure that those criteria are consistently applied and that the system user who has been refused access can make use of a dispute settlement procedure. The regulatory authorities shall also ensure, where appropriate and when refusal of access takes place, that the transmission ... system operator provides relevant information on measures that

would be necessary to reinforce the network. The party requesting such information may be charged a reasonable fee reflecting the cost of providing such information.

(42) 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.

(43) 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.

(44) Article 16(1) of Regulation (EC) 714/2009 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.

(45) Article 19 of Regulation (EC) 714/2009 reads:

The regulatory authorities, when carrying out their responsibilities, shall ensure compliance with this Regulation and the Guidelines adopted pursuant to Article 18.⁵¹

(46) Section 1 of the Congestion Management Guidelines (“General provisions”) reads:

1.1. TSOs shall endeavour to accept all commercial transactions, including those involving cross-border-trade.

1.6. No transaction-based distinction may be applied in congestion management. A particular request for transmission service shall be denied only when the following conditions are jointly fulfilled:

(a) the incremental physical power flows resulting from the acceptance of this request imply that secure operation of the power system may no longer be guaranteed, and

(b) the value in monetary amount attached to this request in the congestion management procedure is lower than all other requests intended to be accepted for the same service and conditions.

⁵¹ As adopted by the Permanent High Level Group under Procedural Act No 01/2012 PHLG-EnC of the Permanent High Level Group.

(47) Section 2 of the Congestion Management Guidelines (“Congestion management methods”) reads:

2.1. Congestion management methods shall be market-based in order to facilitate efficient cross-border trade. For this 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.

2.5. The access rights for long and medium-term allocations shall be firm transmission capacity rights. They shall be subject to the use-it-or-lose-it or use-it-or-sell-it principles at the time of nomination.

2.10. In principle, all potential market participants shall be permitted to participate in the allocation process without restriction. To avoid creating or aggravating problems related to the potential use of dominant position of any market player, the relevant Regulatory and/or Competition Authorities, where appropriate, may impose restrictions in general or on an individual company on account of market dominance.

2.13. The financial consequences of failure to honour obligations associated with the allocation of capacity shall be attributed to those who are responsible for such a failure. Where market participants fail to use the capacity that they have committed to use, or, in the case of explicitly auctioned capacity, fail to trade on a secondary basis or give the capacity back in due time, they shall lose the rights to such capacity and pay a cost-reflective charge. Any cost-reflective charges for the non-use of capacity shall be justified and proportionate. Likewise, if a TSO does not fulfil its obligation, it shall be liable to compensate the market participant for the loss of capacity rights. No consequential losses shall be taken into account for this purpose. The key concepts and methods for the determination of liabilities that accrue upon failure to honour obligations shall be set out in advance in respect of the financial consequences, and shall be subject to review by the relevant national Regulatory Authority or Authorities.

III. Preliminary Procedure

(48) According to Article 90 of the Treaty, 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 10 of the Dispute Settlement Procedures, the Secretariat shall carry out a preliminary procedure before submitting a reasoned request to the Ministerial Council.

(49) The Secretariat received several complaints against Ukraine concerning the same subject matter, the allocation of cross-border capacity and the auctions organized by the Ukrainian transmission system operator *Ukrenergo*. On 4 January 2012, the Secretariat received the first complaint under Article 90 of the Treaty, which was registered under Case ECS-1/12.⁵² On 7 June 2012⁵³ and on 30 October 2014,⁵⁴ the Secretariat received two more complaints against Ukraine related to the same issue. Since the three complaints concerned the same subject matter, they were joined under the same case number pursuant to Article 5(2) of the Dispute Settlement Rules.

(50) The Ministry of Energy and Coal Industry of Ukraine (“the Ministry”) was notified already of the first complaint and the Secretariat’s assessment of the Auction Rules during a mission on

⁵² ANNEX 3: Complaint dated 04.01.2012.

⁵³ ANNEX 4: Complaint dated 07.06.2012.

⁵⁴ ANNEX 5: Complaint dated 30.10.2014.

14 to 16 March 2012 in Kiev, by a letter dated 4 April 2012 and at the *Day of Ukraine in the Energy Community* held on 19 April 2012 in Vienna.

- (51) On 26 February 2013, the Secretariat sent an Opening Letter to Ukraine under Article 12 of the Dispute Settlement Procedures.
- (52) In the Opening Letter, the Secretariat preliminarily concluded that Ukraine failed to comply with Articles 7 and 41 of the Treaty, Articles 3(1), 9(e), 20(1) and 23(2)a) of Directive 2003/54/EC, Articles 1, 2(1), 4, 6(1), 6(2), 6(4) and 9 of Regulation (EC) 1228/2003, Sections 1.1, 1.2, 1.6, 2.1, 2.7, 2.10, 2.12, 2.13, 5.6 and 6.1 of the Congestion Management Guidelines by maintaining in force the Auction Rules adopted by NERC and by their application by the system operator *Ukrenergo*.
- (53) In its reply to the Opening Letter dated 17 April 2013,⁵⁵ the Government acknowledged that some of the issues of non-compliance are linked to the existing market model of the Ukrainian electricity market which was expected to be changed with the new Electricity Market Law of 2013.
- (54) As a follow up to the Opening Letter, draft amendments to the Auction Rules of 2012 were prepared by NERC and reviewed by the Secretariat.⁵⁶ On 30 September 2013, NERC submitted an improved set of draft amendments.⁵⁷ However, NERC informed that addressing the remaining issues of non-compliance identified in the Opening Letter depended on changes in the primary legal framework and the adoption of the new Law. In October 2013, the Secretariat commented⁵⁸ that the non-compliance of the procedure for allocation of cross-border capacity identified in the Opening Letter had not been addressed fully with the proposed amendments to the Auction Rules of 2012. Yet on 21 November 2013, NERC approved the amendments to the Auction Rules without further changes.
- (55) Based on the new Electricity Market Law of 2013,⁵⁹ new draft Auction Rules were prepared by NERC in June 2014. After a further exchange of letters⁶⁰ and meetings, as detailed in the Reasoned Opinion⁶¹ and following the creation of NEURC,⁶² the latter adopted new Auction Rules in February 2015,⁶³ which were again amended by new Auction Rules in force since 12 May 2017.
- (56) In the process of amending and replacing the Auction Rules of 2012 subject to the Opening Letter of the Secretariat, a number of issues of non-compliance with Energy Community law

⁵⁵ ANNEX 7: Reply to Opening Letter in Case ECS-1/12 - Letter from Deputy Minister of Ministry of Energy and Coal Industry, No.01-18-0469, dated 17.04.2013.

⁵⁶ Details on the communication and the meeting held with Ukrainian stakeholders discussing the necessary changes to the Auction Rules is detailed in the Reasoned Opinion, p.11. See in particular ANNEX 8: Minutes of the Meeting held on 12 June 2013 and ANNEX 9: Letter from Deputy Minister of Ministry of Energy and Coal Industry, No.03-18-4026, dated 31.07.2013

⁵⁷ NERC Letter, No.6610/14/47/13, dated 26.09.2013.

⁵⁸ ECS Letter, ECS-1/12/O21-10-2013, dated 21.10.2013.

⁵⁹ Part 2. 2) para.1.

⁶⁰ ANNEX 10: ECS Letter, ECS/O/05-06-2014, dated 05.06.2014; ANNEX 11: ECS Letter, ECS/O/22-07-2014, dated 22.07.2014; ANNEX 12: NERC Letter, No.4361/14/47/14, dated 21.07.2014.

⁶¹ ANNEX 13, p.12

⁶² NERC was dissolved on 27 August 2014 with a Presidential Decree No.693/2014 and the new Commission was created on the same day by Presidential Decree No. 694/2014.

⁶³ NEURC, "On approval of the Rules of electronic auctions on capacity allocation of cross-border electricity lines" No. 176 dated 12.02.2015.

as identified in the Opening Letter have been rectified.⁶⁴ Several other issues of non-compliance could not be resolved on the level of secondary legislation as they are intrinsically linked to the electricity market model currently in place under the Electricity Sector Law of 1998 and the Electricity Market Law of 2013. The remaining concerns of the Secretariat related to the non-compliance of the procedure for allocation of cross-border capacity in Ukraine have been expressed also in its Implementations Reports since 2013.⁶⁵

- (57) 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 14 March 2017 submitted a Reasoned Opinion in the present case.⁶⁶
- (58) In the Reasoned Opinion, the Secretariat dropped certain issues it considered rectified after the Opening Letter from the case. Those issues concern the capacity allocation in cases where there is no congestion at the interconnectors; curtailing capacity in cases of “unplanned shortages”, rules on secondary trading, irregularities in conducting the procedure violating the principle of legal certainty as well as the lack of intervention by the regulatory authority. The rules on collaterals however – that were amended in 2015 and the Secretariat assessed as compliant with the *acquis* and did not include in the Reasoned Opinion⁶⁷ - with the adoption of the new Auction Rules of 2017 however, have been amended again in a manner not compatible with the *acquis*, as elaborated in the legal assessment below.
- (59) The Secretariat thus acknowledged that progress has been achieved since the initiation of the present case in 2013. The whole process of capacity allocation, allocation free of charge in case of no congestion instead of “selling” capacity, the creation of an electronic auction platform (which is about to start operating) as well as improvements in the Auction Rules with regard to cooperation with neighbouring TSOs are indeed positive developments. However, already in the Reply to the Opening Letter⁶⁸ and later communication with the government, *Ukrenergo* and NEURC⁶⁹ it was acknowledged that amendments to the Auction Rules only cannot rectify all identified breaches of the *acquis* because of the close link between the breaches and the market model established in the primary legal framework. As has been explained above that framework will not change in the immediate future and capacity allocation will continue to take place in violation of Energy Community law.
- (60) The Secretariat concluded that Ukraine continues to breach Articles 7 and 41 of the Energy Community Treaty, Articles 3(1), 9(1) and 20 of Directive 2003/54/EC, 1, 2(1) and 6(1) of Regulation (EC) 1228/2003, as well as Sections 1.1; 1.6; 2.1; 2.10 and 2.13 of the Congestion Management Guidelines Ukraine.
- (61) Ukraine did not provide a Reply to the Reasoned Opinion within the deadline indicated therein, i.e. by 14 May 2017.

⁶⁴ ANNEX 6, *supra*, point II.4.

⁶⁵ ECS, Annual Implementation Report, 1 August 2014, p.188; ECS, Annual Implementation Report, 1 August 2014, p.159.

⁶⁶ Reasoned Opinion, *supra*.

⁶⁷ Reasoned Opinion, p.14.

⁶⁸ ANNEX 6, *supra*.

⁶⁹ ANNEXES 10, 11 and 12.

IV. Legal Assessment

1. Applicable law

- (62) As a point of departure, the Secretariat notes that the Dispute Settlement Procedures adopted by the Ministerial Council in 2008 have been amended in October 2015.⁷⁰ Pursuant to Article 46(2) of the Procedural Act of 2015 amending the Dispute Settlement Procedures, however, „[c]ases initiated already before 16 October 2015 shall be dealt with in accordance with the Procedural Act applicable before the amendments adopted on that date.“
- (63) The Secretariat thus submits that the present Reasoned Request should be decided by the Ministerial Council under the Dispute Settlement Procedures of 2008.
- (64) With regard to the substantive law, the case leading to the present Reasoned Request was initiated at the time when the Second Energy Package, i.e. for the purpose of the present case, Directive 2003/54/EC and Regulation (EC) No 1228/2003, was applicable in the Energy Community.
- (65) In July 2009, the so-called Third Energy Package was adopted in the European Union and entered into force on 3 March 2011. In the area of electricity, this Package consists of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity. These legal acts were incorporated in the Energy Community *acquis communautaire* by Decision 2011/02/MC-EnC of the Ministerial Council.⁷¹ The Decision and thus Directive 2009/72/EC and Regulation (EC) No 714/2009 were to be implemented by Contracting Parties by 1 January 2015.
- (66) According to well-established case-law of the Court of Justice of the European Union, relevant to the case at hand under Article 94 of the Treaty, “*the existence of a failure to fulfill obligations must be assessed in the light of the European Union legislation in force at the close of the period prescribed by the Commission for the Member State concerned to comply with its reasoned opinion.*”⁷² In the present case, that period closed on 14 May 2017. On that date Directive 2009/72/EC and Regulation (EC) No 714/2009 were in force.
- (67) Moreover, the Court of Justice held that the circumstances of the case may be assessed against new legislation repealing and replacing the European legislation in force at the time the Opening Letter was sent on the condition that the relevant obligations were maintained in force under the provisions of a new European Union measure and that they are analogous.⁷³

⁷⁰ PA/2015/04/MC-EnC of 16 October 2015 amended Procedural Act No 2008/01/MC-EnC of 27 June 2008.

⁷¹ Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community 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 (“Decision 2011/02/MC-EnC”). Decision 2011/02/MC-EnC repealed Directive 2003/54/EC and Regulation (EC) No 1228/2003.

⁷² See, inter alia, Case C-54/08 *Commission v Germany*, [2011] I-04355 at para. 126; Case C-365/97 *Commission v Italy* [1999] ECR I-7773, para. 32; Case C-275/04 *Commission v Belgium* [2006] ECR I-9883, para. 34; and Case C-270/07 *Commission v Germany* [2009] ECR I-1983, para. 49.

⁷³ Case C-36/14 *Commission v Republic of Poland*, para 24; Case C-53/08 *Commission v Republic of Austria*, paras 131 and 132; Case C-365/97 *Commission v Italian Republic*, para 36; Case C-416/07 *Commission v Greece*, para 35; Case C-363/00 *Commission v Italian Republic*, para 22.

- (68) This is indeed the case for the present infringement procedure. The Third Energy Package did not change the substance of the provisions relevant for allocation of cross-border capacity and maintained even the same wording. Articles 1, 2(1) and 6(1) of Regulation (EC) 1228/2003 correspond to Article 1, 2(1) and 16(1) of Regulation (EC) 714/2009, and Sections 2.1, 2.10, 1.6 and 1.1 of the Congestion Management Guidelines annexed to the Regulation (EC) 1228/2003 correspond to the same Sections of the Guidelines annexed to the Regulation (EC) 714/2009. The provisions related to ensuring non-discriminatory access to the grids from the Directive 2003/54/EC, namely Articles 20, 23(2)a) and 9(e) correspond to the exact wording of Articles 32, 37(6)a) and 12(f) of Directive 2009/72/EC.
- (69) The Secretariat thus submits that due to the change of applicable *acquis communautaire* in the course of the preliminary procedure, the relevant law under which this case should be decided is the Third Energy Package and thus Directive 2009/72/EC and Regulation (EC) No 714/2009.
- (70) In the alternative, i.e. should the Ministerial Council decide not to follow the jurisprudence of the Court of Justice of the European Union referred to above, the Secretariat submits that the present dispute should be decided based on the corresponding provisions from Directive 2003/54/EC and Regulation (EC) 1228/2003 as referred to in the Reasoned Opinion. The arguments put forward in the present assessment remain the same.

2. Substance

- (71) 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 adopted by NEURC. Some of these instances are linked to the current electricity market based on a single buyer model on which the allocation of interconnector capacity depends.

a. Different treatment of electricity imports and export

i. Import and export of electricity in Ukraine

- (72) Article 30(1) of the 1998 Electricity Sector Law of Ukraine⁷⁴ and the Auction Rules of 2009⁷⁵ stipulated that the procedures for allocation of capacity (i.e. auctions) are performed only for export of electricity. For imports, an “*authorized central executive body responsible for ensuring realization of the public policy in the fuel and energy shall determine the conditions of the use of free transmission capacity for the purpose of electric power import and transit across the territory of Ukraine.*”⁷⁶ The Ministry was the authorized central executive body responsible for allocating the interconnector capacity for import and transit. Before 2013, the Ministry would issue an authorization for imports and approve planned import volumes.

⁷⁴ Article 30(1) Electricity Sector Law of Ukraine, 1998 as amended last time on 17.12.2010.

⁷⁵ Article 1(1) and 1(12) Auction Rules.

⁷⁶ Article 1(11) Auction Rules from 2009.

- (73) After the amendment by the Electricity Market Law from 2013, Article 30 of the Electricity Sector Law allows allocation of interconnector capacity also for imports of electricity.⁷⁷ In addition, the Auction Rules of 2017, in their Article 1(1) stipulate that auctions are to be held for access to cross-border capacity for export and/or import of electricity.⁷⁸
- (74) While these amendments put an end to formally differentiating between exports and imports of electricity (whereby the latter are governed by non-market based procedures), these provisions are not applied and implemented in practice. Even though the Auction Rules of 2012 and of 2017 have deleted the reference to the Ministry as the authority responsible for approving capacity allocation for the purpose of imports, in practice such approval is still required.
- (75) On the occasion of several meetings with *Ukrenergo*, as well as in communication by email,⁷⁹ the Secretariat has been informed that imports are performed in Ukraine only if approved by the Ministry in the electricity balance.
- (76) In this respect it needs to be recalled that according to the legislation currently in force (as described above), all the imported electricity is sold to *Energorynok* as the single buyer in the WEM. The Ministry is in charge of approving the electricity balance, and only in case where there is a lack of domestically produced electricity, the Ministry allows imports of electricity to be performed. The Ministry for Energy and Coal Industry is still responsible for the electricity balance⁸⁰ pursuant to an Order of the Ministry for Energy and Coal Industry of 2016 approving the procedure for preparing the annual and monthly balance of electricity.⁸¹ Only after such approval, *Ukrenergo* allocates the necessary transmission capacity to be used for the allowed import, i.e. is performing auctions.
- (77) In practice, the Ministry's involvement goes even further than just not including imports in the electricity balance. In the absence of imports envisaged by the electricity balance for 2017, for instance, the Ministry sent a letter to *Ukrenergo* explicitly asking it not to perform auctions for the allocation of interconnector capacity for imports.⁸²
- (78) Since usually Ukraine's domestic generation capacity satisfies the consumption in the country, imports are allowed rarely and for short-terms only. Such imports usually come from the Russian Federation. Imports for commercial purposes, however, are essentially not taking place in Ukraine. Even in cases where the price of electricity in another Party to the Energy Community would be cheaper, the Ukrainian customers are not benefitting from them.

⁷⁷ The relevant subparagraph of Article 30 of the Electricity Sector Law of 1998 as amended reads: „Electricity suppliers who are members of the wholesale electricity market of Ukraine with 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 operations of export and / or import of electricity.”

⁷⁸ The same will be allowed under the new Electricity Market Law of 2017 once it enters into force.

⁷⁹ ANNEX 15 (confidential): Email communication with *Ukrenergo* employee, dated 25.01.2017 stating that could not share the letter from the Ministry addressed to *Ukrenergo*.

⁸⁰ Para.4.5 of Regulation of the Ministry, approved by Decree of the President of Ukraine No382/2011, dated 06.04.2011.

⁸¹ 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.

⁸² *Supra* note 79.

- (79) Moreover, the fact that the capacity allocated on the interconnectors with the Burshtyn island in western Ukraine, i.e. on the borders with Slovakia, Hungary and Romania is significantly reduced by *Ukrenergo* from an NTC value of altogether some 1600 MW to match the Burshtyn island's export capacity which ranges between 500 MW and 650 MW⁸³ (see above), shows that the interconnector capacities on the borders with other Parties to the Treaty are indeed used only for export. The reason for not allowing imports to Burshtyn island is evidently to protect the domestic generators based on the territory of the island, namely the Burshtyn power plant (2351 MW), Kaluska Combined Heat and Power plant (200 MW) and Tereblyha-Rikhska hydroelectric power plant (27 MW).
- (80) Under these circumstances, the Secretariat considers the legal assessment made in the Reasoned Opinion still valid, as will be argued in the following.
- ii. *Non-compliance with the obligation to grant non-discriminatory third-party access*
- (81) In Ukraine, allocation of cross-border capacity for *export* is performed by *Ukrenergo* under the Auction Rules of 2017. Allocation of electricity for *import*, on the other hand, is performed based on an approval by the Ministry, 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. Therefore, the allocation of cross-border capacity is performed through different procedures based on the directions of the flow of electricity.
- (82) The Secretariat submits that maintaining different procedures for the allocation of capacity depending on the direction of the electricity flow is discriminatory. In particular, the allocation of interconnection capacity for import in accordance with procedures based upon unilateral administrative action of the Ministry fails to respect the principle of third party access to the transmission network as stipulated by Article 32(1) of Directive 2009/72/EC. This provision requires that access to the networks is granted without discrimination.
- (83) To grant access to interconnector capacity in Ukraine for import only upon the Ministry's approval differentiates between the electricity undertakings interested in transporting electricity through the Ukrainian interconnectors for imports.
- (84) The principle of non-discrimination requires that comparable situations are not treated differently unless such difference in treatment is objectively justified.⁸⁴ 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*",⁸⁵ the *acquis* places further obligations not to discriminate on both the transmission system operator and on the State. Article 3(1) of Directive 2009/72/EC requires Contracting Parties not to discriminate between electricity undertakings as regards either rights or obligations. Article 32 of Directive 2009/72/EC obliges them to ensure access to the transmission system for all third parties in an objective manner and without discrimination. Besides, under Article 12(f) of Directive 2009/72/EC, the transmission system operator is responsible for ensuring non-discrimination as between system users or classes of system users. In accordance with Article 16(1) of

⁸³ Annual Report of NEURC for 2015, p.3, *supra*.

⁸⁴ Case C-17/03 *Vereniging voor Energie, Milieu en Water (VEMW)* [2005] ECR I-4983, para. 48.

⁸⁵ Case C-17/03 *VEMW* [2005] ECR I-4983, para. 47.

Regulation (EC) 714/2009, “[n]etwork congestion problems shall be addressed with non-discriminatory market based solutions.”

- (85) In its case law, the Court of Justice of the European Union distinguishes between discriminatory capacity allocation based on specific measures taken by the transmission system operator by refusing system access to individual undertakings, and State measures not attributable to the system operator. The former are prohibited under what is now Article 12(f) Directive 2009/72/EC. Discriminatory capacity allocation based on State measures, on the other hand, and in particular statutory rules established by State authorities, are banned by the rules related to third-party access, Article 32 of Directive 2009/72/EC.⁸⁶ The focus of the present case is on the state measures and the electricity market model currently in place pursuant to the existing primary legal framework (Article 30 Electricity Law of 1998 as amended by the Electricity Market Law of 2013). However, the Secretariat considers that in this case the crucial issue is the interpretation of that market model in Ukraine, and making the procedure for capacity allocation dependent on and closely linked to it. This is done by *Ukrenergo* which retains certain freedom by proposing the Auction Rules for adoption to NEURC and by applying them in practice with a link to the electricity market operated by *Energorynok*. For instance, nothing prevents *Ukrenergo* to develop and apply Auction Rules irrespective of whether the market participant has commercial debts for purchasing electricity.
- (86) As was shown above, imports to Ukraine are only approved by the Ministry in practice for imports coming from Russia in case of a necessity to satisfy the domestic consumption. Imports from EU Member States (to the Burshtyn island) have never taken place for satisfying the demand of the customers based there, even in cases where imports would make economic sense due to lower prices in another Party of the Energy Community. There is also a practical interest in importing electricity to Ukraine. The Secretariat has been notified of several applications for transit of electricity via Ukrainian territory.⁸⁷ Under Energy Community rules, allocating capacity for transit consists of nominating capacity for import and export at the same time,⁸⁸ so that transit necessarily includes the import of electricity.
- (87) 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.*”⁸⁹ 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

⁸⁶ Case C-17/03 *VEMW* [2005] ECR I-4983, paras. 35 and 36.

⁸⁷ On 27 August 2015, the Secretariat received a complaint from ERU Trading Private Enterprise from Ukraine, which was registered under Case ECS-8/15. The complainant informed the Secretariat that in the course of 2015, it was applying to *Ukrenergo* for receiving cross-border capacity to be used for transit of electricity through Ukraine along the following routes: Hungary => Slovakia and/or Romania; Slovakia => Hungary and/or Romania and Romania => Slovakia and/or Hungary. *Ukrenergo* refused all schedules for transit submitted by ERU Trading, based on minutes of a meeting dedicated to electricity export and transit via the Burshtyn island dated 17.06.2014, in which the Ministry of Energy and Coal Industry entrusted the State owned company *Ukrinterenergo* as the only company in Ukraine allowed to perform transit of electricity.

⁸⁸ 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.“

⁸⁹ Case C-127/07 *Soci t  Arcelor Atlantique et Lorraine and Others v. Premier ministre* [2008] ECR I-09895, para.26

interconnector capacity must be treated equally irrespective of the direction and the flow of electricity.

- (88) Allocating interconnector capacity through an auction – a non-discriminatory and market based allocation procedure – only for exports of electricity discriminates the system users which would like to import electricity to Ukraine. Hence, maintaining and applying an allocation procedure which differentiates between the different system users based on the direction of electricity flow encroaches upon the non-discriminatory principle as it treats system users wishing to import electricity less favourable than system users wishing to export electricity.
- (89) Consequently, the Secretariat submits that Ukraine has failed to comply with its obligations under Articles 3(1), 12(f), 32(1) of Directive 2009/72/EC, as well as Article 16(1) of Regulation (EC) 714/2009 read in conjunction with Article 7 of the Treaty.
- (90) 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/EC⁹⁰ “*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, verifiable and shall guarantee equality of access for EU electricity companies to national consumers...*”,⁹¹ and would have to comply with the limits of the principle of proportionality. The latter requires non-market based capacity allocation to be suitable to achieve the public service objective in question, and not go beyond what is necessary to achieve that objective.
- (91) It is to be noted that throughout the preliminary procedure,⁹² 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 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 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 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*

⁹⁰ But not Article 9(e) of Directive 2003/54.

⁹¹ 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

⁹² Ukraine did not reply to the Reasoned Opinion.

Directive, the transition from a monopolistic and compartmentalised market in electricity to one that is open and competitive.”⁹³

iii. *Non-compliance with the obligation for performing market-based allocation of cross-border capacity*

- (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.⁹⁴ This could be understood as excluding 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 binding⁹⁵ Interpretation under Article 94 of the Treaty⁹⁶ 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)*

⁹³ Case C-17/03 *VEMW* [2005] ECR I-4983, para. 62.

⁹⁴ 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.’”

⁹⁵ 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

⁹⁶ Emphasis added. See: Ministerial Council, Interpretation under Article 94 of the Treaty No 2014/01/MC-EnG, 23 September 2014.

*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.“⁹⁷
- (97) As described above, the Electricity Sector Law of Ukraine,⁹⁸ as well as Article 1(1) of the Auction Rules of 2017 stipulates that auctions are to be held for access to cross-border capacity for export and/or import of electricity. However, as demonstrated in Section 1.2 above, it is still the Ministry of Ukraine in charge of giving an approval based on the energy balance and a necessity to import or not electricity for satisfying the demand of domestic consumption. Linking allocating cross-border capacity to a “necessity to import” electricity prevents participation to auctions for cross-border capacity to energy undertakings without the Ministry’s approval, as in such cases auctions for import of electricity are not even held.
- (98) To require a unilateral administrative decision by the Ministry as a basis for the allocation of (actually or potentially congested) interconnectors, and not via 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.

iv. Breach of Article 41 of the Treaty

- (99) 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.⁹⁹ Measures requiring prior authorization,¹⁰⁰ even as a pure formality,¹⁰¹ have been considered by the Court of Justice of the European Union as measures having equivalent effect to import restrictions. Making the import of electricity dependent on the prior approval of the Ministry makes the import of electricity in Ukraine more difficult than purely domestic supply, and thus constitutes a measure prohibited by Article 41 of the Treaty. 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 Ukraine.

⁹⁷ Emphasis added. Parties to the Treaty meaning: between Contracting Parties and between Contracting Parties and Member States

⁹⁸ Article 30(1) Electricity Sector Law of Ukraine as amended. In addition, same rules are stipulated in the new Electricity Market Law of 2017.

⁹⁹ Case 8/74 *Procureur du Roi v Dassonville*, [1974] ECR 837, para. 5.

¹⁰⁰ 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.

¹⁰¹ 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 paras.26-30.

(100) According to the Court's 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.¹⁰² 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.*"

v. Conclusions

(101) The Secretariat thus submits 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.

b. Limiting access to interconnectors

i. Limiting the categories eligible for participation in cross-border capacity allocation procedures

(102) Before the changes made by the Electricity Market Law in 2013, Article 30 of the Electricity Sector Law as well as Article 3 of the Auction Rules of 2012 limited the categories eligible for participation in cross-border capacity allocation procedures (for exports) to suppliers that have a license for supply. In its Opening Letter, the Secretariat preliminarily concluded that Article 3 of the Auction Rules encroaches upon Articles 3(1), 9(e) and 20 of Directive 2003/54/EC as well as Section 2.10 of the Congestion Management Guidelines.

(103) The requirement of a valid supply license has not changed with the amendments to the primary and secondary legal framework in Ukraine. Pursuant to Article 30 of the Electricity Sector Law, as amended by the Electricity Market Law of 2013, only "*electricity suppliers who are members of the wholesale electricity market of Ukraine with 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 operations of export and / or import of electricity.*" Article 5 of the Auction Rules of 2017 also stipulates that "*only energy suppliers are allowed to participate in auctions, and in order to participate they have to acquire the status of allocation participant,*"¹⁰³ while according to Article 2.2 of the Auction Rules of 2017, *Ukrenergo* needs to verify if the candidate has the status of a WEM member, whether it has some debt for the electricity bought from the WEM and whether it has a valid supply license.¹⁰⁴

(104) NEURC is the responsible authority for licensing energy undertakings pursuant to the Law of Ukraine on Licensing of the Types of Economic Activities,¹⁰⁵ the Electricity Sector Law of

¹⁰² Case C-159/94 *Commission v France* [1997] ECR I-5815, para. 94.

¹⁰³ Article 5 Auction Rules of 2017.

¹⁰⁴ Article 2.2. Auction Rules of 2017.

¹⁰⁵ 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)

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*.¹⁰⁶ 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.¹⁰⁷

- (105) As has been said above, Article 3(1) of Directive 2009/72/EC confers on all potential system users a right to access the interconnectors and to bid for cross-border capacity for import and/or export of electricity. This right is also guaranteed by Article 32 of Directive 2009/72/EC which requires Ukraine “*to 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.*” The right to network access is a subjective right of market participants and customers, and constitutes one of the essential measures which the Contracting Parties are required to implement in order to bring about the internal market in electricity.¹⁰⁸ By limiting access to interconnectors for the export of electricity only to users with a valid license to supply, and by excluding other system users, such as generators, traders and (eligible) customers from access to interconnection capacity (provided that they have not obtained a supply license), Article 30 of the Electricity Sector Law, as well as Articles 2.2 and 5 of the Auction Rules of 2017 deprive all other system users to benefit from that right. The condition for every system user interested in purchasing interconnector capacity to apply and be granted a supply license – irrespective of how simple the licensing procedure for supply license may be – encroaches upon the right to non-discriminatory access of system users guaranteed under Article 32 of Directive 2009/72/EC.
- (106) This limitation encroaches further upon Article 12(f) Directive 2009/72/EC, as it fails to ensure non-discrimination between system users or classes of system users, which is a task imposed on *Ukrenergo*, as a transmission system operator.
- (107) Moreover, limiting access to market participants holding a license for supply is also in breach of Section 2.10 of the Congestion Management Guidelines which stipulates that “*in principle, all potential market participants shall be permitted to participate in the allocation process without restriction.*” This provision requires that other interested market participants than only licensed suppliers have the possibility to participate in auctions. Section 2.10 allows for limiting this right to participation in the allocation procedure only if the regulatory authority or the competition authority finds it necessary to take measures “*to avoid creating or aggravating problems related to the potential use of dominant position of any market player.*” This is not the case with the Ukrainian primary and secondary legislation, because they restrict participation in cross-border capacity allocation *per se* by limiting access to only one category of (potential and actual) market participants, i.e. suppliers.

¹⁰⁶ 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 from 16.10.1997). Emphasis added.

¹⁰⁷ 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.

¹⁰⁸ See Case C-439/06 *citiworks AG* [2008] ECR I-3913 para. 44 and Case C-239/07 *Julius Sabatauskas and Other* [2008] ECR I- 07523, para. 43.

- (108) The Secretariat does not deny that a system operator must be able to identify energy market participants in order to perform successfully its tasks assigned by Article 12 of Directive 2009/72/EC, and in particular to ensure a secure, reliable and efficient electricity system. Those powers of the transmission system operator should indeed be stipulated in legislation. However, such identification could be ensured also by mere registration with the system operator of all energy market participants interested in participating to auctions for allocation of cross-border capacity in Ukraine.¹⁰⁹
- (109) Such a requirement also amounts to a restriction of trade within the meaning of Article 41 of the Treaty. The Court of Justice has decided that measures requiring prior authorization,¹¹⁰ even as a pure formality,¹¹¹ amount to measures having equivalent effect to import restrictions and are thus contrary to Article 41 of the Treaty.
- (110) In the wake of the Opening Letter, the Secretariat has been informed that obtaining a supply license in Ukraine does not represent a practical barrier for participation in the allocation procedure in practice, since all producers intending to export electricity need to buy that electricity from *Energorynok*. As a precondition for participating in the WEM they have to obtain a supply license first.¹¹² In addition to the requirement for a supply license to producers amounting to barrier to trade pursuant to Article 41, same is true for such a request for all large customers.
- (111) The Secretariat therefore submits that Ukraine, by limiting the access to interconnectors as part of the transmission grids of Ukraine only to undertakings holding a supply license, fails to comply with Article 41 of the Treaty as well as with the rules on ensuring third party access pursuant to Article 12(f), 32 of Directive 2003/54/EC as well as Section 2.10 of the Congestion Management Guidelines.

ii. Supply contracts with the WEM as condition for participation in auctions

- (112) Article 30 of the Electricity Sector Law and the Auction Rules of 2012 subject the Opening Letter listed several other requirements to be fulfilled by market participants if they want to access the interconnectors and to participate in an allocation procedure for electricity exports. This included the requirement to have a contract for purchasing electricity on the wholesale electricity market from the wholesale supplier *Energorynok*, as well as for having concluded contracts for supply of electricity with foreign entities. Both contracts had to be

¹⁰⁹ In Europe, such identification is ensured by issuing an Energy Identification Code (EIC) that represents a unique code which enables a more efficient electronic data exchange. See: <http://www.eles.si/en/for-business-users/descriptions.aspx> (12.02.2013)

Since issuing an EIC is based on filling an application form with basic information about the energy entity, in case of lack of EIC, such identification could be ensured by mere registration with the system operator of all energy market participants.

¹¹⁰ 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.

¹¹¹ 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.

¹¹² According to information from NERC, 261 economic entities obtained licenses on electricity supply by non-regulated tariff already in July 2013. See: NERC Letter, No.4361/14/47/14, dated 21.07.2014.

approved by the transmission system operator *Ukrenergo* and needed to be valid at least for the period for which allocation of capacity is required.

- (113) Following the Opening Letter, Article 30 of the Electricity Sector Law has been amended by the Electricity Market Law of 2013. Consequently, the approval of the contracts with foreign entities is not any more a precondition for becoming allocation participant. The Auction Rules of 2017, based on Article 30 as amended, do not require such contracts, nor do they require approval by *Ukrenergo* of those contracts in advance.¹¹³ Hence, the breaches identified by the Opening Letter related to the contracts with foreign entities, their approvals by *Ukrenergo* as well as their duration have been rectified.
- (114) However, Article 30 of the Electricity Sector Law still requires that in order to become auction participant, a supplier must be a member of the Ukrainian WEM by having signed the agreement with the single buyer *Energorynok*, and may have no open debt for electricity purchased on the WEM. The same is true for the Auction Rules of 2017.¹¹⁴ Both requirements are preconditions for participating in the auctions for exports. If not fulfilled, participation will be denied.
- (115) The Secretariat submits that the requirement for having to purchase electricity from the wholesale supplier *Energorynok* for the purpose of any export violates the requirements for ensuring non-discriminatory access to interconnectors to all eligible customers as enshrined in Article 32 of Directive 2009/72/EC read in conjunction with Article 7 of the Treaty, as well as Article 16(1) of Regulation (EC) 714/2009, the Congestion Management Guidelines and Article 41 of the Treaty. The principle of non-discrimination enshrined in these provisions requires that access to interconnection capacity must be open to all potential system users, without making it dependent on the availability of supply contracts, and even less so limiting the source of such supplies to one single source (*Energorynok*).
- (116) Furthermore, requiring contracts with *Energorynok* imposes an obligation on the transmission system operator to differentiate between the commercial transactions of the system users applying for access to interconnectors and thus encroaches upon Section 1.1 of the Congestion Management Guidelines, which is to accept *all* commercial transactions. Moreover, requiring contracts with specific sellers and buyers (*Energorynok*) also violates Section 2.10 of the Congestion Management Guidelines as not all potential market participants are permitted to participate in the allocation process without restriction.
- (117) Finally, rules requiring certain contracts of the potential auction participants for commodity as a precondition for participating in auctions for capacity infringe Article 16(1) of Regulation (EC) 714/2009 and Section 1.6 of the Congestion Management Guidelines, as they frustrate the transmission system operator's obligation to preferentially solve congestion with non transaction based methods, i.e. methods that do not involve a selection between the contracts of individual market participants.

¹¹³ *Ukrenergo's* approval of the contracts with *Energorynok* has been subject to Article 3 Auction Rules of 2012, and has been applied in the past, as evident from documents submitted by the complainant: Letter from *Ukrenergo*, Ref. No. 06/06-2-2/9391 of 15.11.2012.

¹¹⁴ Article 2.2 Auction Rules of 2017. Unlike in the Auction Rules of 2012, where evidence for fulfilling all qualification requirements was to be submitted together with the application by the candidate, Article 4 Auction Rules of 2012, the Auction Rules of 2017 stipulate that the auction office asks for confirmation from the *Energorynok* that the supplier applying for participating to auctions has no open debt towards *Energorynok* and that it has the status of participant to the WEM.

- (118) The obligation to purchase the electricity to be exported in Ukraine, and through *Energorynok* as a single seller, encroaches also upon the prohibition of hindering trade among the Parties as stipulated in Article 41 of the Treaty. The requirement to have concluded purchase and supply contracts with *Energorynok*, as well as the sanctions stemming from non-compliance with these requirements, constitute impediments to the cross-border trade in electricity within the meaning of Article 41 of the Treaty. Without any prejudice to possible justification under Article 41(2) of the Treaty – which would have to be put forward by the Ukrainian side – the arrangement seems to be disproportionate. Identification of participants in the auctions organized by *Ukrenergo* could be also ensured by way of registration with the system operator and submission of a code similar to the ENTSO-E’s EIC code, which even features in the Auction Rules of 2017.¹¹⁵
- (119) These infringements are not of a theoretical nature. As has been described above, the requirements to have contracts with *Energorynok* as a precondition to bid for capacity used for exports need to be fulfilled in practice. The 2017 Auction Rules do not require anymore submission of those contracts by the applicant, but instead task the auction office to verify *ex officio* by sending a confirmation request to *Energorynok*. However, this amendment does not change the fact that a contract for purchase of electricity with *Energorynok* is required. This requirement has been applied by *Ukrenergo* in the past to the effect that access to interconnectors operated by *Ukrenergo* was refused in several instances.¹¹⁶
- (120) Thus, the Secretariat submits that Article 30 of the Electricity Sector Law, as amended, and Article 2.2. of the Auction Rules of 2017, and as applied by *Ukrenergo*, encroach upon the right to third party access and infringe Article 32 of Directive 2009/72/EC read in conjunction with Article 7 of the Treaty, as well as Article 16(1) of Regulation (EC) 714/2009, Section 1.1, 1.6 and 2.10 of the Congestion Management Guidelines and Article 41 of the Treaty.

iii. *Other conditions for participation in auctions and the loss of the right to participate*

- (121) The provisions of the Auction Rules of 2012 defined the notion of an “*ineligible participant* [неналежний учасник аукціону]” in the auction. Ineligible participants were banned from participation in auctions during the following six months. A participant was considered ineligible in the following cases: if the participant setting the initial price does not register for participation in the auction¹¹⁷ or does not raise a card to confirm that it is willing to accept the capacity after the first announcement of the initial price; if the winner of the auction subsequently does not conclude a contract for allocation of transmission capacity with *Ukrenergo*, or does not pay the sale price, i.e. the price at which it “bought” the capacity, or if the participant fails to fulfill conditions from the agreement with the wholesale electricity supplier.
- (122) The Auction Rules of 2015 abolished the reference to “*ineligible participants.*” However, as explained above, Article 30 of the Electricity Sector Law still requires that only electricity suppliers who are members of the wholesale electricity market and have no open debt for electricity purchased on the wholesale electricity market have access to transmission

¹¹⁵ Article 12 Auction Rules of 2017.

¹¹⁶ ANNEX 6, *supra*, p.7.

¹¹⁷ Under the Auction Rules of 2012 the capacity was sold, and there was always an initial price irrespective of whether there was congestion or not, and this price was set before the auction.

capacity of cross-border electricity networks for the export electricity. Pursuant to Article 5(7) of the Auction Rules of 2017, “based on the results of examination of the application on acquirement of allocation participants and also the documents attached to the application the auction office decides on whether to register the supplier as allocation participant or to refuse this registration.” Therefore, even though not called ineligible participants anymore, the situation and the corresponding breaches identified in the Opening Letter still persist.

- (123) Moreover, in case the auction participant has not made any bid in any auction during a period of a year, its registration as auction participant is withdrawn.¹¹⁸ This also shows that status of WEM member and lack of indebtedness for the electricity purchased from *Energorynok* is a precondition for participating to the auctions for capacity, which has to be verified annually.
- (124) Finally, once the applicant has been successful with its bids in the auctions, and has been allocated certain cross-border capacity in a yearly auction, it can lose the remaining capacity for the respective network reserve for the whole year in case it uses the obtained capacity less than 70% during a month.¹¹⁹
- (125) According to Article 32(2) of Directive 2009/72/EC, access to the transmission networks (including cross-border interconnectors) may be refused only where there is a lack of capacity in which case duly substantiated reasons must be given.¹²⁰ The Ukrainian rules at stake in the present case do not link the refusal to participate in auctions to cross-border capacities to the lack of capacity.
- (126) Article 3(14) of Directive 2009/72/EC entitles Contracting Parties to not apply Article 32 from Directive 2009/72/EC “where its application would obstruct performance of obligations imposed on electricity undertakings in the general economic interest and in so far as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community.” Ukraine has not claimed that an unrestricted access to the cross-border capacity and its capacity auctions would obstruct the performance of *Ukrenergo’s* public service obligations. As was described above, it would in particular have to prove that the performance could not be achieved by means other than refusal to participation in the auctions for access to interconnectors and complies with the requirements of Article 3 of Directive 2009/72/EC for each refusal ground separately¹²¹
- (127) The Secretariat submits that refusing access to interconnector because the applicant does not make a bid during a year as allocation participant, as well as refusing access to interconnectors by making the allocation participants lose the right they have obtained in auction in case they use the obtained capacity for less than 70%, fail to comply with Article 32 of Directive 2009/72/EC, because they prevent third party access for reasons other than those allowed by Article 32(1) of the Directive 2009/72/EC, i.e. lack of available capacity.
- (128) Even if the reasons for withdrawing the right to use the allocated capacity in the abovementioned cases are the prevention of abuse by single market participants that would obtain but not use large portions of interconnector capacity, and the possibility for *Ukrenergo*

¹¹⁸ Article 5.11 Auction Rules of 2017.

¹¹⁹ Article 12.9 Auction Rules of 2017.

¹²⁰ Case C-439/06 *citiworks*, para. 57.

¹²¹ See Case C-439/06 *citiworks*, para. 60.

to be able to allocate the unused capacity further, such measure fails to satisfy the test applicable under Article 3 of Directive 2009/72/EC. Namely, sanctioning an auction participant by withdrawing its right to capacity if it uses less than 70% as a regulatory measure imposed *ex ante* is disproportionate as there seem to be other, less-restrictive means to achieve the same objective. Section 2.13 of the Congestion Management Guidelines provide for financial consequences of failure to honour obligations associated with the allocation of capacity. According to the Auction Rules in Ukraine, the deposit made available in advance will serve to guarantee the financial obligations stemming from the agreement for capacity allocation. Moreover, a use-it-or-lose-it principle¹²² exists under the Auction Rules 2017¹²³ and should be applied. This principle means that if the capacity allocated at annual auctions is not scheduled on the daily schedules, then *Ukrenergo* would be able to use what has not be utilised by the winner of the auction. To request the transmission system operator to withdraw the right of using all of the awarded capacity until the end of the year as a consequence for not using certain percentage of it exceeds the scope of the use-it-or-lose-it principle.

(129) In addition, denying participation in the auction for the above-mentioned reasons is not compliant with Section 1.6 of the Congestion Management Guidelines. This provision lists only one possibility for denying a request for transmission service, namely if two conditions are jointly fulfilled, i.e. when “*the incremental physical power flows resulting from the acceptance of this request imply that secure operation of the power system may no longer be guaranteed, and when the value in monetary amount attached to this request in the congestion management procedure is lower than all other requests intended to be accepted for the same service and conditions.*”¹²⁴ The first of these criteria refers to situations when security of supply would be endangered if the request for access was accepted, while the second criterion refers to situation when – if congestion occurs, the price offered by the denied applicant is lower than the price offered by the another applicants and due to lack of capacity such offer with the lower price could not be accepted.¹²⁵ None of them allows for the refusal of participation in capacity auctions when the applicant does not make a bid during a year after the date of registration as allocation participant, or use the obtained capacity for less than 70%.

(130) Moreover, Section 2.13 of the Congestion Management Guidelines provides for financial consequences of failure to honour obligations stemming from the allocation of capacity. The Guidelines stipulate that where market participants fail to use the capacity that they have committed to use, or, in the case of explicitly auctioned capacity, fail to trade on a secondary basis or give the capacity back in due time, they shall lose the rights to such capacity and pay a cost-reflective charge. Any cost-reflective charges for the non-use of capacity shall be justified and proportionate and the “*key concepts and methods for the determination of liabilities that accrue upon failure to honour obligations*” shall be set out in advance in respect of the financial consequences, and shall be subject to review by the relevant national regulatory authority. This provision in essence prescribes the use-it-or-lose-it principle. Besides losing non-used capacity, the consequence of not using acquired capacity is the payment a cost-reflective charge defined in advance. Section 2.13 lists the consequences of non-usage of capacity in an exhaustive manner, and does not allow for further sanctions

¹²² Section 2.5 Congestion Management Guidelines.

¹²³ Article 12.8 Auction Rules of 2017.

¹²⁴ Section 1.6 Congestion Management Guidelines.

¹²⁵ When a merit order list is established from the bids for capacity, acceptance of bids starts from the highest offer towards the lowest and bids are accepted up to the moment that free cross-border capacity is available.

such as those envisaged under the Auction Rules of Ukraine. Instead, the Auction Rules from 2017 stipulate that that participant loses the allocated capacity, and “*the costs of its bank guarantee or fee are paid as a fine amounting to 100 minimal wages as defined in the current legislation of Ukraine. The fine does not exempt from the obligation to pay in full for the existing unpaid costs.*”¹²⁶ To demand a fine of 100 minimal wages as a fine for not paying for the obtained capacity (not for not using the capacity as stipulated in Section 2.13 of the Congestion Management Guidelines) is excessive and thus disproportionate in the Secretariat’s view (see also below).

- (131) Furthermore, the consequences envisaged by Section 2.13 of the Congestion Management Guidelines can be triggered only after capacity has been allocated and the winning undertaking has failed to use such capacity, or has failed to trade it on secondary basis. These consequences may not be turned into precondition for participation in an auction, as it is the case with the preconditions set by the Auction Rules of Ukraine.

iv. Conclusions

- (132) The Secretariat therefore submits that excluding an applicant from participating in an auction when it does not satisfy the qualification requirements from Article 2.2 of the Auction Rules of 2017, i.e not making a bid during a year after the date of registration as allocation participant, as well as sanctioning a use of obtained interconnectors’ capacity in less than 70% by losing the whole capacity obtained, is not covered by the permissible possibilities for refusal granted by Article 32 of Directive 2009/72/EC and Sections 1.6 and 2.13 of the Congestion Management Guidelines, and thus infringes those provisions.

c. The effect of the security (bank guarantee or a fee) on trade in electricity

- (133) Electricity suppliers interested in participation to auctions for allocation of cross-border capacity have to pay a guaranty before submitting an application for participation in the auction. As defined in earlier Auctions Rules but also in those of 2017, the guarantee – be it a bank guarantee or a fee - is a monetary payment meant to guarantee that the participant winning the auction will be able to fulfill its financial obligations, i.e. will pay for the capacity allocated. In principle, a security is a suitable means used also in EU Member States¹²⁷ to achieve the objective – a guarantee for fulfilling the financial obligations when such obligations are due.
- (134) An excessive deposit or payment of a fee as a security, however, is capable of creating an obstacle for trade of electricity between the Parties to the Treaty, as it may deter potential market participants from engaging in auctions for export capacity. The modalities of a deposit requirement, and in particular the manner in which it needs to be provided as well as its magnitude may work to the effect of keeping smaller and less potent participants from entering the market. Depending on its design, a guarantee or fee may thus prevent market

¹²⁶ Article 17.2 Auction Rules of 2017.

¹²⁷ An example relevant to the present case (covering several countries) is the Joint Allocation Office, which is a merger of earlier CAO CEE and CASC. JAO Rules provide for a two types of collaterals: bank guarantee and cash deposit. See JAO Auction Rules: file:///C:/Users/rka/Downloads/20160629_EUHAR2017_V1.pdf (17.05.2017).

These two examples show that the requirements for guarantee deposit are not going beyond what is needed to cover the risk of non-payment for a capacity that has been allocated via the bidding procedure for all timeframes.

entry by new companies and foreclose the market to the benefit of the incumbents. In this sense, a securities requirement may violate Article 41 of the Treaty, one of the cornerstones of the single energy market established by the Treaty. As the Court of Justice of the European Union has put it, “lodging of ... a security deposit is likely... to entail a not inconsiderable financial risk for undertakings which have just commenced their activities and may, consequently, lack significant resources”.¹²⁸

- (135) Furthermore, the principle of proportionality requires that the amount of the guarantee corresponds to the price expected to be paid for the specific capacity that could be allocated (based on the bidding price offered by the auction participant). As was stated above, even though the incompliant Auction Rules from 2012 have been amended and improved in 2015 (by introducing calculation of the amount of the bank guarantee by “*multiplying the maximum value of Bid(s) price and maximum value of capacity in MW planned to be obtained by the allocation participant on the corresponding auction*”), the Auction Rules of 2017 now require that the fee and/or the bank guarantee for all auctions (be it yearly, monthly or daily) consist of an amount that exceeds or is equal to 100 (one hundred) minimal wages,¹²⁹ which amounts to approx. 11 000 EUR. The results of auctions held during the last month however show that capacity has sometimes been allocated for as little as 48 EUR.¹³⁰ The fine also does not exempt from the obligation to pay in full for the existing unpaid costs,¹³¹ meaning that the allocation participant pays a fine some 11 000 EUR in addition to the invoices due. The fine also remains the same irrespective of whether the participant has failed to pay for obtained capacity at annual, monthly or daily auctions.¹³²
- (136) The magnitude of the guarantee required by *Ukrenergo* is likely to deter new market entrants from participating in the auctions. As the Secretariat elaborated in its Opening Letter, only one big company (*DTEK* and its affiliated companies) participated and was winning the auctions each year. That was an indicator that only the incumbent is capable of complying with the requirements set in the Auction Rules. After the changes in the Auction Rules of 2015, and in the last few auctions held under them,¹³³ a few more companies were participating to the auctions.
- (137) The Secretariat thus submits that there is no reasonable relation between the potential risk of failure to pay and the amount asked for. Such requirement obviously does not reflect any kind of methodology approximating what the circumstances for each bidder are, with a view to defining a fair guarantee or fee. This amount is excessive and disproportionate in relation to the objective pursued, providing a security against the risk of non-payment.
- (138) The disproportionality is exacerbated by the requirement of paying a fine (in addition to losing the capacity for not ensuring timely payment of the obtained capacity), as now stipulated in Article 17 of the Auction Rules of 2017. Even though Section 2.13 of the Congestion Management Guidelines allows charging a “*justified and proportionate cost-reflective charge*”, it does so for a failure of an auction participant to use the capacity that it has committed to use, or fails to trade on a secondary basis or gives the capacity back in due

¹²⁸ Case 25/07 *Alicja Sosnowska v Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu* [2008] ECR I-05129, para.31.

¹²⁹ Article 6.2 Auction Rules of 2017.

¹³⁰ See for instance capacity of 50MW Burshtyin – Romania, 04.22.2017 - 23.04.2017 to PJSC "DTEK Pavlogradugol."

¹³¹ Article 17.2 Auction Rules of 2017.

¹³² Article 17.2 and 17.3 Auction Rules of 2017.

¹³³ Results available at: <https://ua.energy/kliyantam/auksiony/rezultaty/> (17.05.2017).

time. This requirement is related to the costs of the system operator, which would be required to perform other auctions, to ensure using the allocated capacity by another market participant, etc. However, it is incompliant with the Energy Community rules for allocation of cross-border capacity and Section 2.5 of the Congestion Management Guidelines in particular, if a fine is imposed in addition to losing the capacity obtained at auctions. Contrary to the rationale behind requirement of a security, guaranteeing payment of the financial obligations in the amount due and for the obtained capacity in case the latter does not execute a timely payment, asking for payment of an invoice (in addition to activating the bank guarantee) as well as imposing a fine of some 11 000 EUR for yearly, monthly and daily auctions fails to comply with the proportionality principle.

- (139) The Secretariat recalls that it is on Ukraine to show that their rules fulfil the conditions for application of the derogating rules in Article 41(2) of the Treaty, or any legitimate reasons in the general interest.¹³⁴ This corresponds to the second sentence of Article 3 of the Rules of Procedure for Dispute Settlement whereby a “*Party [which] 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*”.
- (140) In the absence of any justification by Ukraine, the Secretariat limits itself to submitting that a security deposit in the form of a bank guarantee or a payment to cover the system operator’s risk of enforcing payment obligations *vis-a-vis* the successful participant may be considered legitimate in principle. However, the principle of proportionality requires that the measures adopted are suitable to secure the attainment of the objectives that they pursue – i.e. to provide the system operator with a guarantee for the case that an actual payment obligation fails – and not to go beyond what is necessary in order to attain it.¹³⁵ A national rule or practice cannot benefit from the derogation provided for in Article 41(2) of the Treaty if the objective pursued may be protected just as effectively by measures which are less restrictive on intra-Energy Community trade.¹³⁶
- (141) Therefore, the Secretariat submits that the requirement for payment of a fee/providing a bank guarantee in the amount of 100 (one hundred) minimal wages¹³⁷ for participation to any auction, as well as imposing a fine for not using the obtained capacity in addition to losing it and paying the invoices, violates Article 41, as well as Section 2.5. of the Congestion Management Guidelines.

¹³⁴ Case C-159/94 *Commission v France* [1997] ECR I-5815, para. 94.

¹³⁵ Joined Cases C-282/04 and C-283/04 *Commission v Netherlands* [2006] ECR I-9141, para. 33.

¹³⁶ Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, para. 104.

¹³⁷ Article 6.2 Auction Rules of 2017.

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 electricity, Ukraine fails to fulfil its obligations under the Energy Community Treaty, and in particular Articles 7 and 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.

On behalf of the Secretariat of the Energy Community

Vienna, 19 May 2017

A handwritten signature in blue ink, appearing to read "Janez Kopač".

Janez Kopač
Director

A handwritten signature in blue ink, appearing to read "Dirk Buschle".

Dirk Buschle
Legal Counsel/Deputy Director

List of Annexes

- ANNEX 1 Article 30 of Law of Ukraine 'On electricity' No. 575/97-BP, VR, 6 October 1997
- ANNEX 2 Relevant excerpts of Electricity Market Law, No 663-VII, dated 24.10.2013 (not official translation)
- ANNEX 3 Complaint dated 4 January 2012
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- ANNEX 6 Opening Letter of 26 February 2013
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- ANNEX 10 ECS Letter, ECS/O/05-06-2014 of 5 June 2014
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- ANNEX 15 Available upon request



ЗАКОН УКРАЇНИ

Про електроенергетику

(Відомості Верховної Ради України (ВВР), 1998, N 1, ст.1)

{ Із змінами, внесеними згідно із Законами N 1812-III (1812-14) від 08.06.2000, ВВР, 2000, N 38, ст.319 N 1821-III (1821-14) від 22.06.2000, ВВР, 2000, N 38, ст.321 N 2921-III (2921-14) від 10.01.2002, ВВР, 2002, N 16, ст.114 N 741-IV (741-15) від 15.05.2003, ВВР, 2003, N 29, ст.231 N 747-IV (747-15) від 15.05.2003, ВВР, 2003, N 29, ст.236 N 982-IV (982-15) від 19.06.2003, ВВР, 2003, N 52, ст.378 N 1158-IV (1158-15) від 11.09.2003, ВВР, 2004, N 8, ст.67 N 1294-IV (1294-15) від 20.11.2003, ВВР, 2004, N 13, ст.181 N 1330-IV (1330-15) від 25.11.2003, ВВР, 2004, N 15, ст.210 N 2229-IV (2229-15) від 14.12.2004, ВВР, 2005, N 4, ст.103 N 2285-IV (2285-15) від 23.12.2004, ВВР, 2005, N 7-8, ст.162 N 2352-IV (2352-15) від 18.01.2005, ВВР, 2005, N 10, ст.190 N 2505-IV (2505-15) від 25.03.2005, ВВР, 2005, N 17, N 18-19, ст.267 N 2509-IV (2509-15) від 05.04.2005, ВВР, 2005, N 20, ст.278 N 2598-IV (2598-15) від 31.05.2005, ВВР, 2005, N 27, ст.359 N 2633-IV (2633-15) від 02.06.2005, ВВР, 2005, N 28, ст.373 N 2706-IV (2706-15) від 23.06.2005, ВВР, 2005, N 33, ст.428 N 2711-IV (2711-15) від 23.06.2005, ВВР, 2005, N 33, ст.430 N 3235-IV (3235-15) від 20.12.2005, ВВР, 2006, N 9, N 10-11, ст.96 N 3370-IV (3370-15) від 19.01.2006, ВВР, 2006, N 22, ст.184 N 232-V (232-16) від 05.10.2006, ВВР, 2006, N 49, ст.486 N 489-V (489-16) від 19.12.2006, ВВР, 2007, N 7-8, ст.66 N 997-V (997-16) від 27.04.2007, ВВР, 2007, N 33, ст.440 N 107-VI (107-17) від 28.12.2007, ВВР, 2008, N 5-6, N 7-8, ст.78 }

{ Додатково див. Рішення Конституційного Суду N 10-рп/2008 (v010p710-08) від 22.05.2008 }

{ Із змінами, внесеними згідно із Законами N 309-VI (309-17) від 03.06.2008, ВВР, 2008, N 27-28, ст.253 N 601-VI (601-17) від 25.09.2008, ВВР, 2009, N 13, ст.155 N 800-VI (800-17) від 25.12.2008, ВВР, 2009, N 19, ст.257 N 1164-VI (1164-17) від 19.03.2009, ВВР, 2009, N 31, ст.457 N 1220-VI (1220-17) від 01.04.2009, ВВР, 2009, N 32-33, ст.496 N 1565-VI (1565-17) від 17.11.2009, ВВР, 2010, N 1, ст.3 N 2388-VI (2388-17) від 01.07.2010, ВВР, 2010, N 37, ст.496 N 2799-VI (2799-17) від 17.12.2010, ВВР, 2010, N 25, ст.186 N 3486-VI (3486-17) від 03.06.2011 }

{ У тексті Закону слова "розподільчі рахунки" та "розподільчий рахунок" в усіх відмінках замінено відповідно словами "поточні рахунки із спеціальним режимом використання" та "поточний рахунок із спеціальним режимом використання" у відповідних відмінках згідно із Законом N 2921-III (2921-14) від 10.01.2002 }

Цей Закон визначає правові, економічні та організаційні засади діяльності в електроенергетиці і регулює відносини, пов'язані з виробництвом, передачею, постачанням і використанням енергії, забезпеченням енергетичної безпеки України, конкуренцією та захистом прав споживачів і працівників галузі.

Стаття 30. Особливості експорту електроенергії

Для здійснення експорту електричної енергії енергопостачальники закупають необхідний їй обсяг на оптовому ринку електричної енергії України за оптовою ринковою ціною.

Доступ до пропускної спроможності міждержавних електричних мереж України для експорту електричної енергії надається на умовах аукціону. Аукціон щодо доступу до пропускної спроможності міждержавних електричних мереж України на строк не більше одного року проводиться суб'єктом електроенергетики, який здійснює передачу електричної енергії міждержавними електричними мережами України. Участь в аукціоні беруть суб'єкти електроенергетики, які мають ліцензію на здійснення діяльності з постачання електричної енергії, є членами оптового ринку електричної енергії України та не мають простроченої заборгованості за електричну енергію, закуплену на оптовому ринку електричної енергії України. Аукціон проводиться не рідше одного разу на місяць за умови наявності вільної пропускної спроможності міждержавних електричних мереж України.

Переможцем аукціону визначається суб'єкт електроенергетики, який запропонував найвищу ціну. У разі якщо переможець аукціону протягом двох календарних місяців поспіль використовує отриману в результаті аукціону пропускну спроможність міждержавних електричних мереж України менше, ніж на сімдесят відсотків в середньому за місяць, така пропускну спроможність

міждержавних електричних мереж України знову виставляється на аукціон.

Порядок проведення аукціону затверджується Національною комісією регулювання електроенергетики України та визначає:

фінансові гарантії оплати доступу до пропускної спроможності міждержавних електричних мереж України;

величину пропускної спроможності міждержавних електричних мереж України за окремими лотами;

початкову ціну доступу до міждержавних електричних мереж України;

умови відмови в наданні доступу до міждержавних електричних мереж України;

умови дострокового припинення доступу до міждержавних електричних мереж України в разі невиконання енергопостачальником умов договору про доступ до пропускної спроможності міждержавних електричних мереж України або вимог законодавства;

інші умови.

Кошти, отримані в результаті проведення аукціону щодо доступу до пропускної спроможності міждержавних електричних мереж України, розподіляються в порядку, затвердженому Національною комісією регулювання електроенергетики України.

Напрями використання зазначених коштів:

погашення реструктуризованої заборгованості оптового постачальника електричної енергії енергогенеруючим компаніям та суб'єкту електроенергетики, який здійснює передачу електричної енергії міждержавними електричними мережами України, пропорційно до рівня такої заборгованості;

фінансування інвестиційної програми суб'єкта електроенергетики, який здійснює передачу електричної енергії міждержавними електричними мережами України.

При реалізації проектів будівництва (нового будівництва, розширення, реконструкції) магістральних, міждержавних електричних мереж України, включаючи об'єкти мережевої інфраструктури, що дають змогу збільшити пропускну спроможність міждержавних електричних мереж України, кошти, отримані в результаті проведення аукціону щодо доступу до додатково створеної пропускної спроможності, використовуються на забезпечення окупності відповідних проектів будівництва.

Передача електричної енергії, призначеної для експорту, здійснюється на підставі договору з суб'єктом електроенергетики, який здійснює передачу електричної енергії міждержавними електричними мережами України. Зазначений суб'єкт електроенергетики укладає з переможцем аукціону договір про доступ до пропускної спроможності міждержавних електричних мереж України, включаючи технічні умови забезпечення експорту електричної енергії. Примірна форма договору про доступ до пропускної спроможності міждержавних електричних мереж України затверджується Національною комісією регулювання електроенергетики України.

Суб'єкт електроенергетики, який здійснює передачу електричної енергії міждержавними електричними мережами України, зобов'язаний щомісяця оприлюднювати інформацію щодо пропускної спроможності міждержавних електричних мереж України, їх поточного завантаження, а також вільної пропускної спроможності міждержавних електричних мереж України у порядку, встановленому Національною комісією регулювання електроенергетики України.

{ Розділ V доповнено статтею 30 згідно із Законом N 1164-VI (1164-17) від 19.03.2009 }

Президент України

Л. КУЧМА

м. Київ, 16 жовтня 1997 року
N 575/97-ВР

POWER INDUSTRY LAW OF UKRAINE

(Bulletin of the Supreme Council of Ukraine (BSC), 1998, No. 1, page 1)

{As amended by virtue of Laws No. 1812-III (1812-14) dated June 8, 2000, BSC, 2000, No. 38, page 319; No. 1821-III (1821-14) dated June 22, 2000, BSC, 2000, No. 38, page 321; No. 2921-III (2921-14) dated January 10, 2002, BSC, 2002, No. 16, page 114; No. 741-IV (741-15) dated May 15, 2003, BSC, 2003, No. 29, page 236; No. 982-IV (982-15) dated June 19, 2003, BSC, 2003, No. 52, page 378; No. 1158-IV (1158-15) dated September 11, 2003, BSC, 2004, No. 8, page 67; No. 1294-IV (1294-15) dated November 20, 2003, BSC, 2004, No. 13, page 181; No. 1330-IV (1330-15) dated November 25, 2003, BSC, 2004, No. 15, page 210; No. 2229-IV (2229-15) dated December 14, 2004, BSC, 2005, No. 4, page 103; No. 2285-IV (2285-15) dated December 23, 2005, BSC, 2005, No. 7-8, page 162; No. 2352-IV (2352-15) dated January 18, 2005, BSC, 2005, No. 10, page 190; No. 2505-IV (2505-15) dated March 25, 2005, BSC, 2005, No. 17, No. 18-19, page 267; No. 2509-IV (2509-15) dated April 5, 2005, BSC, 2005, No. 20, page 278; No. 25809-IV (2598-15) dated May 31, 2005, BSC, 2005, No. 27, page 359; No. 2633-IV (2633-15) dated June 2, 2005, BSC, 2005, No. 28, page 373; No. 2706-IV (2706-15) dated June 23, 2005, BSC, 2005, No. 33, page 428; No. 2711-IV (2711-15) dated June 23, 2005, BSC, 2005, No. 33, page 430; No. 3235-IV (3235-15) dated December 20, 2006, BSC, 2005, No. 9, No. 10-11, page 96; No. 3370-IV (3370-15) dated January 19, 2006, BSC, 2006, No. 22, page 184; No. 232-V (232-16) dated October 5, 2006, BSC, 2006, No. 49, page 486; No. 489-V (489-16) dated December 19, 2006, BSC, 2007, No. 7-8, page 66; No. 997-V (997-16) dated April 27, 2007, BSC, 2007, No. 33, page 440; No. 107-V (107-117) dated December 28, 2007, BSC, 2008, No. 5-6, No. 7-8, page 78}

{Please see also Resolution No. 10-pn/2008 (v010p710-18) of the Constitutional Court dated May 22, 2008}

{As amended by virtue of Laws No. 309-IV (309-17) dated June 3, 2000, BSC, 2008, No. 27-28, page 253; No. 601-VI (601-17) dated September 25, 2008, BSC, 2009, No. 13, page 155; No. 800-VI (800-17) dated December 25, 2008, BSC, 2009, No. 19, page 257; No. 1164-VI (1164-17) dated March 19, 2009, BSC, 2009, No. 31, page 457; No. 1220-VI (1220-17) dated April 1, 2009, BSC, 2009, No. 32-33, page 496; No. 1565-VI (1565-17) dated November 17, 2009, BSC, 2010, No. 1, page 3; No. 2388-VI (2388-17) dated July 1, 2010, BSC, 2010, No. 37, page 496; No. 2799-VI (2799-17) dated December 17, 2010, BSC, 2010, No. 25, page 186; No. 3486-VI (3486-17) dated June 3, 2011}

{In the text of the Law, the words "clearing accounts" and "clearing account" in all cases are replaced with the words "settlement accounts with special use conditions" and "a settlement account with special use conditions" respectively in the relevant cases pursuant to Law No. 2921-III (2921-14) dated January 10, 2002}

This Law shall determine the legal, economic and organizational principles of activities in the power industry and shall regulate the relationship relating to the electric power production, transmission, supply, and use; ensuring the energy safety of Ukraine, the competition, and the protection of the rights of consumers and persons engaged in the industry.

Article 30. Electric Power Export Peculiarities

For the purpose of the electric power export, electric power suppliers shall purchase the necessary quantity thereof on the Ukrainian wholesale electric power market at a wholesale market price.

The access to the transmitting capacity of Ukraine's international power grids for the purpose of electric power export shall be granted at auction. The auction relating to the access to the transmitting capacity of Ukraine's international power grids for not more than one year shall be conducted by a power industry entity engaging in the transmission of electric power through Ukraine's international power grids. The power industry entities having a license to engage in the electric power supply, being the members of the Ukrainian wholesale electric power market, and having no overdue debts for the electric power purchased on the Ukrainian wholesale electric power market shall participate in the auction. The auction shall be conducted at least once a month subject to the availability of free transmitting capacity of Ukraine's international power grids.

The power industry entity offering the highest price shall be recognized as the winner of the auction. If the average monthly use of the transmitting capacity of Ukraine's international power grids acquired by the winner of an auction as a result of the auction is less than seventy percent in two consecutive months, such transmitting capacity of Ukraine's international power grids shall be put up at a monthly auction again.

The procedure of the auction shall be approved by the National Power Industry Regulation Committee of Ukraine and shall determine:

the financial guarantees of the payment for the access to the transmitting capacity of Ukraine's international power grids;

the transmitting capacity of Ukraine's international power grids in terms of separate lots;

the initial price of the access to the transmitting capacity of Ukraine's international power grids;

terms and condition of an early termination of the access to the transmitting capacity of Ukraine's international power grids if the power supplier fails to fulfill the terms and conditions of a contract of access to the transmitting capacity of Ukraine's international power grids or to comply with the statutory requirements; and

other terms and conditions.

The funds received as a result of the auction relating to the access to the transmitting capacity of Ukraine's international power grids shall be distributed in accordance with the procedure approved by the National Power Industry Regulation Committee of Ukraine.

Direction of use of the said funds:

discharge of the restructured debts of the wholesale electric power supplier to power generating companies and the power industry entity transmitting electric power through Ukraine's international power grids in proportion to the amount of the debt;

financing of the investment program of the power industry entity transmitting electric power through Ukraine's international power grids.

In case of realization of projects of construction (new construction, expansion, reconstruction) of Ukraine's main and international power grids including grid infrastructure facilities enabling to increase the transmitting capacity of Ukraine's international power grids,

the funds obtained as a result of the auction relating to the access to the additional created transmitting capacity shall be used for ensuring the payback of the relevant construction projects.

The electric power intended for export shall be transmitted by virtue of a contract made with the power industry entity transmitting electric power through Ukraine's international power grids. The said power industry entity shall make a contract of access to the transmitting capacity of Ukraine's international power grids with the winner of the auction such contract including the technical conditions of ensuring the electric power export. An approximate form of the contract of access to the transmitting capacity of Ukraine's international power grids shall be approved by the National Power Industry Regulation Committee of Ukraine.

The power industry entity transmitting electric power through Ukraine's international power grids shall publish the information on the transmitting capacity of Ukraine's international power grids, their current utilization as well as free transmitting capacity of Ukraine's international power grids on a monthly basis in accordance with the procedure established by the National Power Industry Regulation Committee of Ukraine.

{Section V is supplemented with Article 30 by virtue of Law No. 1164-VI (1164-17) dated March 19, 2009}

President of Ukraine

L. KUCHMA

Kyiv, October 16, 1997
No. 575/97-BP

The funds obtained as a result of the auction relating to the access to the additional created
transmission capacity shall be used for ensuring the payment of the relevant construction projects.

The electric power intended for export shall be transmitted by means of a contract made
with the power industry entity transmitting electric power through Ukraine's international power
grid. The said power industry entity shall make a contract of access to the transmitting capacity
of Ukraine's international power grids with the owner of the auction such contract including the
technical conditions of ensuring the electric power export. An agreement in form of the contract
of access to the transmitting capacity of Ukraine's international power grids shall be approved by
the National Power Industry Regulation Commission of Ukraine.

The power industry entity transmitting electric power through Ukraine's international
power grid shall publish the information on the transmitting capacity of Ukraine's international
power grids and current utilization as well as free transmitting capacity of Ukraine's
international power grids on a monthly basis in accordance with the procedure established by the
National Power Industry Regulation Commission of Ukraine.

Ukraine's international power grids shall be operated in accordance with Law No. 1164-IV (104-17) dated March
14, 2009.

L. KUCIMA

ВІВНІСТЬ ВЕРУВАДУ
ЗАСВІДЧУЮ ПЕРЕКЛАДАЧ
* + *
THE ABOVE IS A TRUE
TRANSLATION TRANSLATOR





ЗАКОН УКРАЇНИ

Про засади функціонування ринку електричної енергії України

(Відомості Верховної Ради (ВВР), 2014, № 22, ст.781)

{Із змінами, внесеними згідно із Законами
№ 1197-VII від 10.04.2014, ВВР, 2014, № 24, ст.883
№ 514-VIII від 04.06.2015, ВВР, 2015, № 33, ст.324
№ 922-VIII від 25.12.2015, ВВР, 2016, № 9, ст.89
№ 1540-VIII від 22.09.2016, ВВР, 2016, № 51, ст.833}

{У тексті Закону слова та цифри "з енергії сонячного випромінювання об'єктами електроенергетики (генеруючими установками) приватних домогосподарств, величина встановленої потужності яких не перевищує 10 кВт" замінити словами та цифрами "з енергії сонячного випромінювання та/або енергії вітру об'єктами електроенергетики (генеруючими установками) приватних домогосподарств, величина встановленої потужності яких не перевищує 30 кВт" згідно із Законом № 514-VIII від 04.06.2015}

{У тексті Закону слова "національна комісія, що здійснює державне регулювання у сфері енергетики" в усіх відмінках замінено словами "національна комісія, що здійснює державне регулювання у сферах енергетики та комунальних послуг" у відповідному відмінку згідно із Законом № 1540-VIII від 22.09.2016}

Цей Закон визначає правові, економічні та організаційні засади діяльності ринку електричної енергії України та регулює відносини, що виникають у процесі його функціонування.

Розділ I ЗАГАЛЬНІ ПОЛОЖЕННЯ

Стаття 1. Визначення термінів

У цьому Законі наведені нижче терміни вживаються в такому значенні:

адміністратор комерційного обліку електричної енергії (адміністратор комерційного обліку) - суб'єкт ринку електричної енергії, який забезпечує організацію та адміністрування комерційного обліку електричної енергії на ринку електричної енергії, а також виконує функції центральної агрегації даних комерційного обліку на ринку електричної енергії;

адміністратор розрахунків - суб'єкт ринку електричної енергії, який забезпечує організацію роботи ринку електричної енергії та проведення розрахунків на балансуєчому ринку та ринку допоміжних послуг;

акредитація постачальника послуг комерційного обліку (акредитація) - документальне

(Circulation as of 23 October 2013)

Law of Ukraine
On Operating Principles of the Electricity Market of Ukraine

This Law defines legal, economic and organizational principles of the electricity market of Ukraine and regulates relations occurring in course of its operation.

SECTION I. GENERAL PROVISIONS

Article 1. Definitions

For the purposes of this Law the terms listed below shall be used in the following meanings:

Commercial electricity metering administrator (hereinafter – “Commercial Metering Administrator”) – electricity market entity responsible for organization and administration of commercial electricity metering in the electricity market, which fulfills the function of centralized aggregation of commercial metering data in the electricity market.

Settlements administrator – electricity market entity responsible for organization of the electricity market operation and settlements in the balancing market and ancillary services market;

Accreditation of commercial metering services provider (hereinafter - accreditation) – a document by which the commercial metering administrator certifies eligibility and competence of the respective business entity to provide commercial metering services in the electricity market in accordance with the procedure set out in the commercial metering code;

Funds allocation algorithm – procedure of funds allocation by an authorized bank from special current accounts without payment orders, established by the National Electricity Regulatory Commission as provided by this Law;

Balancing group – a union of balance responsible parties created in accordance with this Law, within which one party being a members of such a union is responsible for electricity imbalance of all other parties being members of such a union;

Peculiarities of purchase of ancillary services for providing the reserves of new and/or rehabilitated generation capacity shall be defined by this Law and the Law of Ukraine “On Electricity”.

12. If the scope of the proposed ancillary service is not enough to satisfy the demands of the system operator for that service or if the ancillary service is rendered by the ancillary services provider with a monopolistic (dominant) position in the market for such services or in a specific part of the Unified Energy System of Ukraine with existing system constraints, sale of such ancillary service shall be mandatory for the ancillary services provider. The price for such services shall be calculated under the methodology of calculation of regulated prices for ancillary services approved by the National Electricity Regulatory Commission.

Regulated prices in the ancillary services market shall mandatorily ensure:

- compensation for economically justified costs of ancillary services providers on the provision of the relevant ancillary services, including coverage of the justified investments required to ensure the provision of the services;

- profit gaining.

13. If the rate of increase of price quotations provided on a competitive basis by ancillary services providers exceeds the limits set by the market rules, the sale of such ancillary services and purchase thereof by the system operator shall be exercised at prices calculated in accordance with the market rules.

14. The system operator shall furnish the settlements administrator with information on the volume and prices of purchased ancillary services and also on the actually provided ancillary services for calculation of the respective payments. Information on the volume and cost of purchased ancillary services shall be public information, which shall be disclosed by the system operator in accordance with the procedure stipulated by the market rules.

15. The costs of the system operator for payment of ancillary services shall be included into the tariff on centralized (operational and technological) dispatching of the Unified Energy System of Ukraine.

Article 10. Access to cross-border electricity transmission capacities

1. The right to access the cross-border electricity transmission capacities to carry out operations of export and / or import of electricity can be granted only to electricity suppliers, which do not carry out the activity of electricity supply on a fixed territory.

Electricity transmission company in coordination with the system operator shall ensure non-discriminatory access conditions for electricity suppliers to main and cross-border electricity networks in carrying out export and / or import of electricity within the technical capacities of electricity networks based on their prioritized use in order to meet the needs of electricity consumers in Ukraine in accordance with the standards of operational safety of the Unified Energy System of Ukraine.

Access to cross-border electricity transmission capacities on behalf of the electricity transmission company shall be granted by the system operator in accordance with the Procedure for holding electronic auctions for allocation of transmission capacity, which shall be approved by the National Electricity Regulatory Commission upon approval by the Antimonopoly Committee of Ukraine.

2. Granting of access to cross-border electricity transmission capacities shall be organized by the system operator in coordination with system operators and / or transmission system operators of neighboring countries.

3. The system operator shall determine the available transmission capacity in accordance with a methodology approved by the central authority of executive power ensuring formation of the state policy in the electricity sector. The volume of the available transmission capacity shall be agreed with the respective system operators and / or the operators of transmission systems of the neighboring countries.

Every day, the system operator in accordance with the Procedure for electronic auctions for allocation of cross-border transmission capacity shall publish the information about the daily, monthly and annual size of the available, free and distributed transmission capacity, as well as the information with regard to which the priority access has been granted according to the Law, the forecast regarding reliability of the free transmission capacity, as well as free transmission capacity offered for auction.

4. The distribution of the free cross-border electricity transmission capacities shall be performed by the system operator under the electronic auction procedure using electronic documents and digital signatures except for cases as required by this Law. Access to cross-border electricity transmission capacities shall be granted to electricity suppliers based on the results of the auction.

In case that the total demand for cross-border electricity transmission capacities exceeds free cross-border electricity transmission capacity, auction for the access shall be conducted based on the principle of priority satisfaction of bids of auction participants offering the highest price. In such a case, price of access to transmission capacity in a specific direction shall be defined at the lowest price of the satisfied bids of auction participants.

Provided that the total demand for cross-border electricity transmission capacities is less than or equal to the free cross-border electricity transmission capacity, the system operator, on behalf of the electricity transmission company, shall grant to the participants of such auction access to cross-border electricity transmission capacities on a free of charge basis.

To allocate free cross-border electricity transmission capacity, the system operator shall conduct annual, monthly and daily auctions. When conducting the auction, the system operator shall distribute the entire free cross-border electricity transmission capacity determined for the corresponding period.

5. The funds received by the electricity transmission company as a result of the provision of access to cross-border electricity transmission capacities at auctions, shall be

used by the electricity transmission company as a first priority to increase the capacity of such networks.

6. Electricity suppliers that have obtained access to cross-border electricity transmission capacities shall, within the time limit stipulated by the market rules and by the Procedure for electronic auctions for allocation of transmission capacity, submit to the system operator daily hourly schedule of export / import of electricity to receive acceptance. In case that the electricity supplier has not submitted to the system operator daily hourly schedule of export / import of electricity, such electricity supplier loses access to cross-border electricity transmission capacity on the corresponding day of export / import of electricity, and the system operator shall distribute the unused volumes of transmission capacity at the daily auction.

In case the electricity supplier utilizes within a calendar month the cross-border transmission capacity of electricity networks of Ukraine received as a result of an annual auction at less than seventy per cent, such electricity supplier shall lose the gained access to cross-border transmission capacities, and the value of the allocated transmission capacity shall become a free transmission capacity and shall be offered for auction.

Electricity suppliers that have obtained access to cross-border electricity transmission capacities, have the right on a contractual basis to transfer to other electricity suppliers their access to cross-border electricity transmission capacities, having notified and having registered such a transfer of access with the system operator in accordance with the Procedure for electronic auctions for allocation of transmission capacity.

7. Increase in the cross-border electricity transmission capacities shall be exercised at the expense of investments of electricity transmission company or at the expense of investments of a natural person or legal entity which is not affiliated, directly or indirectly, with control relations with the electricity transmission company.

Additional (increased) volumes of cross-border electricity transmission capacities created by investments of the natural person or legal entity that is not affiliated, directly or indirectly, with control relations with the electricity transmission company, may be exempted from the provisions of part 4 of this Article provided that:

- the investment must enhance competition in the electricity market;
- the investment will not be made if the exemption is not granted;
- the investment is made into electricity facilities of the Unified Energy System of Ukraine;
- no part of the investment or operating costs of the establishment and / or operation of an additional (increased) volume of cross-border electricity transmission capacities are covered by the electricity transmission or distribution tariff of the electricity transmission company or electricity distribution companies of Ukraine or operators of main and cross border electricity networks of the energy system, in the direction of which the cross border capacity will have been increased.

Such exemption shall be granted to persons, at the expense of investments whereof the cross-border transmission capacity has been increased, for the total volume or part of the additional (increased) transmission capacity for the period, which cannot be less than the payback period of the investment project.

The procedure approved by the Cabinet of Ministers of Ukraine with participation of the central authority of executive power implementing the state policy in the electricity sector, National Electricity Regulatory Commission and the Antimonopoly Committee of Ukraine determines compliance of investment projects with the conditions defined by this Law, upon which they are exempted from provisions of part 4 of this Article as well as the timeframe for such exemption.

Operation of newly built facilities of the cross-border electricity networks constructed at the expense of investments of the natural person or legal entity, which are not directly or indirectly affiliated by relations of control with the electricity transmission company, shall be carried out by the electricity transmission company based on a contract with the owner/investor. Operational and technical dispatching of the newly constructed facilities of the cross-border electricity networks shall be carried out by the system operator as part of the Unified Energy System of Ukraine.

Article 11. The retail electricity market

1. The retail **electricity market shall function** to satisfy the needs of the consumers for electricity.

Entities of the retail electricity market shall be consumers, electricity supply and electricity distribution companies.

Relations between retail market entities shall be regulated by rules of electricity use and agreements entered into in accordance with law.

2. The sale of electricity in the retail electricity market shall be exercised by the independent and / or guaranteed electricity suppliers.

3. Qualified electricity consumers may buy electricity under the electricity supply contract from any independent electricity supplier under the contractual terms and at prices determined by agreement of the parties, and / or from a guaranteed electricity supplier at retail prices of the guaranteed electricity supplier.

Change of electricity supplier by a qualified consumer shall be exercised on a free of charge basis according to the procedure established by rules of electricity use.

4. An electricity supply contract under which an electricity supplier sells electricity to a qualified electricity consumer, in addition to the essential terms and conditions established by the Law, shall define the following:

- 1) electricity quality parameters and electricity supply service quality indicators;
- 2) a procedure for organization of commercial electricity metering and submission of electricity commercial metering data;
- 3) procedure for submission of consumers' applications, claims, complaints and the review thereof by the electricity supplier;

5. Decisions of central authorities of executive power and National Electricity Regulatory Commission on undertaking emergency measures in the electricity market and the cancelation thereof shall not be regulations.

SECTION V. FUNDAMENTALS OF THE ELECTRICITY MARKET OPERATION DURING TRANSITION PERIOD

Article 30. Operations of the electricity market during transition period

1. To implement the full-scale electricity market, envisaged by this Law, and to ensure its effective operation, the respective preconditions shall be established. For this purpose, transition period shall be hereby introduced. It shall take effect since the date of entry into force of this Law until the date of introduction of the full-scale electricity market.

2. During the transition period, taking into consideration peculiarities stated in Sections V and VI of this Law, the following shall operate:

- the wholesale electricity market of Ukraine;
- the ancillary services market;
- the retail electricity market.

3. The wholesale electricity market shall operate according to the Law of Ukraine “On Electricity”.

4. The ancillary services market shall operate to the extent of purchase by the system operator from electricity generating companies of ancillary services as to secondary and tertiary regulation with provision of a reserve of the respective generating capacity. Till the moment of incorporation of the system operator, its functions shall be performed by the state enterprise, which carries out centralized (operational and technological) dispatching of the Unified Energy System of Ukraine.

4.1. Ancillary services of secondary regulation with the secured reserve of the appropriate regulatory capacity shall be provided on a mandatory basis by the electricity generating companies engaged in the electricity production at hydropower plants (except for micro-, mini-, and small-sized hydropower plants).

The system operator shall purchase secondary regulation ancillary services under the respective contract at the tariff regulated by the National Electricity Regulatory Commission. Sale of electricity associated with the provision of the secondary regulation ancillary services shall be performed by the respective electricity generating company in the wholesale electricity market of Ukraine.

4.2. Tertiary regulation ancillary service with the secured reserve of the respective regulatory capacity (“cold”, “hot” reserve for loading / unloading) shall be purchased by the system operator on a competitive basis on a daily and monthly basis in accordance with the procedure for purchasing ancillary services, approved by the National Electricity Regulatory Commission.

The system operator shall select proposals for the load increase (decrease) by the generating companies in the price ascending (descending) order to fully cover the need

(or to satisfy the need to the maximum possible extent) for the respective reserve capacity for the relevant period.

The system operator shall purchase tertiary regulation services under the relevant contract with the electricity generating company. The scope and price of the ancillary services under this contract shall be determined by tender results.

If the growth rate of price quotations of electricity generating companies for increase/decrease of their load exceeds the limit set by the rules of the wholesale electricity market of Ukraine, the sale of such ancillary services by electricity generating companies and purchase thereof by the system operator shall be carried out at prices calculated in accordance with the rules of the wholesale electricity market of Ukraine.

During the first year since the moment of implementation of the transition period, the National Electricity Regulatory Commission has the right to apply limitations of prices in the ancillary services market to prevent an unjustified price growth in this market.

Electricity generating companies engaged in electricity generation at thermal power stations and working in the wholesale electricity market at price quotations shall offer tertiary regulation ancillary service and submit the respective price quotations to a tender to increase (decrease) their load per each generating unit under their operation.

4.3 Upon submission by the system operator, the National Electricity Regulatory Commission may make a decision as to introduction of other ancillary services. The procedure for purchasing ancillary services shall be defined in accordance with Article 9 of this Law.

4.4. Purchase of ancillary services shall be carried out on the basis of ancillary services contracts concluded on the basis of standard contracts approved by the National Electricity Regulatory Commission.

4.5 Costs of the system operator for purchase of ancillary services shall be included into the tariff on centralized (operational and technological) dispatching. Until the moment of incorporation of the system operator, costs of ancillary services purchase shall be included as a separate component into the tariff of the state enterprise, carrying out centralized (operational and technological) dispatching of the Unified Energy System of Ukraine.

5. In the retail market, until legal and organizational arrangements are taken as to the separation of activities of distribution and supply of electricity, functions of the guaranteed electricity suppliers shall be performed by electricity suppliers that supply electricity at regulated tariff on a fixed territory.

Retail electricity prices / tariffs, at which the guaranteed electricity supplier sells electricity to electricity consumers, shall be regulated in the manner determined by the National Electricity Regulatory Commission.

6. Within one year since the beginning of the transition period, electricity transmission company and electricity distribution companies shall conclude contracts with the wholesale electricity supplier and proceed to the purchase of electricity in the

wholesale electricity market of Ukraine to compensate for technological electricity losses for its transmission and distribution via main and cross-border and local electricity networks.

Companies, which carry out electricity transmission via local or main electricity networks purchase the necessary volumes of electricity from the wholesale supplier at prices calculated according to the rules of the wholesale electricity market of Ukraine within the volumes, necessary for compensation for electricity losses during distribution and transmission of electricity. Costs, associated with the purchase of electricity for compensation for its technological losses during distribution or transmission shall be included into the tariffs of relevant business entities.

7. During the transition period, the National Electricity Regulatory Commission ensures organization of introduction of the respective amendments to the Wholesale Electricity Market Members' Agreement and relevant annexes thereto related to peculiarities of operation of the wholesale electricity market of Ukraine, the ancillary services market and retail market during the transition period.

8. During transition period, the functions of the market operator and the guaranteed buyer shall be performed by structural divisions being part of the state enterprise carrying out functions of the wholesale electricity supplier.

Article 31. Introduction of the electricity market

1. The decision as to the date of introduction of the full-scale electricity market hereunder shall be taken by the Cabinet of Ministers of Ukraine. Full-scale electricity market shall be introduced since July 1, 2017, including the following components thereof: bilateral contracts market, day-ahead market, balancing market.

2. Until the full-scale electricity market is introduced (all components of the electricity market of Ukraine determined by this Law), the relevant organizational and normative and legal measures envisaged by Part 2 of Section VI shall be undertaken.

3. Coordination of work ensuring implementation of a full-scale electricity market envisaged by this Law and control over performance of the organizational, normative and legal measures, shall be carried out by a Coordination Center ensuring implementation of the new electricity market model (hereinafter – the “Coordination Center”). The Coordination Center shall be a consultative and advisory body with the Cabinet of Ministers of Ukraine, whose main tasks, in particular, are:

- work coordination of state authorities, institutions, organizations and economic entities on issues of implementation of the new model of the electricity market of Ukraine;

- preparation of proposals and recommendations for measures related to the implementation of the new model of the electricity market of Ukraine;

- control of a status of performance of measures related to the implementation of the new model of the electricity market;

- preparation of proposals and recommendations for improvement of the normative and legislative framework concerning operation of the electricity market of Ukraine, including during the transition period.

Decisions of the Coordination Center in the form of proposals or recommendations for the performance by state authorities, institutions, enterprises and organizations of measures related to the implementation of the new model of the electricity market of Ukraine shall be mandatory.

4. During the first two years since the moment of introduction of the full-scale electricity market as envisaged by this Law, the National Electricity Regulatory Commission has the right to apply limitation of prices in the day ahead market, the balancing market and the ancillary services market to prevent unjustified growth of prices in these markets. Decisions of the National Electricity Regulatory Commission on application of limitation of prices in the day ahead market, the balancing market and the ancillary services market shall not be regulations.

SECTION VI. CLOSING AND TRANSITION PROVISIONS

1. This Law shall come into force since the 1st (first) day of the month following the month of its publication except for the following:

- Article 10 of this Law which enters into force since 1 July 2017;

- second sentence of paragraph one of part four, Article 15, which enters into force since 1 July 2017;

- part five of Article 15 of this Law, which takes effect since the day of entry into force of the Law of Ukraine that regulates peculiarities of legal and organizational separation of electricity distribution activities from electricity production, transmission and supply activities by electricity distribution companies;

- Article 23, paragraph two of part 4, Article 27 of the Law, which enters into force since 1 July 2017;

- sub-item 30 of part 4 of Section VI of Closing and transition provisions, which enters into force since 1 December 2014;

- paragraphs two - four of sub-item 19, paragraphs three – eight of sub-item 20, sub-item 21 of part 4, Section VI of Closing and transition provisions, which take effect since 1 January 2015;

- paragraph four of sub-item 2, paragraphs three, four, nine, twelve – thirteen, seventeen – nineteen, twenty-two – twenty-six of sub-item 12; paragraph four of sub-item 13; paragraph six of sub-item 14; paragraph eleven of sub-item 15; paragraph nine of sub-item 16; paragraph nine of sub-item 18; paragraphs five and six of sub-item 19; sub-item 22, paragraphs two - twelve, paragraphs fourteen – eighteen, twenty – twenty -

“The consumer (owner of networks used for transmission of electricity to other economic entities, household consumers) shall conclude with the electricity transmission organization a contract as to the joint use of technological electricity networks, distribution of electricity”;

29) in Article 27:

in part two:

in paragraph two, the words “normative and technical documents” shall be added after the words “regulations”;

in paragraph nine, the word “violent” shall be deleted;

in paragraph ten, the word “energy suppliers” shall be replaced with the words “suppliers of electricity and heat”;

in part three:

paragraph two shall read as follows:

“For failure to provide information or for deliberate provision of false information envisaged by licenses for generation, transmission, distribution or supply of electricity, performance of functions of the system operator, performance of functions of the market operator, performance of functions of a guaranteed buyer and in regulations governing operation of the Unified Energy System of Ukraine and energy consumption – a fine of up to one thousand non-taxable minimal incomes of citizens”;

in part eight, the words “normative and technical documents” shall be added after the words “regulations”;

part eleven shall read as follows:

“Methods for calculation of the amount of damage caused to the electricity supplier as a result of theft of electricity shall be determined by the Cabinet of Ministers of Ukraine.”;

30) Article 30 shall read as follows:

“Article 30. Specifics of electricity export

Electricity suppliers who are members of the wholesale electricity market of Ukraine with 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 operations of export and / or import of electricity.

For the export of electricity, electricity suppliers shall purchase its required volume on the wholesale electricity market of Ukraine at the wholesale market price determined by rules of the wholesale electricity market of Ukraine.

The company exercising centralized dispatching of the Unified Energy System of Ukraine and transmission of electricity via main and cross-border electricity networks shall provide non-discriminatory conditions of access of electricity suppliers to main and cross-border electricity networks during export and / or import of electricity within the technical capacities of such electricity networks taking into consideration their priority use to meet the needs of electricity consumers in Ukraine for electricity in accordance with the standards of operational safety of the Unified Energy Systems of Ukraine.

Access to transmission capacity of cross-border electricity networks shall be granted by the company exercising centralized dispatching of the Unified Energy System of Ukraine and electricity transmission via main and cross-border electricity networks in coordination with the system operators and / or transmission system operators of neighboring countries.

The company exercising centralized dispatching of the Unified Energy System of Ukraine and transmission of electricity through main and cross-border electricity networks shall determine the available transmission capacity in accordance with the methods approved by the central executive authority ensuring formation of the public policy in the electricity sector. The volume of the available transmission capacity shall be agreed with the relevant system operator and / or transmission system operators of the neighboring country.

The company exercising the centralized dispatching of the Unified Energy System of Ukraine and transmission of electricity through main and cross-border electricity networks, shall publish every day the results of specification of the available transmission capacity and information about the free transmission capacity offered for auction.

The distribution of free transmission capacity of the cross-border electricity networks shall be provided by the company carrying out centralized dispatching of the Unified Energy System of Ukraine and transmission of electricity via main and cross-border electricity networks according to the electronic auction procedure using electronic documents and digital signatures except as required by this Law. Access to transmission capacity of cross-border electricity networks of suppliers of electricity shall be granted based on the results of the auction.

Procedure for electronic auctions for allocation of capacity of cross-border electricity networks shall be approved by the National Electricity Regulatory Commission upon agreement with the Antimonopoly Committee of Ukraine.

With a view to distribute free transmission capacity of cross-border electricity networks, the company carrying out centralized dispatching of the Unified Energy System of Ukraine and electricity transmission via main and cross-border electricity networks shall hold annual, monthly and daily auctions. When holding the auction, the company carrying out centralized dispatching of the Unified Energy System of Ukraine and electricity transmission via main and cross-border electricity networks shall distribute access to free transmission capacity of cross-border electricity networks, determined for the respective period.

If the demand for access to transmission capacity of cross-border electricity networks exceeds the free transmission capacity of cross-border electricity networks, the auction for access shall be organized under the principle of priority satisfaction of participants' bids who offered the highest price. In such a case, the price of access to transmission capacity in the relevant areas shall be defined at the lowest price among the accepted bids.

Provided that the demand for access to transmission capacity of cross-border electricity networks is less than or equal to the free transmission capacity of cross-border electricity networks, the company exercising centralized dispatching of the Unified Energy System of Ukraine and electricity transmission through main and cross-border electricity networks, shall provide the participants of such auction with access to cross-border electricity networks free of charge.

Formalization procedure of the auction results and gaining access to transmission capacity of cross-border electricity networks shall be determined by the Procedure for electronic auctions for allocation of transmission capacity of cross-border electricity networks.

Funds received by the company exercising centralized dispatching of the Unified Energy System of Ukraine and transmission of electricity via main and cross-border electricity networks as a result of distribution of access to transmission capacity of cross-border electricity networks at auctions, shall be used by it for the following:

- increase in the transmission capacity of such networks;

Within the time limit and in the manner provided by the Rules of the wholesale electricity market of Ukraine and the Procedure for electronic auctions for allocation of capacity of cross-border electricity networks, electricity suppliers that gained access to the transmission capacity of cross-border electricity networks shall submit electricity hourly export / import schedule on a daily basis. If, within the above mentioned period the electricity supplier has not submitted a daily schedule of hourly export / import of electricity, such electricity supplier shall lose access to transmission capacity of cross-border electricity networks on the relevant day, and the company exercising centralized

dispatching of the Unified Energy System of Ukraine and transmission of electricity via main and cross-border electricity networks shall distribute the unused transmission capacity at the daily auction.

If within a calendar month the electricity supplier that gained access to transmission capacity of cross-border electricity networks based on the results of the auction uses the transmission capacity of cross-border electricity networks of Ukraine received as a result of an annual auction at less than seventy per cent, such electricity supplier shall lose the received access to transmission capacity of cross-border electricity networks, and the value of such distributed transmission capacity shall become a free transmission capacity and shall be proposed for auction.

Electricity suppliers that have gained access to cross-border electricity transmission capacities of electricity networks, on a contractual basis shall have a right to transfer to other electricity suppliers their access to cross-border electricity transmission capacities of electricity networks, notifying and registering transfer of such a right with the company exercising the centralized dispatching of the Unified Energy System of Ukraine and transmission of electricity via main and cross-border electricity networks in accordance with the Procedure for electronic auctions for allocation of transmission capacity of cross-border electricity networks.

Electricity transmission for export shall be exercised on the basis of a contract concluded with the electricity sector entity that performs electricity transmission through cross-border electricity networks of Ukraine. Such entity shall enter into a contract with the successful bidder of the auction as to access to transmission capacity of cross-border electricity networks of Ukraine, including technical specifications to ensure export of electricity. The sample format of a contract on access to transmission capacity of cross-border electricity networks of Ukraine shall be approved by the National Electricity Regulatory Commission.

Increase in the cross-border electricity transmission capacities shall be exercised at the expense of investments of a company exercising centralized dispatching of the Unified Energy System of Ukraine and transmission of electricity via main and cross-border electricity networks or at the expense of investments made by a legal entity that is affiliated, directly or indirectly, by control relations with the company exercising the centralized dispatching of the Unified Energy System of Ukraine and transmission of electricity via main and cross-border electricity networks.

Additional (increased) volumes of cross-border electricity transmission capacities of electricity networks created at the expense of investments made by the legal entity that is not affiliated, directly or indirectly, by control relations with the company exercising centralized dispatching of the Unified Energy System of Ukraine and transmission of

electricity via main and cross-border electricity networks may be exempted from the provisions of part seven of this Article 30 provided that:

- the investment shall enhance competition in the wholesale electricity market;
- the investment would not been made if the exemption were not granted;
- the investment is made into the energy facilities of the Unified Energy System of Ukraine;

- any part of the investment or operating costs for the establishment and / or operation of an additional (increased) volume of cross-border electricity transmission capacities of electricity networks are not covered by the tariff on the transmission or distribution and supply of electricity carried out by the company exercising centralized dispatching of the Unified Energy System of Ukraine and transmission of electricity via main and cross-border electricity networks.

Such exemption shall be granted for the entire volume of additional (increased) transmission capacity and for a timeframe that cannot be less than the payback period of the investment project. Persons, due to investments whereof the cross-border electricity transmission capacities of electricity networks have increased, shall have priority access to additional (increased) volume of transmission capacity.

Compliance of investment projects with the conditions defined by this Law, under which they are exempted from the provisions of part seven of this Article, and the period of such exemption shall be determined in the manner approved by the Cabinet of Ministers of Ukraine.

Operation of the newly built cross-border power networks constructed at the expense of investments of a legal entity that is not affiliated, directly or indirectly, by control relations with the electricity transmission company shall be carried out by the electricity transmission company under a contract with the owner / investor.

Operational and technological dispatching of newly built facilities of cross-border electricity networks shall be exercised by the system operator as part of Unified Energy Systems of Ukraine.”;

31) Article 30 shall be deleted;

32) Closing Provisions shall be amended with items 4 and 5 as follows:

“4. Till introduction of the full-scale electricity market envisaged by the Law of Ukraine “On Operating Principles of the Electricity Market of Ukraine”, the system operator shall conclude contracts for the purchase of ancillary services to provide the reserves of new and / or reconstructed generating capacity with producers, for which at the time of termination of operation of the wholesale electricity market of Ukraine the



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Pages: 2

Dear Sirs

We would like to introduce you our company "Raw&Refined Commodities Kft" which is Hungarian based company and a member of energy holding Raw&Refined Commodities.

Recent years we are trying to import electricity from Ukraine to Hungary and have our partner in Ukraine CJSC "Belotserkivska teploelectrocentral". Taking into account recent event and results of last TSO NEK UKRENERGO CBTC auction we may assume that Ukrainian authorities are building up new and new entrance barriers to cross-border auctions by modifying it for one holding company DTEK which is the energy division of System Capital Management (SCM). DTEK incorporates energy trading companies Eastenergo LLC and Power Trade LLC and has its Kyiv office at 2A Mechnikova Str, Floor 23, Parus Business Centre, Kyiv, 01601, Ukraine.

It was second time when TSO NEK UKRENERGO organized non-transparent cross-border transfer capacity auction where traditionally won one company without competition. It's obvious fact that all rules adopts only for one participant which knows it in advance and all other participant don't have enough time to prepare the documents according to short-tem changes. That time five working days prior to the auction day NEK UKRENERGO announced additional requirements to the participants which were not stated in legal acts regulating energy market of Ukraine and auction process on access to cross-border capacity. Here are the main of them: participant should harmonize its contract for electricity export in its technical part with requirements of NEK UKRENERGO and NEK UKRENERGO have to put his signature that the contract is harmonized; to be able to harmonize the contract for electricity export the participant have to submit to NEK UKRENERGO written confirmation that it has valid EIC code but not clear stated which EIC code of EU counterparty or domestic company.



far as we know according to treaty establishing the energy community (hereinafter "Treaty") joined by Ukraine on 24 September 2010 Ukraine should implement EU legislation in Electricity sector as mentioned in Acquis Communautaire till 01/01/2012. Besides this Treaty require from its members to

- "Create a **stable regulatory market framework** capable of attracting investment in gas network, **power generation, and transmission and distribution networks**, so that all Parties have access to stable and continuous energy supply that is essential for economic development and social stability";
- "Create a **single regulatory space for trade in Network Energy** that is necessary to match the geographic extent of the concerned product markets";
- "Develop Network Energy market **competition** on a border geographic scale and exploit economies of scale";
- "Creation of a **single mechanism for the cross-border transmission and/or transportation of Network Energy ...**";
- "**Fair competition**";
- "Mutual **recognition of licenses in energy sector**";
- "**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".

Instead of transparent and clear European rules Ukraine has:

- Monopolization;
- Closeness;
- Non-transparency;
- Entrance barriers;
- Breach of EC competition rules (annex III to Treaty)

We would kindly ask you to investigate the fulfillment by Ukraine the obligations under Treaty and actions of TSO NEK UKRENREGO concerning quick changing of cross-border capacity auctions rules and composing them for one company while using EU high standard practice and common rules without confirming it by legal acts.

Yours sincerely,

Thomas Stein
General Manager
Raw&Refined Commodities Kft.



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| Energy Community RECEIVED | | | | | | |
| Date: | 04. Juni 2012 | | | | | |
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**Energy Community Secretariat,
Mr. NEYKOV Slavtcho,
Director**

Nr. 0106/48312-20120531

Dear Mr. NEYKOV,

Referring to Your Evaluation Mission in the Republic of Moldova in the period of 28-30 March 2012, the distribution company ICS RED Union Fenosa S.A. would like to express its cordial thanks for very warm meeting we had at ANRE's premises on May 7. 2012, where you manifested appreciated attention to our concerns on the aspects of power market opening in Moldova.

We promised to write you on the issues of our major preoccupation. As the entity foreseen for unbundling we found two aspects that raise the real concerns for our company. The first touches regulatory framework, which is not yet well developed and clear at the moment, especially referring to the transition period to the legal unbundling of distribution and regulated supply activities. However we expect ANRE will succeed to overcome this problem, having your support and assistance. From our side we will try to contribute to reach this goal by sharing the experience on power market liberalization which Gas Natural Fenosa has performed in Spain and other countries during the last decade.

The second aspect refers to the availability of the competitive power market. As we mentioned in Chisinau at the appropriate meeting such market doesn't exist in the country. Only one power plant is left to sell electricity independently-Cuciurgan PP (TPP). The other ones are regulated: CHP-1, CHP-2, CHP-Nord, Costesti HPP.

TPP could theoretically compete with Ukrainian or Romanian suppliers, but there are many obstacles that impede to create the competitive environment. Romanian power system is not connected to Moldova one because of different frequency standards. And what is more, the interconnection lines capacity for electricity import/export and trading with this country is much lower than the needed demand.

Ukrainian grid is operating in parallel with Moldavian network, but the capacity of interconnection lines is dependent on the level of TTP charging, i.e. if Ukrainian suppliers win the competition for cheapest electricity in front to TPP, the export of electricity to Moldova would be problematic as power static stability regime in the region cannot be ensured because TPP would be low loaded (electricity will be produced only for left bank of Nistru river). Even if interconnection line capacity would be available, there is another barrier to have a real competitor for TPP. According to the Ukrainian authorities decision only one supplier is entitled to export electricity to Moldova. At the moment this company is "DTEK Power Trade Ltd". As the last several years experience showed the negotiation of power contracts with these two suppliers didn't follow in a manner both competitors submit two independent offers for full required load curve satisfaction. Each time it was guessed a commercial scheme in which the amount of and price for electricity were pre-established between these two parties.

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Finally, we suppose, that electricity for Moldova comes from TPP and Ukraine according to such agreements. So, there is only one way to have a competitive power market for local customers: Ukraine accepts common open power market for the region, where Moldova is included as well.

We hope the impediments described above would introduce more clarity for EC Secretariat about the real environment Moldova is facing in the process to power market liberalization and this will be considered in the corresponding treatment of the regulatory framework foreseen for the country.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Silvia Radu', with a large, sweeping flourish extending to the right.

Silvia Radu,
President,
ICS RED Union Fenosa S.A.



ТОВАРИСТВО З ОБМЕЖЕНОЮ
ВІДПОВІДАЛЬНІСТЮ
«ДТЕК ТРЕЙДІНГ»

DTEK TRADING
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Our Ref.: 11/5851/к dd. 29.10.2014
Your Ref.: _____ dd. _____

To: Energy Community Secretariat

Subject: Complaint on failure by Ukraine to comply with the Energy Community Treaty establishing the obligations regarding rules for conducting electronic auctions for allocation of the cross-border electricity network capacity

The Law of Ukraine “On the Fundamental Principles of the Electricity Market Functioning in Ukraine” (hereinafter “The Law of Ukraine”) has come into force on January 1, 2014. The Law of Ukraine envisages reform of the Ukrainian electricity market with the purpose of bringing the Ukrainian electricity market rules in line with the EU requirements in compliance with Ukraine’s obligations assumed when joining the Energy Community.

Among other, the Law of Ukraine envisages reformation of relations in the sphere of access to the cross-border electricity network capacity (hereinafter “cross border capacity allocation procedure”) with the purpose of carrying out export and/or import of electricity.

According to the provisions of Section VI “Final and Transitional Provisions” of the Law of Ukraine, **as of December 1, 2014** changes to the Law of Ukraine “On the Electricity Sector” will enter into force, which define peculiarities of providing access to the cross-border electricity network capacity with the purpose of carrying out export and/or import of electricity. Thus, current version of the cross-border capacity allocation procedure cannot be applied for carrying out auctions for year 2015 due to expiration of the legislative provisions underlying thereof.

The Law of Ukraine envisages the following major requirements:

“The enterprise responsible for centralized dispatching of the united energy system of Ukraine and electricity transmission via main and cross border electric networks shall carry out allocation of the available cross border capacity of the cross border electricity networks according to **the procedure of the electronic auction using electronic workflow and electronic digital signature**, except in cases as established by this Law.



Access to the cross border capacity of the interstate electricity networks shall be provided to the electricity suppliers **based on the results of the auction. The procedure for holding auctions on allocation of the cross border capacity of cross border electric networks shall be approved by the national commission responsible for state regulation in the electricity sector** upon confirmation by the Antimonopoly Committee of Ukraine.”

In compliance with the provisions of the Law, on May 19, 2014 the national commission responsible for state regulation in the sphere of electric energy (hereinafter “the NERC”), has published on its official web site the draft regulatory act “The procedure for holding electronic auctions on allocation of the cross border electricity network capacity” (hereinafter – the Draft Procedure).

After carrying out public hearings regarding this document, NERC has again published the Draft Procedure on August 15, 2014. The re-published version included comments and proposals by the market actors or players received after the initial publication.

Further approval of the cross-border capacity allocation procedure has become impossible due to liquidation of the NERC in accordance with the Presidential Decree as of August 27, 2014 No.693/2014 and creation of the National commission carrying out state regulation in the spheres of electric energy and communal services by the Presidential Decree as of August 27, 2014 No. 694/2014 (hereinafter NCRECS).

At its first meeting on **September 17, 2014**, conducted as public hearings NCRECS has made a decision to approve and publish the Draft Procedure on its official website. According to the legislation the Draft Procedure should be published within five days after the decision.

However, as of today **October 28, 2014**, the Draft Procedure has not been published on the NCRECS’s web site.

The Law of Ukraine “On the Basis of the State Regulatory Policy in the Sphere of Business Activities” sets a minimal time period during which physical and legal entities as well as their associations may provide comments and proposals to the published draft of the regulatory act. Such time period is one month.

However, according to the earlier published Draft Procedure, monthly and annual auctions shall be held in accordance with the auctions schedule, which in turn shall be published by the system operator no later than November 1 of the year preceding that in which access to cross- border capacity shall be granted.

Thus, even in the event of the proper publishing of the Draft Procedure in the nearest future, the annual auction for 2015 will not be held. However, an opportunity exists to conduct monthly and daily auctions.

It is worth noting, that the Energy Community Secretariat as part of the Case ECS-1/12 regarding non-compliance of the current cross border capacity allocation procedure with the provisions of the Treaty establishing the Energy Community, has applied to the competent Ukrainian authorities regarding the need to review the current procedure and held a number of consultations with the representatives of NEC “Ukrenergo” and NERC regarding this issue. However, as of now, all actions aimed at approval of the procedure, which meets the requirements of the European law, are blocked.

Taking into consideration the aforementioned, DTEK Trading LLC is petitioning the Energy Community Secretariat to take appropriate action to compel Ukraine to fulfill its obligations under the Treaty establishing the Energy Community in what concerns approval of the transparent and competitive rules for conducting electronic auctions for allocation of the cross-border electricity network capacity.

Yours sincerely,

Vitaly Butenko
Director



Vienna, 26 February 2013
UA-MC/O/jko/06/25-02-2013

Subject: Opening letter in Case ECS-1/12

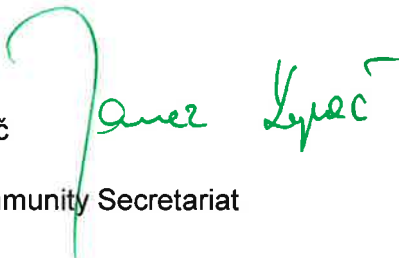
Excellency,

Please find attached the opening letter in reference to Case ECS-1/12.

Please accept, Excellency, the expression of my highest considerations.

Yours sincerely,

Janez Kopač
Director
Energy Community Secretariat



H.E. MR. EDUARD STAVYTSKYI
MINISTER OF ENERGY AND COAL INDUSTRY
OF UKRAINE

Opening Letter

in Case ECS-1/12

By the present Opening Letter, the Energy Community Secretariat ("the Secretariat") initiates dispute settlement proceedings against Ukraine for non-compliance with the Treaty establishing the Energy Community ("the Treaty"), and in particular with Articles 7 and 41 of the Treaty, Articles 3(1), 9(e), 20(1) and 23(2)a) of Directive 2003/54/EC¹, Articles 1, 2(1), 4, 6(1), 6(2), 6(4) and 9 of Regulation (EC) 1228/2003², Sections 1.1, 1.2, 1.6, 2.1, 2.7, 2.10, 2.12, 2.13, 5.6 and 6.1 of the Congestion Management Guidelines³.

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 12 of these Rules, such a procedure is initiated by way of an Opening Letter.

According to Article 10(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 Ukraine either to comply of its own accord with the requirements of the Treaty or, if appropriate, justify its position. In the latter case, Ukraine is invited to provide the Secretariat with all factual and legal information relevant to the case at hand within the deadline set at the end of this 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

a) The electricity sector in Ukraine

The electricity market of Ukraine is organized according to a single buyer model. The State owned enterprise *Energorynok* acts as market administrator for the wholesale electricity market of Ukraine, purchasing 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 CHPPs and supplied to consumers on their territory, and electricity produced in small power units. *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 the National Electricity Regulatory Commission (NERC). Electricity transmission is operated by the State company

¹ 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 Repealing Directive 96/92/EC, OJ 2003/L 176/37, 15.07.2003.

² Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on the Conditions of the Access to the Network for Cross-Border Exchanges in Electricity, OJ 2003/L 176/1, 15.07.2003

³ Ministerial Council Decision 2008/02/MC-EnC on the implementation of Commission Decision of 9.11.2006 amending the Annex to Regulation 1228/2003 on conditions for access to the network for cross-border exchanges in electricity, 27.06.2007.

Ukrenergo, which 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. *Ukrenergo* operates export transmission capacities primarily with Russia (1800 MW), Moldova (1950 MW) and Belarus (800 MW). These interconnections are used in the first place to provide security in the balancing of the system of Ukraine in cases of emergency. There is usually no commercial utilization of those capacities except of the interconnection with Moldova (which belongs to the main system of Ukraine and transits through Moldova back to Ukraine to supply the electricity in the region of Odessa). In relation to the allocation of the capacity at the interconnector with Moldova, only a small amount of the installed cross-border capacity has been allocated. At the annual auction for 2011 held on 14 December 2010, 200 MW of interconnectors' capacity have been allocated,⁴ whereas at the annual auction for 2012 held on 14 December 2011, 700 MW of interconnectors' capacity have been allocated.⁵

Only a smaller part of the Ukrainian power system is linked with the European ENTSO-E network through the isolated Burshtyn island in western Ukraine which disposes of an installed generation capacity of 1950 MW.⁶ Due to internal consumption, however, the Burshtyn island's real export capacity is up to 550 MW in summer and up to 500 MW in winter. As regards the interconnectors' capacities linking the Burshtyn island to the ENTSO-E network, the NTC values (as provided by ENTSO-E)⁷ are Ukraine – Hungary: 800 MW; Ukraine – Slovakia: 400 MW and Ukraine – Romania: 400 MW. However, only around 550 MW of the total interconnectors' capacities are used for export.

Hence, cross-border capacity is used for export 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. At the annual auctions both for 2011 and 2012, there was more demand for interconnection capacity than was actually put on auction. The only undertaking being allocated cross-border capacity eventually was *DTEK Vostokenergo*. For 2013 again *DTEK Vostokenergo* and *DTEK Trading* won all the auctions. Monthly auctions were held for the capacity of the interconnectors with Moldova and Belarus but there was no monthly allocation in 2011 and 2012 of interconnectors' capacity in the Burshtyn island.

In relation to the interconnection with Moldova, the situation is different. The two electricity systems operate synchronously, the interconnection lines are not congested and the interconnection capacity between the two countries is sufficient for an increased cross-border trade. This is visible also from the results of the annual auctions held by *Ukrenergo*.⁸ At both annual auctions for 2011 and 2012, the only undertaking being allocated cross-border capacity is *DTEK Power Trade*. For the year 2013, *DTEK*

⁴http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?art_id=86371&cat_id=75289 (12.02.2013)

⁵http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?art_id=92307&cat_id=75289 (12.02.2013)

⁶ Burshtyn power plant, Kaluska Combined Heat and Power plant and Tereblyya-Rikhska hydroelectric power plant are the generation plants installed in this area.

⁷ <https://www.entsoe.eu/index.php?id=391> (12.02.2013)

⁸ For instance, 700 MW have been announced for the annual auction for 2013 and only 300 MW have been allocated. See the announcement for annual auction: http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?art_id=113285&cat_id=75288 and the results of the auction: http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?art_id=113621&cat_id=75289 (06.02.2013)

Vostokenergo won the annual auction for all capacity at the interconnector with Moldova. The same undertaking is the (only) winner of monthly auctions for allocation of capacity for export to Moldova.⁹

b) The Auction Rules adopted by NERC

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. Until December 2012, the auctions were held according to the Auction Rules adopted in 2009.¹⁰ The Auction Rules are amended periodically by NERC. New Auction Rules have been adopted by NERC in December 2012.¹¹ As will be explained below, under these Rules, the interconnectors' capacity is sold at a price regardless of whether congestion occurs. This is reflected by the definition of the term "auction" that "*is a form of carrying out tenders, on competitive basis with the aim of selling access to the cross border capacity of electric networks of Ukraine for export of electric energy.*"¹²

i. The Auction Rules provide rules for performing annual and monthly auctions, but do not include daily allocation of capacity. The auctions are performed by an auctioneer, and no electronic platform is in place,¹³ neither for annual and/or monthly auctions.

ii. The Power Industry Law of Ukraine¹⁴ and the Auction Rules¹⁵ stipulate that the procedures for allocation of capacity (i.e. the auction) are performed only for export of electricity. For imports, an "*authorized central executive body responsible for ensuring realization of the public policy in the fuel and energy shall determine the conditions of the use of free transmission capacity for the purpose of electric power import and transit across the territory of Ukraine.*"¹⁶ The Ministry of Energy and Coal Industry of Ukraine is the authorized central executive body which is responsible for allocating the interconnectors capacity for import and transit. The Ministry of Coal and Energy Industry gives an authorization for imports and approves a planned import volume. According to the legislation currently in force (where the Ukrainian electricity market is based on a single-buyer model), all the imported electricity is sold to *Energorynok*. Upon approval by the Ministry, *Ukrenergo* allows the amount of necessary transmission capacity to be used for import. Since usually Ukraine's domestic generation capacity satisfies the consumption in the country, imports are performed rarely and for short-terms only.

iii. As regards exports, Article 30 of the Power Industry Law lists the requirements which any business entity submitting an application for participation in an auction for capacity must fulfill. Such entity must have a license to engage in electric power supply, must be a member of the Ukrainian wholesale electric

⁹ http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/category?cat_id=75287 (12.02.2013)

¹⁰ 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)

¹¹ 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).

¹² Article 1(2) Auction Rules

¹³ The performance of auctions is governed by Article 6 Auction Rules.

¹⁴ Article 30(1) Power Industry Law of Ukraine, 1998 as amended last time on 17.12.2010.

¹⁵ Article 1(1) and 1(12) Auction Rules

¹⁶ Article 1(11) Auction Rules from 2009. This provision is not part of the Allocation Rules of 2012. However, since there is no other provision that regulates the allocation of capacity for import or transit, and auctions are not held for allocating cross-border capacity in these directions, the presumption is that the procedure is still subject to Ministry approval.

power market by signing a contract with the single buyer *Energorynok*, and may have no outstanding debts for the electricity purchased on the Ukrainian wholesale electricity market. The requirement for a supply license excludes from participation in an auction all undertakings holding a license for generation of electricity¹⁷ and all eligible customers with no license. All these requirements are preconditions for participating to the auctions and if not fulfilled, participation will be denied not only to the auction in question but also in the auctions for the following six months.

The Auction Rules specify in more details the qualification requirements for participation in an auction listed in the Power Industry Law. Qualification requirements introduced by the Auction Rules and not listed in the primary Law include:¹⁸

- Availability of a contract with the wholesale electricity supplier of Ukraine (*Energorynok*), for the purchase of electricity for further export, as well as the availability of power supply contracts with foreign entities to which the electricity will be sold. The current Auction Rules introduced a stricter requirement than the Auction Rules from 2009 by demanding that both contracts are coordinated and approved by the system operator. This requirement goes far beyond a mere submission of the contracts to *Ukrenergo*. Rather, it includes a very detailed assessment of the clauses of the contract. It is evident from a letter by *Ukrenergo*, written in response to a request to approve contracts, that *Ukrenergo* demands amendments to individual contracts (*in casu*: amendments to the winter and summer periods, the daily planning of scheduled power supply at weekends and holidays, to include compensation obligations for consumed volumes of electricity etc.)¹⁹
- In addition, the Allocation Rules require that the time period of the contracts signed with *Energorynok* shall not be less than the time period for which the potential participant in the auction plans to acquire cross-border capacity. This latter requirement has been already applied in previous auctions based on letters from NERC from December 2010.²⁰ In essence, this means that for an undertaking to participate in auctions for allocating cross-border capacity it is not enough only to have a contract with *Energorynok*, but the duration of such contract must be the same as the time for which access to interconnectors is requested.²¹ Besides the contracts with

¹⁷ Licenses are issued under Article 13 Power Industry Law

¹⁸ Article 3 Auction Rules.

¹⁹ Letter from *Ukrenergo*, Ref. No. 06/06-2-2/9391 of 15.11.2012.

²⁰ This latter requirement has been already applied in the previous auctions based on NERC's letters from December 2010; even though the Allocation Rules from 2009 have not been amended, letters from NERC served as a legal basis for applying that requirement. See: Letter from NERC, No.4812/10/17-10, 7 December 2010 and NERC letter No.13/10/17-11 See: http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?showHidden=1&art_id=86324&cat_id=75288&ctime=1292236628441 (12.02.2013). Their relevance is proven by the fact that on 13 December 2010, i.e. one day before the annual auction for 2011 was performed (the annual auction for 2011 took place on 14 December 2010) the transmission system operator *Ukrenergo* published an announcement on its website citing NERC's letter. See: http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?art_id=86314&cat_id=75288&search_param=%E4%E+ %F3%E2%E0%E3%E8+%EF%EE%F2%E5%ED%F6&searchForum=1&searchDocarch=1&searchPublishing=1 (12.02.2013)

²¹ Accordingly, on 13 December 2010 i.e. one day before the annual auction for 2011 was performed (the annual auction for 2011 took place on 14 December 2010) the transmission system operator *Ukrenergo* published an announcement on its website citing NERC's letter. See: http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?art_id=86314&cat_id=75288&search_param=%E4%E+ %F3%E2%E0%E3%E8+%EF%EE%F2%E5%ED%F6&searchForum=1&searchDocarch=1&searchPublishing=1 (12.02.2013)

Hence, only the undertakings having a contract with the wholesale market *Energorynok* with a minimum validity until 31 December 2011 were entitled to participate in the annual auctions.

Energorynok, the duration of the contracts with foreign entities also needs to correspond to the period for which access to the interconnector is requested.²²

- Payment of the full amount of a warranty deposit for each of the lots intended to be purchased at the auction;
- The applicant may not be considered an “improper” applicant on the day of the auction (see below).

Evidence for fulfilling all qualification requirements is to be submitted together with the application.²³

The Auction Rules also contain criteria for when an applicant/participant is to be considered “improper”, and thus denied participation in the auctions. In particular, an applicant/participant is considered improper if:

- the participant whose price bid²⁴ was recognized by the Auction Committee as the initial price²⁵ of the lot before the auction, fails to register for participating in the auction, or fails to raise the auction card during the auctioneer’s first announcement of the initial price of the relevant lot,²⁶
- the winner of the auction refuses to conclude the capacity access contract at the sale price²⁷, or if the first payment under the contract is not made on time. In such a case the system operator keeps the security deposit of the winner, and the capacity access contract, if concluded, is dissolved,²⁸
- the participant fails to fulfill conditions from the agreement with the wholesale electricity supplier related to settlements, in which case access to interconnectors may be denied and the capacity access contract may be dissolved by the system operator unilaterally.²⁹

As mentioned above, the consequences of considering an applicant or participant as improper include not only denial of participation in the auction, but it also results in depriving it of the right of participation in auctions in the next six months following the auction in question.

Besides the reasons listed in the above, the requirements relating to the length of the contracts with *Energorynok* and the foreign buyers, as approved by *Ukrenergo* in advance, have apparently been treated in the past as reasons for considering applicants as improper and for not allowing them access to the interconnectors by the Auctions Committee established by *Ukrenergo*. This seems to have happened in particular at two consecutive annual auctions, for 2011 and 2012. At the annual auction for 2011,

²² Before the auctions for 2012, on 6 December 2011 NERC sent a letter to *Ukrenergo* explaining that the supply contracts of the applicants have to be approved by *Ukrenergo* in advance of the auction (See: NERC letter No.13/10/17-11, 06.12.2011). Accordingly, on 7 December 2011 *Ukrenergo* published that information for the potential participants in the upcoming annual auction on its website. See: http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?art_id=91904&cat_id=75288 (12.02.2013). The letter from NERC again served as a basis for extending the qualification requirement from the Auction Rules related to availability of concluded foreign economic power supply contracts. See also Article 3.1 Auction Rules.

²³ Article 4 Auction Rules

²⁴ The price bid is “the price, for which the entity that submitted the petition for participation in the auction is ready to purchase the lot offered for the auction.” See: Article 1(2) and 5(5) Auction Rules

²⁵ The initial price is “lot price that is determined by the auction commission as a maximal among all price bids by the auction participants for every separate lot, which can be changed by the decision of the auction commission in accordance herewith.” See: Article 1(2) and 5(5) Auction Rules

²⁶ Article 6(6) Auction Rules

²⁷ the sale price is the “highest among prices offered for the lot in the auction by the auction participant.” See: Article 1(1) Auction Rules

²⁸ Article 7(8) Auction Rules

²⁹ Article 8(1) Auction Rules

performed on 14 December 2010, one of the applicants whose contract with *Energorynok* was shorter than the annual auction period was denied participation at the auction by the Auction Committee. The undertaking was also deprived of the right to participate in the auctions for the following six months.³⁰ During the annual auction for 2012, performed on 14 December 2011, non-compliance with the requirement for having a power supply contracts with a foreign buyer approved by *Ukrenergo* was a reason for the Auction Committee to deny participation to one market participant. According to the results of the auctions published on the website of *Ukrenergo*, this market participant has been denied the right to participate in the annual auction for 2012 as well as in the auctions performed in the following six months³¹ because it was declared to be an improper applicant.³²

The two resolutions of *Ukrenergo* denying participation to the annual auctions for 2011 and 2012 were subject to judicial procedure. The first resolution of the Auction Committee performing annual auctions for 2011 declaring one market participant to be improper because the length of its contract with the wholesale electricity market *Energorynok* was shorter than the period for which it requested allocation of cross-border capacity has been appealed to the Kiev Commercial Court.³³ The Kiev Commercial Court,³⁴ the Kiev Commercial Court of Appeal³⁵ and finally, the Higher Commercial Court of Ukraine³⁶ dismissed the claim. The second resolution denying participation in annual auctions for 2012 of one of the applicants, on account of the absence of supply contract approved by *Ukrenergo*, has also been appealed to the Kiev Commercial Court,³⁷ which has dismissed the claim.³⁸ That judgment has been appealed and the case is still open.

The annual auction for cross-border capacity for 2013 was again subject to disputes related to the organization and the conditions for participation. On 12 November 2012, *Ukrenergo* published on its website an announcement for the annual auctions for 2013.³⁹ It informed the interested market participants that new Auction Rules have been drafted by NERC on 8 November 2012. The announcement informed that until they come into effect (undergoing state registration and publication), there would be two options for the annual auction to be held on 20 November 2012 – either the auction would be held according to the rules from 2009 or – if the new rules actually enter into force before 20 November 2012 – the auction would be held under those new rules. The application for participation was expected to be submitted not later than end of the working day on 19 November 2012. On 19 November 2012, *Ukrenergo* announced on its website that the new Auction Rules of NERC had indeed entered into force after having been published on 17 November 2012, and required the applications to be submitted

³⁰ See: http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?art_id=86371&cat_id=75289 (12.02.2013)

³¹ http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?art_id=92307&cat_id=75289&search_param=14+%C4%E5%F6%E5%EC%E1%E5%F0+2011&searchForum=1&searchDocarch=1&searchPublishing=1 (12.02.2013)

³² It is worth noting that on 11 November 2011, that market participant has requested approval of its foreign economic contract for sale of electricity from *Ukrenergo* (See: Document No.3028/17, 17.11.2011)

Due to the fact that the draft amendments of the Decree for amending the Auction Rules published by NERC have not entered into force and because the legal and regulatory acts in force did not provide an obligation for *Ukrenergo* to approve the concluded foreign economic electric power supply contracts, *Ukrenergo* refused approval of the contracts requested by the market participant on 25 November 2011 (See: *Ukrenergo* document, No.01/06-2-3/14255, 25.11.2011).

³³ Statement of claim filed to the Commercial Court of Kiev, No.37/04, 05.01.2011

³⁴ Statement of claim filed to the Commercial Court of Kiev, No.37/04, 05.01.2011 and Case No.41/8, Judgment of the Kiev Commercial Court, 25.03.2011

³⁵ Case 41/8, Judgment of the Kiev Commercial Court of Appeal, 01.06.2011

³⁶ Cassation appeal against the Judgment of the Kiev Commercial Court dated 25.03.2011 and the Ruling of the Kiev Commercial Court of Appeal dated 01.06.2011 in Case 41/8 and Case No.41/8, Judgment of the Higher Commercial Court of Ukraine, 27.07.2011

³⁷ Statement of claim filed to the Commercial Court of Kiev, No.78/04, 23.12.2011

³⁸ Case No.5011-40/930-2012, Judgment of the Kiev Commercial Court, 23.04.2012

³⁹ http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?art_id=113285&cat_id=75288 (12.02.2013)

by 20 November for the annual auction to take place on 21 November 2012 according to the new Rules.⁴⁰ Thus, the interested entities had only one (!) day to comply with the new Auction Rules which brought substantial changes to the existing procedure. Besides requiring approval by *Ukrenergo* of the contracts with the wholesale supplier and with the foreign entities, the new rules increased for twelve times (!) the warranty deposit that should be paid by the applicants.⁴¹

The uncertainty about the applicable Auction Rules, and the fact that only one day was eventually available for complying with the new Auction Rules, prevented some interested parties from participating in the annual auction, as they could not fulfill the newly introduced requirements. In particular, on 6 November 2012, *Ukrenergo* refused reviewing and approving a contract with a foreign entity upon a request submitted to it on 1 November by an interested company, claiming that there was no legal basis for such review according to the existing legal framework.⁴² Despite the fact that there had been no changes in the legal framework in the meantime, *Ukrenergo* on 15 November 2012 answered two new requests from the same company – dated 12 and 14 November – to the effect that it could not approve the submitted contracts because they did not fulfill certain requirements published on its website.⁴³ Following several further applications, the interested company did not manage to get its contract approved by *Ukrenergo*, and was therefore prevented from participating in the annual auction for 2013.

iv. As was already mentioned, another qualification requirement,⁴⁴ i.e. a precondition for participation in an auction, is the payment of a warranty deposit which according to its definition is a “*monetary payment that is deposited to the account of the system operator by the participant of an auction as a tool for securing his honesty and financial guarantee of payment for access to the cross boarder capacity of intergovernmental electric networks of Ukraine.*” This deposit is calculated by the Auction Committee⁴⁵ according to a formula defined in the Auction Rules.⁴⁶ The deposit for every lot that the undertaking aims at purchasing in the auction must be paid to the account of the transmission system operator no later than the day when the application for participation in the auction is submitted.⁴⁷ Thus the payment of a deposit is a precondition for submitting an application for participating to the auction. The formula from the Auction Rules in 2009 was amended in the new Auction Rules; the warranty payment for annual auction became twelve times higher, without any explanation for the reasons of changing the formula and the necessity for increasing the deposit.

⁴⁰ http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/archive?&cat_id=75288&stind=1 (12.02.2013)

⁴¹ According to the formula from the 2009 Rules, the warranty deposit for the Burshtin Island should have been 9 734 226,00 UAH (what is approximately 1 million EURO), according to the new formula from 2012 Rules the warranty deposit for the same Burshtin Island should be 116 810 712,00 HRN (11,5 million EURO). See: http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?art_id=113285&cat_id=75288 (12.02.2013)

⁴² Ukrenergo letter, No.03/06-2-2/8974, 06.11.2012

⁴³ Ukrenergo letter, No.06/06-2-2/9391, 15.11.2012

⁴⁴ Article 3(1) Auction Rules

⁴⁵ Article 1(6) Auction Rules

⁴⁶ Article 2(3) Auction Rules. According to the Auction Rules from 2009, the amount of the security deposit for a monthly auction was calculated by the formula (para. 2(3)): security deposit = $T \times t \times P$ (UAH) and the amount of the security deposit for an annual auction was calculated by the formula (para.2(4)): Security deposit = $(T \times t \times P)/12$ (UAH). In the new Auction Rules from 2012, the amount of the security deposit for a monthly and yearly auction shall be calculated by the following formula (para.2(3)): security deposit = $T \times t \times P$ (UAH). In the formulas: T is the tariff on the electric power transmission through main and international power grids, approved by NERC as of the first day of the month in which the notice of the auction is published pursuant to the auction schedule, UAH per 1 MW*hr; t is time of provision of the services under the lot, hours; P shall mean the transmitting capacity of international power grids intended for the electric power export under the lot, MW and 12 is the number of months in the calendar year.

⁴⁷ Article 4(1) Auction Rules

In case an interested entity does not apply for participation to the auction following the payment of the deposit, or if the participant in the auction did not win the auction, the system operator refunds its warranty payments in five banking days following the date when the Auction Committee signs the minutes for acceptance of the applications.⁴⁸ In case the warranty paid by the winner of the auction is higher than the sale price,⁴⁹ the difference must also be returned within five working days.⁵⁰ The warranty payment is not refunded in case the auction winner refuses to enter into the agreement for access to cross border capacity at the sale price⁵¹, or does not execute the first payment on time according to the agreement, unless otherwise envisaged in the agreement conditions.⁵²

v. Besides the qualification requirements already mentioned, the Power Industry Law stipulates that the Auction Rules developed by NERC shall determine also the “*initial price of the access to the transmission capacity of Ukraine’s international power grids.*”⁵³ The initial price will be published on the system operator’s website.⁵⁴ The Auction Rules define a lot as “*a volume of access to the free cross boarder capacity of intergovernmental electric networks of Ukraine for the export of electric energy offered for sale at the auction as a separate subject with characteristics set by the auction commission in the auction announcement.*” After announcing the initial price, the final sale price of a lot is determined by the auctioneer raising the price in accordance with the offers given by the participants that raise their auction card during the auction.⁵⁵ The initial price can be lowered in case there is no participant raising the auctions card after the announcement of the initial price. Determination of an initial price as a starting price for the auction, as well as determining a sale price is irrespective of whether congestion occurs or not. The sale price is to be paid in any event by the participant that won the auction. This payment for the access to the transmission grid (the interconnection line) is to be paid *in addition* to the access tariff set by the regulatory authority.

vi. The Auction Rules also give a possibility for the system operator to reduce the transmission capacity if unable to provide the full capacity for which an agreement was signed with the winner of the auction.⁵⁶ There is no explanation of the reasons for which the system operator can decrease the cross border capacity, and there are no reasons explicitly linked to emergency situations.

vii. Furthermore, the Auction Rules explicitly prohibit the transfer of not-used capacity, except in cases where the winner of the auction does not pay the sale price.⁵⁷ In the latter case, capacity will be allocated to the participant that offered the second best price.

c) The complaint and the ensuing discussions

On 4 January 2012, the Secretariat received a complaint concerning the cross-border capacity allocation organized by the Ukrainian transmission system operator *Ukrenergo*. The complaint under Article 90 of the Treaty was registered under Case ECS-1/12. Upon receiving the complaint, the Secretariat assessed the compliance of the Auction Rules adopted by NERC in 2009. The Ministry of Energy and Coal

⁴⁸ Articles 5(2) and 7(5) Auction Rules

⁴⁹ The terminology will be explained under point v. below.

⁵⁰ Article 7(5) Auction Rules

⁵¹ The terminology will be explained under

⁵² Article 7(8) Auction Rules

⁵³ Article 30(4) Power Industry Law

⁵⁴ Article 2(2) Auction Rules

⁵⁵ Article 6 Auction Rules

⁵⁶ Article 1(14) Auction Rules

⁵⁷ Article 9 Auction Rules

Industry of Ukraine was notified of the complaint and the Secretariat's assessment of the Auction Rules during a mission on 14 to 16 March 2012 in Kiev. On 4 April 2012 the Secretariat sent a letter to the Ukrainian Deputy Minister. In that letter, the Secretariat offered its assistance to Ukraine in drafting new compliant Rules for allocation of cross-border capacity, and suggested Ukraine to organize a working meeting, inviting representatives from all interested parties in the country, such as NERC and the transmission system operator. To support this, the Secretariat sent its assessment of the Auction Rules also to NERC. The issue of non-compliance of the Auction Rules was raised also at the "Day of Ukraine in the Energy Community" held on 19 April 2012 where a large delegation of Ukrainian representatives visited the Secretariat.

On 7 June 2012, the Secretariat received another complaint against Ukraine related to the same issue – allocation of cross-border capacity and the auctions organized by the Ukrainian transmission system operator *Ukrenergo*. Since the two complaints concerned the same subject matter, they were joined under the same case number pursuant to Article 5(2) of the Dispute Settlement Procedures.

In absence of any response from the Ukrainian authorities, and given the importance of cross-border capacity allocation for the establishment of an internal market as pursued by the Treaty establishing the Energy Community, the Secretariat decided to initiate the present proceedings under Article 90 of the Treaty.

II. Relevant Energy Community Law.

Energy Community Law is defined in Article 1 of the Rules of Procedure for Dispute Settlement under the Treaty ("Dispute Settlement Procedures")⁵⁸ 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).

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.

Article 7 of the Treaty reads:

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

Article 10 of the Treaty reads:

*Each Contracting Party shall implement the *acquis communautaire* on energy in compliance with the timetable for the implementation of those measures set out in Annex I.*

⁵⁸ Procedural Act No 2008/01/MC-EnC of 27 June 2008

Article 11 of the Treaty reads:⁵⁹

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.

Article 2 of the Protocol concerning the accession of Ukraine to the Treaty establishing the Energy Community reads:

I. For the purpose of compliance with Title II of the Treaty establishing the Energy Community and its related Annexes, the timetable for implementation of the acquis communautaire is defined as follows:

Directive 2003/54/EC Concerning Common Rules for the Internal Market in Electricity by 1 January 2012

Regulation (EC) No 1228/2003 on the Conditions of the Access to the Network for Cross-Border Exchanges in Electricity by 1 January 2012

Commission Decision 2006/770/EC amending the Annex to Regulation 1228/2003 on conditions for access to the network for cross-border exchanges in electricity by 1 January 2012

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

Member States ... shall not discriminate between these undertakings as regards either rights or obligations.

Article 9 of Directive 2003/54/EC (“Tasks of Transmission System Operators”) reads:

Each transmission system operator shall be responsible for:

[...]

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

Article 20 of Directive 2003/54/EC (“Third party access”) reads:

1. Member States 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.

2. The operator of a transmission or distribution system may refuse access where it lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3. Member States shall ensure, where appropriate and when refusal of access takes place, that the transmission or distribution system operator provides relevant information on measures that would be necessary to reinforce the network. The party requesting such information may be charged a reasonable fee reflecting the cost of providing such information.

⁵⁹ 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.

Article 23(2)(a) of Directive 2003/54/EC ("Regulatory authorities") reads:

The regulatory authorities shall be responsible for fixing or approving, prior to their entry into force, at least the methodologies used to calculate or establish the terms and conditions for:

(a) connection and access to national networks, including transmission and distribution tariffs. These tariffs, or methodologies, shall allow the necessary investments in the networks to be carried out in a manner allowing these investments to ensure the viability of the networks.

Recital 13 of Regulation (EC) 1228/2003 reads:

It would not be appropriate to apply distance-related tariffs, or, provided appropriate locational signals are in place, a specific tariff to be paid only by exporters or importers in addition to the general charge for access to the national network.

Recital 14 of Regulation (EC) 1228/2003 reads:

The precondition for effective competition in the internal market is non-discriminatory and transparent charges for network use including interconnecting lines in the transmission system.

Article 1 of Regulation (EC) 1228/2003 ("Subject-matter and scope") reads:

This Regulation aims at setting fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal electricity market, taking into account the specificities 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.

Article 2(1) of Regulation (EC) 1228/2003 ("Definitions") reads:

1. For the purpose of this Regulation, the definitions contained in Article 2 of 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 repealing Directive 96/92/EC (1) shall apply with the exception of the definition of 'interconnector' which shall be replaced by the following:

'interconnector' means a transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States.

Article 4 of Regulation (EC) 1228/2003 ("Charges for access to networks") reads:

1. Charges applied by network-operators for access to networks shall be transparent, take into account the need for network security and reflect actual costs incurred insofar as they correspond to those of an efficient and structurally comparable network operator and applied in a non discriminatory manner. Those charges shall not be distance-related.

2. Producers and consumers ('load') may be charged for access to networks. The proportion of the total amount of the network charges borne by producers shall, subject to the need to provide appropriate and efficient locational signals, be lower than the proportion borne by consumers. Where appropriate, the level of the tariffs applied to producers and/or consumers shall provide locational signals at European level, and take into account the amount of network losses and congestion caused, and investment costs for infrastructure. This shall not prevent Member States from providing locational signals within their territory or from applying

mechanisms to ensure that network access charges borne by consumers ('load') are uniform throughout their territory.

3. When setting the charges for network access the following shall be taken into account:

- payments and receipts resulting from the inter-transmission system operator compensation mechanism;*
- actual payments made and received as well as payments expected for future periods of time, estimated on the basis of past periods.*

4. Providing that appropriate and efficient locational signals are in place, in accordance with paragraph 2, charges for access to networks applied to producers and consumers shall be applied regardless of the countries of destination and, origin, respectively, of the electricity, as specified in the underlying commercial arrangement. This shall be without prejudice to charges on declared exports and declared imports resulting from congestion management referred to in Article 6.

5. There shall be no specific network charge on individual transactions for declared transits of electricity.

Article 6 of Regulation (EC) 1228/2003 ("General principles of congestion management") reads:

6.1. 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.

6.2. Transaction curtailment procedures shall only be used in emergency situations where the transmission system operator must act in an expeditious manner and redispatching or countertrading is not possible. Any such procedure shall be applied in a non-discriminatory manner.

Except in cases of 'force-majeure', market participants who have been allocated capacity shall be compensated for any curtailment.

6.4. Market participants shall inform the transmission system operators concerned a reasonable time ahead of the relevant operational period whether they intend to use allocated capacity. Any allocated capacity that will not be used shall be reattributed to the market, in an open, transparent and non-discriminatory manner.

Article 9 of Regulation 1228/2003 ("Regulatory authorities") reads:

The regulatory authorities, when carrying out their responsibilities, shall ensure compliance with this Regulation and the guidelines adopted pursuant to Article 8. Section 1 of the Congestion Management Guidelines ("General provisions") reads:

1.1. TSOs shall endeavour to accept all commercial transactions, including those involving cross-border-trade.

1.2. When there is no congestion, there shall be no restriction of access to the interconnection. Where this is usually the case, there need be no permanent general allocation procedure for access to a cross-border transmission service.

1.6. No transaction-based distinction may be applied in congestion management. A particular request for transmission service shall be denied only when the following conditions are jointly fulfilled:

(a) the incremental physical power flows resulting from the acceptance of this request imply that secure operation of the power system may no longer be guaranteed, and

(b) the value in monetary amount attached to this request in the congestion management procedure is lower than all other requests intended to be accepted for the same service and conditions.

Section 2 of the Congestion Management Guidelines (“Congestion management methods”) reads:

2.1. Congestion management methods shall be market-based in order to facilitate efficient cross-border trade. For this 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.

2.7. ... The highest value bids, whether implicit or explicit in a given timeframe, shall be successful.

2.10. In principle, all potential market participants shall be permitted to participate in the allocation process without restriction. To avoid creating or aggravating problems related to the potential use of dominant position of any market player, the relevant Regulatory and/or Competition Authorities, where appropriate, may impose restrictions in general or on an individual company on account of market dominance.

2.12. Capacity shall be freely tradable on a secondary basis, provided that the TSO is informed sufficiently in advance. Where a TSO refuses any secondary trade (transaction), this must be clearly and transparently communicated and explained to all the market participants by that TSO and notified to the Regulatory Authority.

2.13. The financial consequences of failure to honour obligations associated with the allocation of capacity shall be attributed to those who are responsible for such a failure. Where market participants fail to use the capacity that they have committed to use, or, in the case of explicitly auctioned capacity, fail to trade on a secondary basis or give the capacity back in due time, they shall lose the rights to such capacity and pay a cost-reflective charge. Any cost-reflective charges for the non-use of capacity shall be justified and proportionate. Likewise, if a TSO does not fulfil its obligation, it shall be liable to compensate the market participant for the loss of capacity rights. No consequential losses shall be taken into account for this purpose. The key concepts and methods for the determination of liabilities that accrue upon failure to honour obligations shall be set out in advance in respect of the financial consequences, and shall be subject to review by the relevant national Regulatory Authority or Authorities.

Section 5.6 of the Congestion Management Guidelines reads:

All relevant information shall be available for the market in due time for the negotiations of transactions (such as the time of negotiation of annual supply contracts for industrial customers or the time when bids have to be sent into organised markets).

III. Preliminary Legal Assessment

The subject-matter of the proceedings initiated by the present Opening Letter comprises certain provisions of the Power Industry Law of Ukraine, the Auction Rules adopted by NERC in the version of 2012, as well as their application in practice to the allocation of cross-border capacity for electricity. The Secretariat, based on a preliminary legal assessment, has come to an opinion that in this respect, Ukraine fails to properly implement several provisions of the *acquis communautaire*, as specified in the following.

1. Different treatment of electricity imports and exports

According to its Article 1, Regulation (EC) 1228/2003 aims at setting fair rules for the allocation of available capacities of interconnections between national transmission systems, with Article 2 of the said Regulation defining interconnector as “a transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States.”⁶⁰ Read together, these two provisions imply that rules for allocation of capacity shall be developed for all interconnectors without distinguishing between the different directions of export, import or transit.

Article 6(1) of Regulation (EC) 1228/2003 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.

As described above, the Power Industry Law of Ukraine,⁶¹ as well as the Auction Rules,⁶² stipulate that procedures for allocation of capacity (in the form of auctions) are performed only for the export of electricity. For the import of electricity, the Ministry of Energy and Coal Industry of Ukraine is responsible for allocating the interconnectors capacity, upon notification of the contracts for import and upon approval of the monthly balance.

a) In this respect, the Secretariat considers, firstly, that distinguishing between different directions of electricity flow and maintaining different procedures for the allocation of capacity in different directions is not in line with Articles 1 and 2(1) of Regulation (EC) 1228/2003. Moreover, the principle of non-discrimination requires⁶³ that comparable situations are not treated differently unless such difference in treatment is objectively justified.⁶⁴ 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.

b) Secondly, 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.⁶⁵ Measures requiring prior authorization,⁶⁶ even as a pure formality,⁶⁷ have been considered by the Court of Justice of the European Union as measures having equivalent effect to import restrictions. Making the import of electricity depending on prior approval of the contracts for supply by the Ministry makes the import of electricity in Ukraine more difficult than purely domestic supply and is thus likely to constitute a measure prohibited by Article 41 of the Treaty. As a matter of fact, the requirement for Ministry approval of the contracts for import to Ukraine all but excludes the possibility of foreign suppliers to sell electricity to

⁶⁰ Article 2(1) Regulation (EC) 1228/2003

⁶¹ Article 30(1) Power Industry Law of Ukraine

⁶² Article 1(1) and 1(12) Auction Rules

⁶³ According to the settled case law of the Court of Justice of the European Union whose jurisprudence is binding for the institutions of the Energy Community, Article 94 Energy Community Treaty

⁶⁴ Case C-17/03 *Vereniging voor Energie, Milieu en Water (VEMW)* [2005] ECR I-4983, para. 48

⁶⁵ Case 8/74 *Procureur du Roi v Dassonville*, [1974] ECR 837, para. 5

⁶⁶ Case C-120/95, *Nicolas Decker v Caisse de maladie des employés privés*, [1998] ECR I- 01831, para.35-36; C-189/95, *Criminal proceedings against Harry Franzén*, [1997] ECR I-05909, para. 70-71

⁶⁷ C-54/05, *Commission of the European Communities v Republic of Finland*, [2007] ECR I- 02473, para.32.

Ukrainian customers. With the procedure currently in place, they are excluded from selling directly to Ukrainian eligible customers or to Ukrainian suppliers.

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.⁶⁸ This corresponds to the second sentence of Article 3 of the Rules of Procedure for Dispute Settlement whereby a "*Party [which] 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.*"

c) Thirdly, the allocation of interconnection capacity for imports by a unilateral administrative decision of the Ministry fails to respect the principle of regulated access to the transmission network as embedded in Articles 20(1) and 23(2)(a) of Directive 2003/54/EC. These provisions require that access to the networks is granted without discrimination and based on published tariffs. The Directive also tasks an independent national regulatory authority with "*fixing or approving, prior to their entry into force, at least the methodologies used to calculate or establish the terms and conditions*" for access to the transmission network. A decision by a Ministry on access by importers of electricity to interconnectors fails to respect these provisions.

d) Fourthly, to allow for a unilateral administrative decision by a Ministry as a basis for the allocation of (actually or potentially congested) interconnectors, and not via 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 6(1) of Regulation (EC) 1228/2003 and Section 2.1 of the Congestion Management Guidelines.

The Secretariat thus preliminarily concludes that by establishing a special, non-market based regime for electricity imports, Article 30(1) Power Industry 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.

2. Limiting access to interconnectors for electricity exports

a) Limiting the categories eligible for participation in cross-border capacity allocation procedures

Article 3 of the Auction Rules limits the categories eligible for participation in cross-border capacity allocation procedures (for the export of electricity) to suppliers that have a license for supply.⁶⁹ The Secretariat is of the preliminary view that Article 3 of the Auction Rules, by limiting the categories eligible for participation in cross-border capacity allocation procedures to suppliers that have license for supply, seem to breach Article 3(1) of Directive 2003/54/EC that requires Contracting Parties not to discriminate between electricity undertakings as regards either rights or obligations. The *acquis* confers on all potential system users a right to access the interconnectors and to bid for cross-border capacity for import or export of electricity. This right is further guaranteed by Article 20 of Directive 2003/54/EC. It has been interpreted by the Court of Justice as a subjective right and constitutes one of the essential

⁶⁸ Case C-159/94 *Commission v France* [1997] ECR I-5815, para. 94.

⁶⁹ By the Allocation Rules of 2009, a license for supply at unregulated tariffs was required for participation to auctions for allocation of cross-border capacity. The new Allocation Rules from 2012 seems to allow participation also to the suppliers at regulated tariffs, i.e. all *Oblenergo*.

measures which the Contracting Parties are required to implement in order to bring about the internal market in electricity.⁷⁰ By limiting access to interconnectors for the export of electricity only to users with a license to supply, and by excluding other system users, such as generators, traders and (eligible) customers from access to interconnection capacity, the Allocation Rules adopted by NERC deprive all other system users to benefit from that right. This limitation encroaches further upon Article 9(e) Directive 2003/54/EC as it fails to ensure non-discrimination between system users or classes of system users.

Moreover, limiting access to market participants holding a license for supply seems to infringe Section 2.10 of the Congestion Management Guidelines which stipulates that *"in principle, all potential market participants shall be permitted to participate in the allocation process without restriction,"* This provision requires that other interested market participants than only licensed suppliers, such as generators and traders, shall have the possibility to participate in auctions. Section 2.10 allows for limiting this right to participation in the allocation procedure only if the regulatory authority or the competition authority finds it necessary to take measures *"to avoid creating or aggravating problems related to the potential use of dominant position of any market player."* This is not the case with the Ukrainian Allocation Rules, because they restrict participation in cross-border capacity allocation *per se* and by limiting access to only one category of (potential and actual) market participants, i.e. suppliers.

The Secretariat does not deny that a system operator must be able to identify energy market participants in order to perform successfully its tasks assigned by Article 9 of Directive 2003/54/EC and in particular to ensure a secure, reliable and efficient electricity system. However, such identification could be ensured by mere registration with the system operator of all energy market participants that are interested in participating to auctions for allocation of cross-border capacity in Ukraine.⁷¹

The Secretariat thus preliminarily concludes that Article 3 of the Auction Rules encroaches upon Articles 3(1), 9(e) and 20 of Directive 2003/54/EC as well as Section 2.10 of the Congestion Management Guidelines.

- b) The existence and approval of purchase/supply contracts as requirements for participation in cross-border capacity allocation procedures**

Article 30 of the Power Industry Law and the Auction Rules adopted by NERC list several criteria and qualification requirements to be fulfilled by market participants if they want to access the interconnectors and to participate in an allocation procedure.

In particular, the requirement for having a contract for purchasing electricity on the wholesale electricity market with the wholesale supplier *Energorynok* for the purpose of further export, as well as for having concluded contracts for supply of electricity with foreign entities, both of which must be approved by the transmission system operator *Ukrenergo* and need to be valid at least for the period for which allocation of capacity is required, appear to violate the requirements for ensuring non-discriminatory access to interconnectors to all eligible customers as enshrined in Article 7 of the Treaty, Articles 3(1) and 20 of Directive 2003/54/EC and Article 6(1) of Regulation (EC) 1228/2003. It follows from these provisions that access to interconnection capacity must be open to all potential system users, without making it

⁷⁰ See Case C-439/06 *citiworks AG* [2008] ECR I-3913 paragraph 44 and Case C-239/07 *Julius Sabatauskas and Other* [2008] ECR I-07523, para. 43

⁷¹ In Europe, such identification is ensured by issuing an Energy Identification Code (EIC) that represents a unique code which enables a more efficient electronic data exchange. See: <http://www.eles.si/en/for-business-users/descriptions.aspx> (12.02.2013) Since issuing an EIC is based on filling an application form with basic information about the energy entity, in case of lack of EIC, such identification could be ensured by mere registration with the system operator of all energy market participants.

dependent on the availability of procurement and supply contracts, and even less so limiting it to one single source (*Energorynok*) and determining the duration of the contracts with both the seller and buyer.

Furthermore, requiring contracts with *Energorynok* and with a foreign entity imposes an obligation to the transmission system operator to differentiate between the commercial transactions of the system users applying for access to interconnectors and thus frustrates the achievement of the goal pursued by Section 1.1 of the Congestion Management Guidelines, which is to accept *all* commercial transactions. Moreover, requiring contracts with specific sellers and buyers (*Energorynok* and foreign entities) also violates Section 2.10 of the Congestion Management Guidelines as not all potential market participants are permitted to participate in the allocation process without restriction. Finally, those rules requiring certain contracts of the entities applying for participation in auctions to be approved by *Ukrenergo* in advance, infringe Article 6(1) of Regulation (EC) 1228/2003 and Section 1.6 of the Congestion Management Guidelines, as they frustrate the transmission system operator's obligation to preferentially solve congestions with non transaction based methods, i.e. methods that do not involve a selection between the contracts of individual market participants.

The obligation to purchase the electricity to be exported domestically and through the *Energorynok* as a single seller, also seems to encroach upon the prohibition of hindering trade among the Parties as stipulated by in Article 41 of the Treaty. The requirement to provide purchase and supply contracts *ex ante* to *Energorynok*, as well as the sanctions stemming from non-compliance with these requirements, appear to constitute impediments to the cross-border trade in electricity within the meaning of Article 41 of the Treaty. Without any prejudice to possible justification under Article 41(2) of the Treaty – which would have to be put forward by the Ukrainian side – the arrangement, and in particular the sanction regime, seems to be disproportionate. As was said above, it seems as identification of participants in the auctions organized by *Ukrenergo* could be also ensured by way of registration with the system operator. To require approval of supply contracts *Ukrenergo*, and giving the latter apparently unlimited discretion in requesting changes to these contracts, goes far beyond the tasks of a system operator and is not needed for its role of operating and managing the transmission grids in Ukraine.

The infringements are not of a theoretical nature. As has been described above, the requirements to provide contracts with *Energorynok* as the seller and a foreign buyer need to be fulfilled by submitting these contracts to *Ukrenergo* in advance in order to come to a decision on the eligibility of the participant in question. The two requirements in question have been applied by *Ukrenergo* in the past to the effect that access to interconnectors operated by *Ukrenergo* was refused at least two times, once based on a lack of contract (with the required length) with *Energorynok*, and once based on the lack of contract with a foreign undertaking. Following the stipulations of the Auction Rules, the two instances of refusal also triggered the exclusion of the applicant from six future auctions.

Thus, the Secretariat preliminarily concludes that Article 30 of the Power Industry Law and the provisions defining qualification requirements in the Auction Rules, in principle and as applied by the actions of *Ukrenergo* described above, encroach upon the principle of third party access and infringe Articles 7 and 41 of the Treaty, Articles 3(1) and 20 of Directive 2003/54/EC, Article 6(1) of Regulation 1228/2003 and Section 1.1, 1.6 and 2.10 of the Congestion Management Guidelines.

c) Defining improper participants and its consequences

The provisions of the Auction Rules of Ukraine define an improper participant in the auction as any business entity that does not comply with the provisions listed in Articles 6(6), 7(8) or 8(1) of the Auction Rules. Namely, a participant is considered improper if the participant that set the initial price does not

register for participation to the auction or does not raise the card since the first announcement of the initial price; if the winner of the auction does not conclude a contract for allocation of transmission capacity or does not pay the sale price, and finally if the participant fails to fulfill conditions from the agreement with the wholesale electricity supplier. The consequences of being considered improper by *Ukrenergo* are not only denial of participation in the auction where the undertaking was considered improper, but also deprive it of participating in auctions within the next six months.

i. However, according to Article 20 of Directive 2003/43/EC, access to the transmission networks (including cross-border interconnectors) may be refused only where there is a lack of capacity in which case duly substantiated reasons must be given. Besides, Article 3(8) Directive 2003/54/EC entitles Contracting Parties to not apply Article 20 from Directive 2003/54/EC “*where its application would obstruct performance of obligations imposed on electricity undertakings in the general economic interest and in so far as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community.*” It is for Ukraine to ascertain whether an unrestricted access to the system would obstruct the performance of *Ukrenergo*’s public service obligations and whether the performance could not be achieved by means other than refusal to participation in the auctions for access to interconnectors for each refusal ground separately.⁷²

- The Secretariat observes that the first requirement - considering a participant as improper in case he fails to register for participating in the auction or to raise the auction card during the auctioneer’s first announcement of the initial price of the relevant lot - seems to be an unsuitable means of exclusion, as such a participant will simply not participate in the auction as a result of his own decision, without there being any need to consider him improper. It would be for Ukraine to describe the logic and reasoning behind these grounds for exclusion.

- Considering a participant improper if he is a winner of the auction but refuses to conclude the contract of access to the transmission capacity at the sale price, or if the first payment under the contract is not made in time, appears to be disproportionate as there seem to be other, less-restrictive means to achieve the same objective. If Ukraine wants to sanction such behavior, the means to do so should be of a civil law nature and not or not always affect the right to participate in future auctions. Section 2.13 of the Congestion Management Guidelines provide for financial consequences of failure to honour obligations associated with the allocation of capacity. According to the Auction Rules in Ukraine, the deposit made available in advance will serve to guarantee the financial obligations stemming from the agreement for capacity allocation. Moreover, the use-it-or-lose-it or use-it-or-sell-it principle⁷³ should be applied and another applicant should be allocated the capacity in question.

- The third reason for which an applicant to the auction may be considered improper – i.e. if he fails to fulfill conditions from the agreement with the wholesale electricity supplier related to settlements – appears to be not a legitimate reason. According to what was said above under point b), signing contracts with *Energorynok* in advance of the auction is not considered a legitimate means for achieving the objective of performing auctions. It is not a task of *Ukrenergo*, as the system operator performing the allocation of cross-border capacity, to verify if the participants to the auctions have honored their obligations with other market players, such as *Energorynok*. This also calls into question the fulfillment of the unbundling provisions of Article 10 of Directive 2003/54/EC.

⁷² See Case C-439/06 *citiworks*, para. 60

⁷³ Section 2.5 Congestion Management Guidelines

In any event, the six-months exclusion from participation to the auctions as a result of being considered "improper" is not a proportionate consequence, as it amounts to a full exclusion from the market for electricity exports. It appears from this assessment that denying access to interconnectors to entities that are considered improper under the Auction Rules irrespective of whether there is capacity available, infringes the right granted by Article 20 Directive 2003/54/EC.

ii. In addition, denying participation in the respective auction as well as in the following six auctions is not compliant with Section 1.6 of the Congestion Management Guidelines. This provision lists only one possibility for denying request for transmission service when two conditions are jointly fulfilled, namely when "*the incremental physical power flows resulting from the acceptance of this request imply that secure operation of the power system may no longer be guaranteed, and when the value in monetary amount attached to this request in the congestion management procedure is lower than all other requests intended to be accepted for the same service and conditions.*"⁷⁴ The first of these criteria refers to situations when security of supply would be endangered if the request for access was accepted, while the second criterion refers to situation when – if congestion occurs, the price offered by the denied applicant is lower than the price offered by the another applicants and due to lack of capacity such offer with the lower price could not be accepted.⁷⁵ None of them allows for the refusal of participation in capacity auctions when the applicant is to be considered "improper".

iii. Moreover, Section 2.13 of the Congestion Management Guidelines provides for financial consequences of failure to honour obligations stemming from the allocation of capacity. The Guidelines stipulate that where market participants fail to use the capacity that they have committed to use, or, in the case of explicitly auctioned capacity, fail to trade on a secondary basis or give the capacity back in due time, they shall lose the rights to such capacity and pay a cost-reflective charge. Any cost-reflective charges for the non-use of capacity shall be justified and proportionate and the "*key concepts and methods for the determination of liabilities that accrue upon failure to honour obligations*" shall be set out in advance in respect of the financial consequences, and shall be subject to review by the relevant national regulatory authority. This provision in essence stipulates that a use-it-or-lose-it principle shall apply. Besides losing non-used capacity, the consequence of not using acquired capacity shall be the payment a cost-reflective charge defined in advance. Section 2.13 lists the consequences of non-usage of capacity in an exhaustive manner, and does not allow for further sanctions such as those constituting "improper" behaviour under the Auction Rules of Ukraine. Denial of access to interconnectors and depriving an undertaking to participate in several consecutive auctions is not allowed by any of the provisions of the *acquis*, and is not considered as a possibility even in cases when the undertakings fail to honour their obligations from the auctions. Furthermore, the consequences envisaged by Section 2.13 of the Congestion Management Guidelines can triggered only after capacity has been allocated and the winning undertaking has failed to use such capacity, or has failed to trade it on secondary basis. These consequences may not be turned into precondition for participation in an auction.

The Secretariat preliminarily concludes that excluding an applicant from participating in an auction as well as in the next six months after the auction in question, when it does not satisfy the qualification requirements from Articles 6(6), 7(8), or 8(1) of the Auction Rules goes beyond the possibilities for refusal granted by Article 20 of Directive 2003/54/EC and Sections 1.6 and 2.13 of the Congestion Management Guidelines, and thus infringes those provisions.

⁷⁴ Section 1.6 Congestion Management Guidelines

⁷⁵ When a merit order list is established from the bids for capacity, acceptance of bids starts from the highest offer towards the lowest and bids are accepted up to the moment that free cross-border capacity is available.

3. The effect of the warranty deposit on trade in electricity

According to what has been said above, a warranty deposit calculated by the Auction Committee according to a formula defined in the Auction Rules must be paid before submitting an application for participation in the auction. As Article 1(6) of the Auction Rules defines, the warranty deposit is a monetary payment required “as a tool for securing the honesty and financial guarantee of payment for access to the cross border capacity.” A warranty deposit is meant to guarantee that the participant winning the auction will be able to fulfill its financial obligations, i.e. will pay for the capacity allocated. In principle, a warranty deposit is a suitable means used also in EU Member States⁷⁶ to achieve the objective – a guaranty for fulfilling the financial obligations when such obligations are due.

An excessive warranty deposit, however, is capable of creating an obstacle for free trade of electricity between the Parties to the Treaty, as it may deter potential market participants from engaging in auctions on export capacity. The modalities of a deposit requirement, and in particular the manner in which it needs to be provided as well as its magnitude may work to the effect of keeping smaller and less well-established participants from entering the market. Depending on its design, a warranty deposit may thus prevent market entry by new companies and foreclose the market to the benefit of the incumbents. In this sense, a deposit requirement may violate Article 41 of the Treaty, one of the cornerstones of the single energy market established by the Treaty. As the Court of Justice of the European Union has put it, “lodging of ... a security deposit is likely... to entail a not inconsiderable financial risk for undertakings which have just commenced their activities and may, consequently, lack significant resources”.⁷⁷

The Secretariat recalls that 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.⁷⁸ This corresponds to the second sentence of Article 3 of the Rules of Procedure for Dispute Settlement whereby a “Party [which] 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.”

Even though a warranty deposit covering the system operators risk of enforcing payment obligations *vis-a-vis* the successful participant may be considered legitimate in principle, that legitimacy is missing

⁷⁶ Two examples from regional coordinated auction offices are relevant for the present case, because they are relevant for several countries at the same time.

The first one is the coordinated auction office for Central and Eastern Europe (CAO CEE), involving the TSOs from Austria, Czech Republic, Germany, Hungary, Poland, Slovakia, Slovenia and Croatia for its borders with the EU. The calculation of the financial requirements to cover the risk of the capacity allocations is defined in the Auction Rules for 2013 (pp. 17-21). The deposit could be provided by two instruments: bank guarantees, deposits or a combination of the two. The calculation of the credit limit as defined in Article 4.4. is required to cover the full amount of the placed bids “constituting the maximum limit for the value of PTRs that can be attributed to the Auction Participant in the Auction Process.” Examples are provided in Annex 14 and Article 4.5 provides indication how the credit limit is utilised.

See: http://www.central-ao.com/images/stories/upload/Auctions2013/20121109_auction_rules_2013_binding.pdf (12.02.2013)

Another example is the central auction office (CASC) covering Central West Europe Region (CWE), Central South Europe Region (CSE) and Switzerland. Its rules require only a positive disposable balance on a business bank account that will serve also for the payment of the allocated capacity. The disposable balance “(Credit Limit) is the funds in the Business Account minus the aggregate amount of debts payable to the Joint Auction Office” (p. 22). See: http://www.casc.eu/media/pdf/Harmonized%20Auction%20Rules%20Doc/Rules%20for%20Capacity%20Allocation%20by%20Explicit%20Auctions_V1%200_CWE%20CSE%20and%20Switzerland.pdf (12.02.2013)

These two examples show that the requirements for guarantee deposit are not going beyond what is needed to cover the risk of non-payment for a capacity that has been allocated via the bidding procedure for all timeframes.

⁷⁷ Case 25/07 *Alicja Sosnowska v Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu* [2008] ECR I-05129, para.31

⁷⁸ Case C-159/94 *Commission v France* [1997] ECR I-5815, para. 94.

where auctions are held in cases where there is no congestion at the interconnector. According to what will be reasoned at point III.3.iii. below, this practice contravenes the *acquis communautaire*. Furthermore, any derogation from the free movement principle needs to satisfy the principle of proportionality, which requires that the measures adopted be appropriate to secure the attainment of the objectives that they pursue – i.e. to provide the system operator with a guarantee for the case that an actual payment obligation fails – and not to go beyond what is necessary in order to attain it.⁷⁹ A national rule or practice cannot benefit from the derogation provided for in Article 41(2) of the Treaty if the objective pursued may be protected just as effectively by measures which are less restrictive of intra-Energy Community trade.⁸⁰ It is for Ukraine to invoke and sustain possible justification grounds for derogation from the free movement principles and to show that the measures are proportionate, do not go beyond what is necessary and if the objective could not be achieved with less restrictive measures.

As described above, the Ukrainian Allocation Rules require payment of the full deposit in advance. In this respect, the Secretariat observes that requiring effective payment of the deposit to the system operator in advance of the auctions seems to be disproportionate. It would be sufficient to only make it available to the operator as a bank guarantee in the sense that it will only be effectuated in case the capacity is actually allocated to that applicant, or if the applicant for participation in an auction maintains positive balance on its bank account with sufficient means to pay the sale price in case it wins the auction when there is congestion.⁸¹

Furthermore, the principle of proportionality requires that also the amount of deposit corresponds to the price expected to be paid for the specific lot (based on the bidding price offered by the applicant). As was stated above, the formula from the Ukrainian Auction Rules in 2009 has been amended in the new Auction Rules of 2012, with the result that the warranty payment for annual auction became much higher, without any explanation for such increase. The results from the annual auctions show that the warranty deposit calculated according to the formula in the Auction Rules is much higher than the actual price paid for the different lots. This was already the case in the annual auctions (for 2012) that took place according to the Auction Rules from 2009. The difference between the warranty deposit and the sale price is even more striking in the results from the annual auction for 2013, where the warranty deposit was much higher when calculated according to the new Auction Rules from 2012. For instance, one lot of 130 MW at the interconnector with Poland in 2012 was subject to warranty deposit of 1 812 964,40 UAH.⁸² At the auction it was allocated for a sale price of 5000 UAH.⁸³ The same lot was subject to a warranty deposit of 2 433 236,00 UAH⁸⁴ in 2013, which was twice as much as the deposit required in 2012, and was allocated for sale price of only 10 000 UAH.⁸⁵ These results show that the sale price constituted only 0,41% of the warranty deposit required for this lot. In other words, there is no reasonable relation between the potential risk of failure to pay and the amount asked for. At this point in time, the Secretariat must consider this amount excessive and disproportionate in relation to the objective pursued – the securization against the risk of non-payment. The magnitude of the warranty deposit required by *Ukrenergo* is likely to deter new market entrants from participating in the auctions. The fact that only one big company (*DTEK* and its affiliated companies) participates and wins the auctions each year, shows that only the incumbent is capable of complying with the requirements set in the Auction Rules.

⁷⁹ Joined Cases C-282/04 and C-283/04 *Commission v Netherlands* [2006] ECR I-9141, para. 33

⁸⁰ Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, para. 104.

⁸¹ See the examples from CAO CEE and CASC provided above.

⁸² http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?art_id=91896&cat_id=75288 (12.02.2013)

⁸³ http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?art_id=92307&cat_id=75289 (12.02.2013)

⁸⁴ http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?art_id=113285&cat_id=75288 (12.02.2013)

⁸⁵ http://www.ukrenergo.energy.gov.ua/ukrenergo/control/uk/publish/article?art_id=113621&cat_id=75289 (12.02.2013)

Therefore, the Secretariat preliminarily has to conclude that the warranty deposit as designed by and calculated under the Ukrainian Auction Rules is in violation of Article 41 of the Treaty.

4. Capacity allocation in the case of non-congested interconnectors

As set out above, ensuring regulated access to transmission network is an obligation stipulated in Article 20 Directive 2003/54/EC. Such access shall be based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users, defined under the rules stipulated in Article 4 of the Regulation (EC) 1228/2003. The tariffs for access to the transmission system (including interconnectors) shall be calculated in accordance with methodologies fixed or approved by the regulatory authority, prior to their entry into force.⁸⁶

a) Besides the charges for access to the system, i.e. the regulated tariff, the *acquis* does not allow for an additional price for allocating capacity at interconnectors in case there is no congestion. According to Regulation (EC) 1228/2003, *"it would not be appropriate ... a specific tariff to be paid only by exporters or importers in addition to the general charge for access to the national network."*⁸⁷ Moreover, the Congestion Management Guidelines have been developed in order to introduce *"efficient methods of congestion management ... for cross-border electricity interconnection capacities in order to ensure effective access to transmission systems for the purpose of cross-border transactions."*⁸⁸ Section 6.1 of the Congestion Management Guidelines stipulates that such allocation of capacity may generate revenue only in the event of congestion. (Only) in that case Section 2.7 Congestion Management Guidelines requires that the highest value bids, whether implicit or explicit in a given timeframe, shall be successful.

Since Section 6.1 of the Congestion Management Guidelines allows revenues only in case of congestion and taking into account Recital 13 and 14 of Regulation (EC) 1228/2003 and Recital 2 of Congestion Management Guidelines, a national requirement for paying a price for allocated capacity irrespective of the existence of congestion is not in line with the *acquis*.

As the above-mentioned requirements apply irrespectively of whether the interconnector in question is congested or not, they also infringe Section 1.2 of the Congestion Management Guidelines. This provision requires that there is no restriction of access to the interconnection when there is no congestion. However, an obligation to pay a sale price in any case, irrespectively of the existence of congestion, constitutes such restriction.

b) Furthermore, establishing an initial and then a sale price for each lot irrespectively of whether there is congestion or not, amounts to an export charge which is prohibited under Article 41 of the Treaty. The allocated cross-border capacity is used for the export of electricity, and is thus an essential service for export of the good in question (electricity). According to settled case-law *"any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect."*⁸⁹ Similarly to import restrictions where the Court of Justice of the European Union held that procedures making imported goods *more costly* than domestic goods were

⁸⁶ Article 23(2)a Directive 2003/54/EC

⁸⁷ Recital 13 Regulation (EC) 1228/2003

⁸⁸ Recital 2 Congestion Management Guidelines

⁸⁹ Case C-293/02 *Jersey Produce Marketing Organization Ltd* [2005] ECR I-9543, para. 55

prohibited⁹⁰ the price to be paid by the exporters of electricity for transmission capacity – without being justified by network congestion – amounts to a prohibited export charge. The Court also held that domestic rules which impose different procedures in respect of exports alone “*constitute a measure having effect equivalent to quantitative restrictions in so far as ... capable of constituting a direct or indirect, actual or potential obstacle to intra-Community trade for export, but not on those intended for the domestic market.*”⁹¹ Thus the Secretariat is at an opinion that the price that the participants are required to pay for each lot of capacity they get allocated irrespective of the existence of congestion constitutes a measure that falls under and is prohibited by Article 41 of the Treaty.

The Secretariat thus preliminarily concludes that allocating interconnector capacity based on a price set through an auction even in case the interconnector is not congested is not in accordance with Article 41 of the Treaty, Articles 20 and 23(2)a) of Directive 2003/54/EC, Article 4 of Regulation (EC) 1228/2003, and Section 2.7 and 6.1 of Congestion Management Guidelines.

5. Curtailing allocated capacity in cases of “unplanned shortages”

According to the Allocation Rules, in case the system operator cannot provide the amount of capacity the winner of an auction was allocated due to an unplanned shortage, it has the right to curtail the allocated capacity. In such a case, the contracts made in the annual capacity allocation have priority, whereas the contracts made as a result of monthly allocation are honoured in proportion to the transmission capacity of the interconnector still available after the shortage.⁹² The Auction Rules further stipulate that in case it is necessary to reduce the transmission capacity under several contracts signed for the same time period (annual or monthly), the curtailment shall again be made in proportion to the available transmission capacity of the interconnector taking into account the quantity of the unplanned shortage.⁹³

This provision from the Auction Rules in Ukraine, allowing curtailment of allocated cross-border capacity, covers “unplanned shortages”, a concept not further defined either by the Auction Rules or the Law and not limited to emergency situations as required by Article 6(2) of Regulation 1228/2003. According to Article 6(2) of Regulation (EC) 1228/2003 “*transaction curtailment procedures shall only be used in emergency situations where the transmission system operator must act in an expeditious manner and re-dispatching or countertrading is not possible. Any such procedure shall be applied in a non-discriminatory manner.*” Not defining and limiting potential cases when the transmission system operator may unilaterally curtail the transmission capacity grants almost unlimited discretion to the system operator and makes this provision in the Auction Rules prone to arbitrary application. It therefore seems to violate Article 6(2) of Regulation (EC) 1228/2003 and runs counter to the general principle of legal certainty, namely that rules and decision must be clear, precise and predictable in their effects, especially where they may have negative consequences for individuals and undertakings.⁹⁴

6. Secondary trading

As described above, Article 9 of the Ukrainian Allocation Rules stipulates that the “*obligations and rights of a winner of the auction cannot be transferred or assigned to other persons except for cases established by this procedure.*” The only possibility for transferring the allocated capacity between the

⁹⁰ Case 154/85 *Commission v Italy*, [1987] ECR 2717

⁹¹ Case 53/76 *Procureur de la République Besançon v. Bouhelier* [1977] ECR 197, paras. 16-18

⁹² Article 1(14) Auction Rules

⁹³ Article 1(14) Auction Rules

⁹⁴ Case C-158/07 *Förster* [2008] ECR I-8507, paragraph 67; Case T-475/07 *Dow AgroSciences v Commission*, judgment of 9 September 2011, para. 264

different participants in the auction is in “*case of dissolution of access contract made as a result of monthly auctions.*” In such cases, i.e. when the winner of the auction refuses to conclude the contract at the selling price, or if the first payment is not made on time,⁹⁵ or when the transmission system operator unilaterally dissolves the contract for access to the interconnector if the winner in the auction has not fulfilled its payment obligations⁹⁶ “*the right to make the relevant transmission capacity access contract shall pass to the participant in the monthly auction whose price is the highest after the selling price.*”

Section 2.12 of the Congestion Management Guidelines requires that “*capacity shall be freely tradable on a secondary basis, provided that the TSO is informed sufficiently in advance,*” and when the transmission system operator “*refuses any secondary trade (transaction), this must be clearly and transparently communicated and explained to all the market participants by that TSO and notified to the Regulatory Authority.*” These provisions are of high importance for making interconnection capacity available for developing a cross-border electricity market. They have been established to foster an efficient use of interconnector capacity. In case the participant that has been allocated the capacity is not in a position to use it, it must have a right to be reimbursed for the costs incurred for acquiring that capacity, namely by selling it to another market participant. Moreover, this provision creates a possibility for a dominant company to bid for all available capacity and thereby preventing their smaller competitors from having access to the interconnectors.⁹⁷ If such a company wins all, or a substantial part, of the cross-border capacity put at auction – as is the case in Ukraine – it does not even have a possibility to sell it on if it does not need all or part of the capacity, thus preventing other potential market participants from using that particular interconnection capacity.

The Secretariat thus preliminarily concludes that the prohibition of secondary trading in any other case except in the ones provided for in Article 9 of the Ukrainian Auction Rules violates Section 2.12 of the Congestion Management Guidelines.

7. Non-compliance with Section 5.6 Congestion Management Guidelines and the principle of legal certainty

As described above, in all the auctions for 2011, 2012 and 2013, the requirements for participation in an auction have been amended at a very short notice, without allowing sufficient time to the interested entities to comply with those new requirements and preventing them from participation to the respective annual auctions. In relation to the auctions for 2011 and 2012, this was not even linked to formal amendments to the Allocation Rules (as for the auctions for 2013), and the requirements for participation have been extended by letter from NERC, as explained above in Point 1.(b).iii.

In December 2010, the interested participants have been informed one (!) day before the annual auction for 2011 about NERC’s letter introducing new participation requirements by an announcement on the website of the system operator *Ukrenergo*. Thus, they had only one day of time to comply with the requirement for having a contract with the wholesale market *Energorynok* with a minimum validity until 31 December 2011. Due to the short notice, only the participants that already had such contract signed could participate in the auction held on the day after.

⁹⁵ Article 7(9) Auction Rules

⁹⁶ Article 8(1) Auction Rules

⁹⁷ Schoser, C., *The regulation on Cross-border Electricity Exchanges: Substantive Rules*, in Jones, C. EU Energy Law: Volume I – the Internal Energy Market – the Third Liberalisation Package, Claeys & Casteels, 2010 at p.339

On 7 December 2011, *Ukrenergo* published NERC's letter imposing new requirements on the interested entities as a prerequisite to participate in the annual auction for 2012, namely that their supply contracts with foreign entities have to be approved by *Ukrenergo* in advance of the auction. With this announcement, the interested entities were given a week (four working days) in order to coordinate their contracts with *Ukrenergo*. Again, due to the short notice, only the entities that had contracts already coordinated with *Ukrenergo* could take part in the annual auctions.

Finally, the Auction Rules from 2009 were replaced by new Auction Rules in December 2012. However, these new Rules entered into force only one (!) day before the application for participation was due and only after a period of uncertainty. Therefore, up to the last moment the interested entities could not know according to which rules the auction would be held. The system operator had published two different options on its website, which require fulfillment of different conditions for participation. Therefore, again, only the companies that had already contracts with the wholesale supplier and with foreign entities with duration as long as the period for which allocation of capacity was requested, and whose contracts have been approved in advance by *Ukrenergo*, could participate in the auctions. And even worse, due to the different formula for calculating the warranty deposit, which according to the two published options was twelve times (!) different, only companies with such amount of money at their disposal could participate in the auction.

The result was that only one entity – *DTEK* and its affiliated companies participated and won all the bids at all interconnectors at the three annual auctions at issue here, for 2011, 2012 and 2013. The same company also won the monthly auctions for allocating capacity at the interconnector with Moldova. The auction results clearly show export of electricity is made *de facto* impossible for any applicant that does not comply with those requirements.

a) The Secretariat, at this point in time, concludes that publishing the information relevant for participation in the auctions in the way described above, infringe Section 5.6 of the Congestion Management Guidelines which requires that “*all relevant information shall be available for the market in due time for the negotiations of transactions*”. One day or even four working days can by no means considered sufficient time to react to legislative changes that impose new and/or stricter requirements for participation in annual auctions for allocation of cross-border capacity. The Guidelines, by way of example, refer to “*annual supply contracts for industrial customers or the time when bids have to be sent into organised markets*”. This is all the more relevant for transactions involving foreign entities, as was the case at present.

These rules reflect the principle of legal certainty as a general principle of Energy Community law. In the Secretariat view, any institution of a Party to the Treaty, including regulatory authorities and system operators, are bound by Energy Community law, including its general principles.⁹⁸ The existence of general principles of Energy Community law is explicitly recognized by Article 2(1) of the Dispute Settlement Procedures. As follows from Article 94 of the Treaty, Energy Community law is to draw on the case law of the Court of Justice of the European Union in that respect. In the Secretariat's view, the relevant general principles of Energy Community law include the principle of legal certainty.⁹⁹ In particular, and in addition to the requirement from Section 5.6. of the Congestion Management Guidelines for making all information available in due time, the principle of legal certainty requires that “*rules involving negative consequences for individuals should be clear and precise and their application*

⁹⁸ See: Opening Letter in Case ECS-12/11 against Montenegro sent on 28.11.2011

⁹⁹ Case C-158/07 *Förster* [2008] ECR I-8507, paragraph 67; Case T-475/07 *Dow AgroSciences v Commission*, 09.09.2011, para. 264.

predictable for those subject to them".¹⁰⁰ Obviously, this principle does not prevent rules – such as *in casu* the Allocation Rules – from being amended. However, it does require that “*the legislature take account of the particular situations of traders and provide, where appropriate, adaptations to the application of the new legal rules.*”¹⁰¹ Thus, it demands that amendments are done sufficiently in advance and that they are clearly defined and made available in due time to the interested market participants. If such amendments are done at a moment when the procedure for allocation of cross-border capacity is already on-going, as in the last three years in Ukraine, the authority amending the rules (NERC) should have taken into consideration the specific situation of the participants to the auction procedure by considering whether they will have sufficient time and the factual possibility to comply with the new rules. Informing the undertakings interested in participating to cross-border allocation of capacity about amendments of the Allocation Rules and introducing new requirements for participation to the auctions only one or even four working days before the auctions take place conflicts with the principle of legal certainty in the Secretariat’s view.

b) Moreover, lack of available information in due time makes it more difficult, and in the Ukrainian case even impossible, for interested undertakings to participate in auctions for allocation of cross-border capacity. This in turn represents an obstacle to cross-border trade that infringes Article 41 of the Treaty, which as explained in point III.1 above, conflicts with any rule or measure enacted by a Party capable of directly or indirectly, actually or potentially, hindering trade among the Parties.¹⁰²

The Secretariat thus preliminarily concludes that Ukraine is not in compliance with Article 41 of the Treaty, Section 5.6. of the Congestion Management Guidelines and the principle of legal certainty as a general principle of Energy Community law.

8. Non-compliance with Article 9 Regulation (EC) 1228/2003

Under Article 9 of Regulation 1228/2003, the national regulatory authority has an obligation to ensure compliance with that Regulation, including its Congestion Management Guidelines. NERC has not only adopted the Auction Rules which include provisions apparently non-compliant with the Energy Community *acquis*, it has also not taken later any effective remedial action to ensure compliance of the Auction Rules with the *acquis communautaire*. Therefore, the Secretariat must conclude at this point that Ukraine has failed to fulfil its obligation under Article 9 of the Regulation (EC) 1228/2003 by the approval of the Auction Rules and 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 NERC is attributable to Ukraine as a Contracting Party to the Treaty.

IV. Conclusion

At this point in time, the Secretariat concludes that Ukraine fails to comply with Articles 7 and 41 of the Treaty, Articles 3(1), 9(e), 20(1) and 23(2)a) of Directive 2003/54/EC, Articles 1, 2(1), 4, 6(1), 6(2), 6(4) and 9 of Regulation (EC) 1228/2003, Sections 1.1, 1.2, 1.6, 2.1, 2.7, 2.10, 2.12, 2.13, 5.6 and 6.1 of the Congestion Management Guidelines by maintaining in force the Auction Rules adopted by NERC and by their application by the system operator *Ukrenergo*. Under Article 2(2) of the Dispute Settlement Rules, a violation of Energy Community law by public authorities such as NERC or public companies such as *Ukrenergo* is attributable to Ukraine as a Contracting Party to the Treaty.

¹⁰⁰ Case C-17/03 *VEMW* [2005] ECR I-4983, para. 80

¹⁰¹ Case C-17/03 *VEMW* [2005] ECR I-4983, para. 81

¹⁰² Case 8/74 *Procureur du Roi v Dassonville*, [1974] ECR 837, para. 5

In accordance with Article 12 of the Dispute Settlement Procedures, the Government of 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

26 April 2013.

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, 26 February 2013

Janez Kopač
Director



Dirk Buschle
Legal Counsel/Deputy Director



**МІНІСТЕРСТВО ЕНЕРГЕТИКИ ТА
ВУГІЛЬНОЇ ПРОМИСЛОВОСТІ УКРАЇНИ**
(Міненерговугілля України)

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E-mail: kanc@mev.energy.gov.ua, Код ЄДРПОУ 37471933

17.04.2013 № 01/18 - 0469

На № _____ від _____

Директору Секретаріату
Енергетичного Співтовариства
Я. Коначу

Шановний пане Конач!

Міністерство енергетики та вугільної промисловості України засвідчує свою повагу Секретаріату Енергетичного Співтовариства та, як орган, що здійснює координацію виконання зобов'язань України в рамках Договору про заснування Енергетичного Співтовариства інформує.

Міненерговугілля України провело відповідну роботу разом із Національною комісією, що здійснює державне регулювання у сфері енергетики та ДП «Енергоринок» у зв'язку з відкритим листом Секретаріату Енергетичного Співтовариства від 26 лютого 2013 року у справі ECS-1/12 щодо ініціювання процедури врегулювання спору у справі відносно України за недотримання положень Договору про заснування Енергетичного Співтовариства та повідомляє.

Енергосистема України створювалась з 20-х років ХХ століття як частина єдиної енергосистеми СРСР. В 1993 році відбулося відокремлення Об'єднаної енергосистеми України від Єдиної енергосистеми Росії, при цьому основна частина ОЕС України продовжує працювати в паралельному режимі з енергетичними системами країн СНД. З липня 2002 року частина ОЕС України, так званий «Бурштинський острів», входить до синхронної зони ENTSO-E. Величина потужності максимально допустимого експорту з «Бурштинського острова» встановлюється ENTSO-E та визначається вимогами сталої роботи Бурштинської ТЕС, і електричної мережі «Бурштинського острова». Протягом 2012 року вона складала 500 МВт у зимовий період (з 1 жовтня до 31 березня) та 550 МВт – у літній (з 1 квітня до 30 вересня). На 2013 рік ДП «НЕК «Укренерго» після виконання додаткових технічних та організаційних заходів згідно з вимогами ENTSO-E

отримало можливість збільшити максимально допустимий переток потужності до 650 МВт.

В електроенергетиці України з 1996 року діє модель ринку «Єдиного покупця» відповідно до якої вся вироблена та імпортована електрична енергія продається через оптовий ринок електроенергії України. Законодавством не передбачені двосторонні договори купівлі-продажу електроенергії. На сьогодні ведеться підготовка до переходу від існуючої моделі ринку до моделі, яка відповідає цільовій моделі ринку Європейського Союзу. Згідно з Програмою економічних реформ на 2010–2014 роки діюча модель оптового ринку електричної енергії України (модель „єдиного покупця”), має бути замінена ринком прямих договорів і балансуєчим ринком з поступовим відкриттям ринку для кваліфікованих споживачів. Згідно з Національним планом дій щодо впровадження Програми економічних реформ у 2013 році має бути прийнято Закон України «Про засади функціонування ринку електричної енергії» (реєстр. № 10571 від 06.06.2012, прийнято Верховною Радою України у першому читанні) та підзаконні акти, які забезпечать функціонування нової моделі ринку, в яких будуть враховані положення *acquis communautaire* Енергетичного Співтовариства.

Порядок проведення аукціонів щодо доступу до пропускної спроможності міждержавних електричних мереж України для експорту електричної енергії (далі – Порядок) був розроблений та прийнятий на початку 2009 року до приєднання України до Договору про заснування Енергетичного Співтовариства і повністю відповідає вимогам українського законодавства.

Вважаємо, що деякі зауваження Секретаріату до Порядку потребують уточнення. Зокрема, це стосується зауваження щодо обмеження доступу до міжсистемних ліній електропередачі для експорту електроенергії.

Відповідно до вимог Порядку та системи ліцензування, яка діє в енергетичній галузі України, зацікавлені сторони, які бажають прийняти участь в аукціонах на розподіл пропускної спроможності повинні мати ліцензію на здійснення діяльності з постачання електричної енергії за нерегульованим тарифом. Однак це не є перешкодою для участі в аукціоні, оскільки будь-який виробник електроенергії має право отримати зазначену ліцензію та провадити відповідну діяльність.

Питання наявності та затвердження договорів купівлі/постачання як умови участі у процесі розподілу пропускної спроможності міждержавних

мереж обумовлене як вимогами формування енергетичного балансу, забезпечення безпеки і надійності функціонування об'єднаної енергетичної системи України так і вимогами системних операторів країн імпортерів української електричної енергії. Зокрема, вимогою системних операторів країн ENTSO-E є узгодження контрактів на поставку електричної енергії, головною метою яких є гарантія постачання електроенергії для споживачів Європи та належне митне оформлення Україною експорту електроенергії.

В той же час розглядається питання щодо врахування в рамках чинного законодавства України окремих зауважень Секретаріату при внесенні змін до Порядку. Зокрема, питання щодо:

- заміни гарантійного внеску банківськими гарантіями;
- можливості встановлення нульової початкової ціни лоту у випадку відсутності перевантажень міждержавних електричних мереж;
- врегулювання питання скорочення розподіленої пропускнуої спроможності у випадках «незапланованого дефіциту»;
- визначення періоду часу від моменту прийняття змін до Порядку до набрання ними чинності.

Деякі питання, порушені у листі Секретаріату вимагають більш глибокого опрацювання з урахуванням досвіду їх розв'язання в країнах ЄС та Енергетичного Співтовариства, у зв'язку з цим пропонуємо створити спільну робочу групу із залученням українських фахівців та експертів Секретаріату, яка би детально розглянула питання щодо:

- вторинної торгівлі пропускнуою спроможністю міждержавних електричних мереж України;
- впровадження Регламенту (ЄС) № 1228/2003 про умови доступу до мереж транскордонного обміну електроенергії та Рішення Комісії від 9 листопада 2006 року, що вносить зміни до Додатку до Регламенту (ЄС) № 1228/2003 про умови доступу до мереж транскордонного обміну електроенергією;
- організації експорту та імпорту електричної енергії.

З повагою,

Міністр



Е. Ставицький

**Director of the Secretariat of the
Energy Community
J. Kopać**

Dear Mr. Kopać!

The Ministry of Energy and Coal Industry of Ukraine confirms its compliments to the Secretariat of the Energy Community and as the authority that coordinates the implementation of Ukraine's commitments under the Treaty establishing the Energy Community informs about the following.

The Ministry of Energy and Coal Industry of Ukraine has carried out the corresponding work together with the National Commission for the State Regulation of Energy and the State Enterprise "Energorunok" concerning the open letter of the Energy Community Secretariat about the case ECS-1/12 written on the 26th of February 2013 with the aim of initiating dispute settlement procedures in case of Ukraine for non-compliance of the provisions of the Treaty establishing the Energy Community and reports about the following.

The power system of Ukraine had been created at 20 years of the twentieth century as part of the unified energy system of the USSR. In 1993 there was the separation of the United Energy System of Ukraine from the Unified Power System of Russia; apparently the bulk of the United Energy System of Ukraine continues to operate in parallel with the energy systems of the Commonwealth of Independent States (CIS). Since July 2002 the part of the United Energy System of Ukraine, the so-called "Burshtyn Island" is the synchronous zone of ENTSO-E. The value of the maximum power export "Burshtyn island" set ENTSO-E and determined by the requirements of sustainable Burshtyns'ka thermal and electrical network "Burshtyn island." In 2012 it amounted to 500 MW in the winter (from October 1 to March 31) and 550 MW - in the summer (from April 1 to September 30). In 2013 the State Enterprise "NEK" Ukrenergo" has been able to increase the maximum overflow capacity to 650 MW after the implementation of additional technical and organizational measures in accordance with ENTSO-E.

Since 1996 the market model "Single buyer" operates in the electricity power system of Ukraine under which all produced and imported electricity is sold through the wholesale electricity market of Ukraine. According to the law there is no provision of bilateral contracts for the sale of electricity. Currently, the transition from the existing market model to the model that meets the target models of the European Union has being prepared. According to the Program of Economic Reforms for 2010-2014 the working model of the wholesale electricity market of Ukraine (model "Single buyer") is to be replaced by a direct contract market and balancing market with the gradual opening of the market for eligible customers. According to the National Action Plan concerning the implementation of the program of economic reforms the Law of Ukraine «On the basis of the electricity market" (№ 10571 from 06.06.2012 passed by the Verkhovna Rada of Ukraine in the first reading) is to be passed in 2013 and regulations that will ensure functioning of the new market model, which will take into account the provisions of the Energy Community *acquis communautaire*.

The procedure of auctions conduction for access to transmission capacity of interstate power networks of Ukraine to export electricity (hereinafter - procedure) was developed and adopted in early 2009 to the accession of Ukraine to the Treaty establishing the Energy Community and in full compliance with Ukrainian legislation.

We believe that some comments of the Secretariat concerning the procedure need clarification. The first are observations concerning the classification of intersystem lines for electricity export.

According to the procedure and licensing system, which operates in the energy sector of Ukraine, interested parties who wish to participate in auctions for distribution of transmission capacity must have a license for the supply of electricity at unregulated rates. However, this does not preclude participation in the auction, since any electricity producer is entitled to receive the mentioned above license and to conduct appropriate activities.

The availability and approval of contracts purchase/supply as the condition of participation in the international distribution of transmission capacity of interstate networks is due to both the requirements of energy balance, security and reliability of the integrated power system of Ukraine and the requirements of system operators' importers of Ukrainian electricity. In particular, the requirement of system operators of ENTSO-E is the coordination of contracts for the supply of

electricity; the main purpose is to guarantee the supply of electricity to consumers in Europe and appropriate customs registration of Ukraine electricity exports.

At the same time, it has being considered to take into account under the current legislation of Ukraine the Secretariat individual observations in the amending Procedure. In particular, the following issues:

- Replacement of guarantee payment by bank guarantees;
- The possibility of a zero initial lot price in the absence of congestion interstate power networks;
- Settlement of reduction of distributed transmission capacity in cases of "unplanned deficit";
- Determination of time period from the moment of the adoption of amendments to the Procedure before its entry into force.

Some issues raised in the letter by the Secretariat require more detailed study on the experience of the settlement in the European Union and the Energy Community. Taking into consideration the mentioned above the Ministry proposes to establish a joint working group with the participation of Ukrainian specialists and experts of the Secretariat, which would examine in detail the following issues:

- Secondary trading transmission capacity of interstate power networks of Ukraine;
- Implementation of Regulation (EC) № 1228/2003 on conditions for access to the networks of cross-border exchange of electricity and Commission Decision of 9 November 2006 amending the Annex to Regulation (EC) № 1228/2003 on conditions for access to the networks of cross-border exchange of electricity;
- Organization of export and import electricity.

Yours sincerely

Minister

E. Stavitskiy

Rozeta Karova

From: Rozeta Karova
Sent: Tuesday, 18. June 2013 13:05
To: oleg.shevchenko@mev.energy.gov.ua; bonkalo.KV@relay-2.energy.gov.ua; driver@nec.energy.gov.ua; birdy7@yandex.ru; viktorija.ruzhenkova@mev.energy.gov.ua; Shovkalyuk@nerc.gov.ua; Rudenko@nerc.gov.ua; rogozin@nerc.gov.ua
Cc: Dirk Buschle; Simon Uzunov; Gabriela Cretu; Janez Kopac
Subject: Kiev meeting_12 June 2013_follow up and next steps
Attachments: 17 06 2013_Kiev_Minutes of meeting_final.docx; ??????.XLSX

| Tracking: | Recipient | Delivery |
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| | Simon Uzunov | Delivered: 18.06.2013 13:05 |
| | Gabriela Cretu | Delivered: 18.06.2013 13:05 |
| | Janez Kopac | Delivered: 18.06.2013 13:05 |

Dear all,

First of all, we would like to thank you for the very constructive meeting we had last week in Kiev as a follow up to the Opening Letter sent by the Secretariat in Case ECS-1/12 initiating a dispute settlement procedure against Ukraine in relation to the procedure for allocation of cross-border capacity at interconnectors of Ukraine. We find the meeting very relevant and useful as a starting point of the cooperation between the Ukrainian institutions and companies and the Secretariat, in the process of amending the existing Auction Rules and making the procedure for allocation of cross-border capacity in compliance with the Energy Community law.

As agreed during the meeting, we are sending you the minutes of the meeting – an extensive overview of the issues discussed including the expected future steps from both sides. As we promised during the meeting, we are sending you the Secretariat's view and also recommendations of how the incompliance should be rectified giving you examples from other Contracting Parties and EU Member States. Please check the Allocation Rules we send you (the links cover the rules of the CEE CAO countries; Romania; Hungary; Serbia...) and they are all in English.

In addition, we also list the issues that we expect from your side, and in particular drafting amendments to the existing Auction Rules in compliance with the comments and examples given.

After the Secretariat receives new draft Auction Rules, another working meeting shall be organized either in Kiev or in Vienna, discussing the detailed provisions of the new Auction Rules. Please note that the adoption of the new Electricity Law shall not be precondition for drafting new Auction Rules and shall not delay the process. The objective is to have the new compliant rules adopted before the annual auction for 2014 is held.

In case you have difficulties and/or problems and you need more information or explanation during the drafting process, please do not hesitate to write an email or call us directly.

Looking forward to receiving your feed-back and the new draft of compliant Auction Rules soon. As a first step, it would be good if you could inform us on the time when we could expect such a new draft to be developed and sent to the Secretariat for review.

Kind regards,

Rozeta Karova
Simon Uzunov

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KIEV, 12 June 2013, 10:00 - 17:00

The meeting took place as a follow up to the Opening Letter sent by the Secretariat in Case ECS-1/12 initiating a dispute settlement procedure against Ukraine in relation to the procedure for allocation of cross-border capacity at interconnectors of Ukraine. The meeting was organized by the Ministry of Energy and Coal Industry of Ukraine and was hosted by the transmission system operator *Ukrenergo*. Besides these two institutions, representatives from the National Electricity Regulatory Commission of Ukraine (*NERC*) and the electricity market operator of Ukraine *Energorynok* were also present at the meeting.

The meeting started with two presentations from *Ukrenergo* - about the procedure for allocation of cross-border capacity, and initial general discussion about the specificities of the Ukrainian power system. In particular:

- 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; only a smaller part of the Ukrainian power system is linked with the European ENTSO-E network through the isolated Burshtyn island in western Ukraine;
- installed generation capacity in the Burshtyn island amounts to 2500 MW, but due to internal consumption, the Burshtyn island's real export capacity is up to 650 MW;
- as regards the interconnectors' capacities linking the Burshtyn island to the ENTSO-E network (with Romania, Slovakia and Hungary), even though the capacity is much higher, only around 550 MW is regularly available for export; this means that technical congestion on the interconnection lines does not exist, but the interest of the companies for using the interconnectors for export of electricity is higher than what the internal transmission capacity of the network within Burshtyn island can facilitate, so internal commercial congestion exists;
- there is 54.000 MW installed generation capacity in the main electricity system of Ukraine, and approximately 30.000 MW is needed for domestic use which means that there is sufficient electricity for export; however, since the system of Ukraine is not connected with the European system the available electricity cannot be exported in the European countries;
- The export to Russia is not performed due to administrative and commercial reasons – except in the case of the interconnection line which is transiting the system of Moldova in order to supply the Odessa region of Ukraine. and can be used to for export of electricity in Moldova.

Taking all these specificities into account, the Secretariat explained that in order to close the Case ECS-1/12, the breach of the Energy Community law needs to be rectified by developing and applying a compliant procedure for allocation of cross-border capacity for the interconnectors with the EU countries, but also with Moldova which is an Energy Community Contracting Party.

The Secretariat welcomed the draft amendments to the Allocation Rules prepared by *NERC* as a follow up to the Opening Letter and uploaded for public consultation. The Secretariat however invited the Ukrainian authorities to start sharing the draft legislation with the Secretariat in order to receive comments and proposals before initiating public consultation. This is a well established practice with the other Contracting Parties, as it is advisable to discuss the compliance with the Energy Community law before the adoption of new acts instead of leaving a possibility for lack of compliance and challenging it through a dispute settlement procedure after its adoption.

In addition, the Secretariat reminded that the prepared amendments address only very few issues of compliance and they are not sufficient for rectifying the breach of all provisions of Energy Community law identified by the Secretariat in the Opening Letter.

Ukrainian institutions agreed to immediately start with the drafting of amendments to the Allocation Rules, taking into account the recommendations from the Secretariat, and to share the new draft document as soon as available.

Afterwards, detailed discussion on all the points raised in the Opening Letter was initiated. The following represents a summary of that discussion and the steps agreed as a follow up, together with ECS proposals for solving each of the issues and the expectations for what the Ukrainian authorities promised to submit to the Secretariat.

1. Different treatment of electricity imports and exports

UA concern: Only one type of procedure shall exist for allocation of cross-border capacity for all interconnectors of the country, and it should be suitable for allocating the capacity at the interconnectors in the Burshtyn island, Moldova and the Russian Federation. In such a case, if commercial import is allowed in the same manner as export, cheap electricity from the Russian Federation will be imported in Ukraine, and there will be a problem to manage the existing electricity produced in Ukraine. If Ukrainian electricity producing capacities need to be closed – since the electricity produced could not be exported to the EU countries due to the lack of synchronization of the power systems – problems with the employees of mines, power plants will appear.

ECS: Even though there will be one Electricity Law in Ukraine, nothing prevents *NERC* to adopt separate and different procedures for allocation of capacity for the different borders. That is already done in some EU Member States, such as Hungary for instance, which has different procedures for allocation of interconnectors' capacity with different countries.

** ECS is sending an example of how such rules could look like:*

Please have a look at the Hungarian example: MAVIR (TSO -HU) has several rules for bilateral auctions on different borders - with RO, with RS and even with UA: <http://www.mavir.hu/web/mavir-en/120>

2. Limiting access to interconnectors for electricity exports

a) *Limiting the categories eligible for participation in cross-border capacity allocation procedures*

UA explanation: requirement for availability of a supply license is not an obstacle in practice. The procedure is very easy and does not take time; many applicants on a daily basis get and lose such license. All distribution and supply companies supplying at regulated tariffs also have a license for supply at non-regulated prices as well as all generators.

** UA shall explain and justify the need for having a supply license for supply at non-regulated tariffs and to prove that it is not a disproportionate requirement becoming an obstacle for trade of electricity (explaining the requirements for issuing a license; the time needed for obtaining such license; the number of market participants that have obtained such license).*

ECS recommendation: since the objective to be ensured with the requirement for a supply license is identification of auction participants, in the EU an Energy Identification Code (EIC)

is issued. Since Ukraine is not part of the ENTSO-E and *Ukrenergo* does not issue EIC code, but:

taking into account that issuing an EIC is based on filling an application form with basic information about the energy entity, such identification in Ukraine could be ensured by mere registration with the system operator of all energy market participants.

In this manner, also the large eligible customers would be able to participate to allocation of capacity in order to exercise their eligibility right and to choose a supplier from other countries or even from Ukraine in the case of a customer in Odessa region supplied through the interconnector trespassing Moldova, and all other even small generators (ex. of RES) will not need to apply for a supply license in addition to the license for generation.

However, please note that Turkey has started to issue EIC Codes before the synchronization of systems and ENTSO-E membership:
https://www.entsoe.eu/fileadmin/user_upload/edi/library/eic/io/area.htm

b) The existence and approval of purchase/supply contracts as requirements for participation in cross-border capacity allocation procedures

UA explanation: *Ukrenergo* needs to approve the contracts in question since it needs to issue documents that are requested by the customs authorities due to the payment of VAT. The explanation of whether there is any additional tax levied just for the reason of export or import of electricity was not clear.

** UA shall send to ECS detailed explanation of why approval of contracts is needed; what is the link with the customs authorities; what kind of tax or fee is paid by exporters and importers of electricity, both related to the electricity as a good and to the interconnectors' capacity.*

ECS recommendation: if the concern is that *Ukrenergo* needs to approve the interconnectors that need to be used for carrying import and export of electricity as well as ensuring the technical possibility for transporting the requested quantity of electricity; that could be solved with:

- signing a framework annual agreement between the interested market participant and *Ukrenergo* and in this regard please see the framework agreements form *EMS* (Serbia) and *Transelectrica* (Romania) and
- upon nomination of the borders and the quantity after each auction where capacity is received, *Ukrenergo* should issue a declaration stating the direction (export, import or transit) and the quantity of electricity transported. This shall be sufficient for the customs authorities to levy the VAT.

The same issue is discussed in the Contraction Parties from South East Europe that - unlike the EU Member States - do not have a common VAT system, by issuing such declaration by the TSO.

** ECS is sending to Ukrenergo examples of framework contracts signed between the TSOs of Serbia and Romania with market participants:*

a) EMS (Serbia) website contains all the needed information related to procedure, contract forms:
http://www.ems.rs/eng/stranice/tehnicke_informacije/opste_inf_2013.htm

b) Transelectrica (Romania):

<http://www.transelectrica.ro/5Piete/EN/alocarecap.php>
<http://www.transelectrica.ro/6Transparenta/EN/piata2.php>

and

Please also look at the declaration that the Macedonian TSO is issuing to the market participants for customs purposes (the declaration is sent as a separate document).

ECS will look for other examples by TSOs if possible issued in English, but taking into consideration that this is a document for tax purposes, it is usually done in national language. This is just an example of what is needed.

Note that none of the TSOs require approval of contracts. And even this declaration issued is related to transport of electricity as a good, and not to the capacity of the interconnectors. Therefore, it is done **after** the auctions and it cannot be a precondition for participation to auctions.

ECS position is that the request for approval of the purchase/supply contracts with Energorynok and foreign companies as a precondition for participating in an auction; requiring their validity to be the same as the time for which allocation of capacity is requested is discriminatory and represents an administrative barrier to trade.

c) *Defining improper participants and its consequences*

UA concern: the objective for having such a strict consequence as exclusion from participation to the auction in question and the capacity allocation auctions in the next six months, is to check the seriousness of the applicants; to prevent that more than 200 applicants from applying at all auctions even though they do not fulfill the conditions; and to incentivize only the serious and well prepared undertakings to participate.

ECS recommendation: The existing procedure is a very serious breach of Energy Community law, and the measures imposed are not proportionate to the objective to be achieved – to check the seriousness of the applicants for participation to auctions.

Section 2.13 of the Congestion Management Guidelines provides for financial consequences of failure to honour obligations stemming from the allocation of capacity. The Guidelines stipulate that where market participants fail to use the capacity that they have committed to use, or, in the case of explicitly auctioned capacity, fail to trade on a secondary basis or give the capacity back in due time, they shall lose the rights to such capacity and pay a cost-reflective charge. Any cost-reflective charges for the non-use of capacity shall be justified and proportionate and the “*key concepts and methods for the determination of liabilities that accrue upon failure to honour obligations*” shall be set out in advance in respect of the financial consequences, and shall be subject to review by the relevant national regulatory authority. This provision in essence stipulates that:

- a use-it-or-lose-it principle shall apply;
- a use-it-or-sell-it and
- besides losing non-used capacity, the consequence of not using acquired capacity shall be the payment a cost-reflective charge defined in advance.

Section 2.13 lists the consequences of non-usage of capacity in an exhaustive manner, and does not allow for further sanctions such as those constituting “improper” behaviour under the Auction Rules of Ukraine. Denial of access to interconnectors and depriving an undertaking to participate in several consecutive auctions is not allowed by any of the provisions of the *acquis*, and is not considered as a possibility even in cases when the undertakings fail to honour their obligations from the auctions.

Furthermore, the consequences envisaged by Section 2.13 of the Congestion Management Guidelines can be triggered only **after** capacity has been allocated and the winning undertaking has failed to use such capacity, or has failed to trade it on secondary basis. These consequences shall not be a precondition for participation in this one, or in another auction.

** ECS is sending a proposal of how use-it-or-lose-it principle should be defined.*

Please have a look at Article 12.2 of the CEE CAO (involving the TSOs from Austria, Czech Republic, Germany, Hungary, Poland, Slovakia, Slovenia) (pages 40-41) http://www.central-ao.com/images/uploads/Auctions2013/20121109_auction_rules_2013_binding.pdf

In relation to financial penalty, one example could be the Auction Rules of Transelectrica (Romania) and MAVIR (Hungary), Article 11: http://www.mavir.hu/documents/10262/177988529/Yearly+and+Monthly+Auction+Rules+TEL-MAVIR+2013_final.pdf/5427efe6-c2d9-4524-8935-5b919ecc8402

It reads: "In case of delayed payment MAVIR is entitled to charge default rates on a due amount for each commenced day of the delay. The default interest rate is calculated daily on the basis of yearly amount of the Effective Base Rate of MNB + 2%. Effective Base Rate is defined as the interest rate of National Bank of Hungary (Magyar Nemzeti Bank "MNB"). Its value is specified and published on website (www.mnb.hu) by the National Bank of Hungary."

ECS will check in more details and will send you in addition in the coming weeks, other examples from an EU Member State where a financial penalty as a cost-reflective charge is developed, in order to punish the not serious participants to the auction.

Please note that exclusion of participation in 6 consecutive auctions is not allowed.

*And the existing cases where capacity is lost or when financial penalty is imposed – is because of not honouring the obligations towards the TSO, **after** the capacity has been allocated. It is not a precondition for participation to an auction.*

3. The effect of the warranty deposit on trade in electricity

UA explanation: NERC informed that the draft amendments to the Allocation Rules, currently in public consultation, amend this provision in line with ECS comments from the Opening Letter. Instead of payment of a warranty deposit, now there is a requirement for bank guarantee. In relation to the amount of the deposit, which was found to be excessive in the ECS analysis in the Opening Letter, NERC explained that the formula for calculating the amount has been also changed.

** UA will translate the draft amendments and will send them to the ECS.*

ECS view: Upon receiving the translated draft amendments, the ECS will assess the compliance of the new provisions, in particular whether the formula for calculating the bank guarantee does not lead to requirement for excessive amount to be available as a precondition for participating to auction that would deter small undertakings from participation.

** ECS is sending an example showing that the requirements for guarantee deposit are not going beyond what is needed to cover the risk of non-payment for a capacity that has been allocated via the bidding procedure for all timeframes:*

The CEE CAO (involving the TSOs from Austria, Czech Republic, Germany, Hungary, Poland, Slovakia, Slovenia) procedure sets financial guarantees to cover the amount that the applicant bids. This is defined in the auction rules for 2013 (pages 17-21) http://www.central-ao.com/images/uploads/Auctions2013/20121109_auction_rules_2013_binding.pdf and it is based on 2 instruments: bank guarantees, deposits or a combination of the two.

The calculation of the credit limit is defined in Article 4.4. required to cover the full amount of the placed bids providing examples in Annex 14. Also Article 4.5 provide indication how the credit limit it is utilised.

In CASC (Central West Europe Region (CWE), Central South Europe Region (CSE) and Switzerland) there are different requirements, only a business account bank that will serve also for the payment of the allocated capacity. The requirement is to keep always a positive disposable balance for the account (page 22). http://www.casc.eu/media/pdf/Harmonized%20Auction%20Rules%20Doc/Rules%20for%20Capacity%20Allocation%20by%20Explicit%20Auctions_V1%200_CWE%20CSE%20and%20Switzerland.pdf

Therefore, in both cases, the requirements are not going beyond what is needed to cover the risk of non-payment for a capacity that has been allocated via the bidding procedure for all timeframes (Y, M, D if applicable).

4. Capacity allocation in the case of non-congested interconnectors

UA explanation: the Ministry informed that the draft Electricity Market Law, currently in parliamentary procedure, provides a possibility for having allocation of interconnectors' capacity without paying a price.

ECS view: even in the existing Electricity Law there is nothing that prevents amendment of this provision in the Allocation Rules. Article 30 of the existing Law that deals with allocation of cross-border capacity stipulates that "NERC shall determine ...the initial price for access to cross-border transmission capacity..."

This gives a possibility for NERC to amend the existing Allocation Rules by explicitly determining that in case there is no congestion at the interconnector, there will be no price paid for the capacity.

** UA shall draft amendments to the existing Allocation Rules providing a possibility for obtaining interconnectors' capacity without payment in case there is no congestion even before the new Electricity Law is adopted, and will send them to ECS for review.*

5. Curtailing allocated capacity in cases of "unplanned shortages"

UA explanation: Ukrenergo explained that curtailing of capacity is only related to technical issues and unavailability of interconnectors' capacity, and that all possibilities for performing curtailment are clearly defined in the contracts concluded between Ukrenergo and the electricity undertakings participating to the auctions.

ECS view: the reasons and cases when curtailing is possible only in emergency situations and shall be applied in a non-discriminatory manner. NERC to define these possibilities in one provision of the Allocation Rules stating that curtailment is possible in emergency situations only and shall define the list of what is considered as "emergency situations".

** UA will send to ECS draft of this provision for review.*

6. Secondary trading

UA explanation: there is a possibility for transfer of allocated capacity in the existing Allocation Rules.

ECS view: Article 9 of the Ukrainian Allocation Rules stipulates that the “*obligations and rights of a winner of the auction cannot be transferred or assigned to other persons except for cases established by this procedure.*” The only possibility for transferring the allocated capacity between the different participants in the auction is in “*case of dissolution of access contract made as a result of monthly auctions.*”

* **ECS is sending** (above) a proposal of how use-it-or-lose-it principle should be defined.

Secondary trading on the other hand is an obligation from Section 2.12 of the Congestion Management Guidelines that requires capacity to “*be freely tradable on a secondary basis, provided that the TSO is informed sufficiently in advance,*” and when the transmission system operator “*refuses any secondary trade (transaction), this must be clearly and transparently communicated and explained to all the market participants by that TSO and notified to the Regulatory Authority.*”

7. Non-compliance with Section 5.6 Congestion Management Guidelines and the principle of legal certainty

UA explanation: NERC informed that the draft amendments to the Allocation Rules, currently in public consultation, amend this provision in line with ECS comments from the Opening Letter. There is now a clear provision stating that “*new rules enter into force at the day of official publication but shall be applied after one month from the moment that they enter into force.*”

* **UA will translate** the draft amendments and will send them to the ECS.

ECS view: Upon receiving the translated draft amendments, the ECS will assess the compliance of the new provisions and will inform Ukraine about the findings.

Future steps:

As agreed during the meeting, ECS:

- Is sending the minutes of the meeting outlining the expectations from the Ukrainian authorities, and is attaching examples of other Contracting Parties and EU Member States together with its recommendations of how the concerns raised in the Opening Letter could be solved;
- In particular, **ECS is sending:**
 - a) example from Hungary showing how it is possible also for Ukraine to develop different procedures for allocation of interconnectors' capacity for different interconnectors addressing the Ukrainian concern of having different procedures for the interconnectors with EU Member States and Moldova (complying with Energy Community law) and Russian Federation and Belarus;
 - b) procedure and sample of declaration issued by other TSOs (Macedonia for now, the Secretariat will check for other examples and send them to Ukraine in the coming weeks) regarding approval of technical issues such as borders and

- quantity of electricity transported with the purpose for submitting it to the customs authorities for payment of VAT;
- c) example of how use-it-or-lose-it principle should be defined;
 - d) example from an EU Member State (Romania and Hungary) where financial penalty as a cost-reflective charge is developed in line with Section 2.13 of the Congestion Management Guidelines in order to address the Ukrainian concern to verify the seriousness of the applicants for participation to an auction and to incentivize them to comply with the requirements;
 - e) an example from CEE CAO showing that the requirements for guarantee deposit are not going beyond what is needed to cover the risk of non-payment for a capacity that has been allocated via the bidding procedure for all timeframes.

Ukraine shall:

- translate the draft amendments of the Allocation Rules that NERC prepared and are in public consultation and will send them to the Secretariat;
- explain and justify the need for having a supply license for supply at non-regulated tariffs and to prove that it is not a disproportionate requirement becoming an obstacle for trade of electricity (explaining the requirements for issuing a license; the time needed for obtaining such license; the number of market participants that have obtained such license).
- send to ECS detailed explanation of why approval of contracts is needed; what is the link with the customs authorities; what kind of tax or fee is paid by exporters and importers of electricity;
- send draft provision defining emergency situations when curtailment of capacity is possible and will send it to ECS for review;
- draft provision providing a possibility for obtaining interconnectors' capacity without payment in case there is no congestion;
- draft new Allocation Rules addressing all the above mentioned issues, taking into consideration the examples of best practices sent by the ECS and will send them to the ECS preferably before the holidays season;
- Ukrenergo, NERC directly or via the Ministry shall address the ECS with any question regarding Secretariat's recommendations and proposal and will inform the Secretariat about any difficulty to comply with the Secretariat's requirements.

After ECS receives new draft Allocation Rules, another working meeting shall be organized either in Kiev or in Vienna, discussing the detailed provisions of the new Allocation Rules. The adoption of the new Electricity Law shall not be precondition for drafting new Allocation Rules. The objective is to have the new compliant rules adopted before the annual auction for 2014 is held.



**МІНІСТЕРСТВО ЕНЕРГЕТИКИ ТА
ВУГІЛЬНОЇ ПРОМИСЛОВОСТІ УКРАЇНИ**
(Міненерговугілля України)

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31.07.2013 № 03/18-4026

На № _____ від _____

**Директору Секретаріату
Енергетичного Співтовариства
пану Я. Копачу**

Шановний пане Копач!

Міністерство енергетики та вугільної промисловості України висловлює високе задоволення у повазі та у відповідності із протокольним рішенням зустрічі представників Секретаріату Енергетичного Співтовариства (далі – СЕС), Міністерства енергетики та вугільної промисловості України, Національної комісії, що здійснює державне регулювання у сфері енергетики (НКРЕ), ДП «Енергорино» та ДП «НЕК «Укренерго», яка відбулася у м. Київ 12 червня 2013 року, повідомляє наступне.

Перш за все слід відмітити, що НКРЕ розробило проект поправок до Порядку проведення аукціонів щодо доступу до пропускної спроможності міждержавних електричних мереж України для експорту електричної енергії (далі - Порядок), які наразі знаходяться на стадії громадських обговорень. Надаємо переклад зазначеного проекту поправок до Порядку на розгляд СЕС (додається).

Також слід зазначити, що згідно зі статтею 13 Закону України «Про ліцензування певних видів діяльності» діяльність в електроенергетиці підлягає ліцензуванню відповідно до спеціальних законів.

Так, згідно зі статтею 6 Закону України «Про природні монополії», діяльність з постачання електричної енергії належить до суміжних ринків, що регулюються відповідно до цього Закону. Статтею 7 цього ж Закону визначено, що діяльність суб'єктів природних монополій у визначених Законом сферах, а також діяльність суб'єктів господарювання на суміжних ринках підлягає ліцензуванню відповідно до закону.

Відповідно до статті 13 Закону України «Про електроенергетику», діяльність з виробництва, передачі та постачання електричної енергії в Україні здійснюється за умови отримання відповідної ліцензії, які видаються Національною комісією, що здійснює державне регулювання у сфері енергетики. Ліцензія видається окремо на кожний вид діяльності відповідно до інструкції, умов і правил здійснення окремих

видів діяльності, що затверджуються Національною комісією, що здійснює державне регулювання у сфері енергетики.

Таким чином, у разі здійснення діяльності з постачання електричної енергії, суб'єкт господарювання має отримати відповідну ліцензію.

НКРЕ здійснює видачу ліцензій на право провадження певних видів господарської діяльності в електроенергетиці відповідно до Інструкції про порядок видачі ліцензій Національною комісією регулювання електроенергетики на здійснення окремих видів підприємницької діяльності, затвердженої постановою НКРЕ від 06.10.99 № 1305 (далі – Інструкція).

Відповідно до пунктів 2.2, 2.3, 2.5 та 2.6 Інструкції, для отримання ліцензії на кожний вид діяльності суб'єкт підприємницької діяльності подає до НКРЕ заяву за встановленою формою (додаток 1 до Інструкції). До заяви додаються документи згідно з Переліком документів на певний вид підприємницької діяльності (додатки 2 - 7, 24, 25).

Перелік документів, що має додаватися до заяви про видачу ліцензії з постачання електричної енергії за нерегульованим тарифом (далі – Перелік), визначено додатком 6 до Інструкції, та включає наступні документи:

- доручення на право представництва заявника (у разі потреби),
- документ про внесення плати за видачу (переоформлення) ліцензії,
- копія статуту (нотаріально посвідчена),
- опис заявленої діяльності,
- документ, що підтверджує Норматив достатності власних активів суб'єктів підприємницької діяльності (копія бухгалтерської звітності ф-№ 1 за звітній період).

Відповідно до пункту 2.7 Інструкції, НКРЕ приймає рішення про видачу ліцензії в термін не пізніше ніж 30 днів з дня отримання заяви та відповідних документів. На сьогодні, за фактом видачі зазначених ліцензій НКРЕ, середній термін видачі ліцензії з постачання електричної енергії за нерегульованим тарифом – 10 робочих днів з дня отримання заяви та відповідних документів.

Також повідомляємо, що станом на 01.07.2013 ліцензії з постачання електричної енергії за нерегульованим тарифом мають 261 суб'єкт господарювання.

Крім того слід відмітити, що для Української сторони принципово узгодження технічних умов виконання експортних та імпорتنих поставок електричної енергії, тому системний оператор вимагає узгоджувати таке:

1. Напрямок, максимальну потужність міждержавної поставки електроенергії,
2. Перелік міждержавних ліній електропередачі (ЛЕП), по яким фактично здійснюється поставка електроенергії з/до ОЕС України (або її частин) до/з відповідних енергосистем суміжних країн (енергетичних об'єднань),
3. Розрахунковий період поставки електроенергії,
4. Порядок планування графіків поставки електроенергії та її облік за центральноєвропейським часом (СЕТ),
5. Регламент планування графіків поставок,
6. Положення про уточнення графіку поставки електроенергії при тижневому та/або добовому плануванні,
7. Положення про те, що непередбачувані зміни в уточнених добових графіках поставки електроенергії можуть бути узгоджені операторами систем електропередачі

(Технічними виконавцями) в оперативному порядку з наступним повідомленням Сторонам Контракту,

8. Положення про те, що поставки електроенергії можуть бути оперативно скорочені або припинені з моменту настання випадків форс-мажору,

9. Положення про визначення фактичного обсягу поставленої електроенергії за розрахунковий період з урахуванням умов технічних договорів з операторами суміжних енергосистем та фактичних перетоків по міждержавним ЛЕП, вказаних у переліку, приведених до умов поставки,

10. Підтвердження наявності ідентифікаційного коду EIC (Energy Identification Code) при постачанні електроенергії до енергосистем Словаччини, Угорщини, Румунії та Польщі,

11. Положення про оперативне корегування графіку негарантованої поставки електроенергії на експорт з «Острова БуТЕС» з підтвердженням його погодження одним або декількома системними операторами Регіональної Групи «Континентальна Європа» суміжних енергетичних систем. Оперативне корегування узгодженого графіку експорту електричної енергії з «Острова БуТЕС» повинно бути оформлено в вигляді додаткових угод про надання аварійної допомоги або купівлі потужності, тощо.

При цьому, вважаємо за доцільне ці умови відзначити у договорі безпосередньо із ДП «НЕК «Укренерго», наприклад, у Договорі про доступ до пропускної спроможності міждержавних електричних мереж України. Або, як було запропоновано представниками СЕС на зустрічі, запровадити реєстрацію учасників аукціону та внести зазначені вимоги як зобов'язання експортера/імпортера у реєстраційній формі. Це питання розглядається та буде вирішено під час перегляду Порядку для експорту електричної енергії.

Крім того, зазначаємо, що податки або збори оплачуються експортерами та імпортерами електроенергії згідно з митним законодавством України.

Згідно з частиною 1 Статті 75 та частиною 1 Статті 83 Митного кодексу України від 13.03.2012 № 4495-VI (далі – МКУ) до товарів, що надходять на митну територію України, може бути застосований митний режим імпорту, до товарів, що призначені для вивезення за межі митної території України, та до товарів, що вже вивезені за межі цієї території та перебувають під митним контролем, може бути застосований митний режим експорту. При цьому пунктом 2 частини 3 Статті 75 та пунктом 2 частини 2 Статті 83 МКУ передбачена сплата митних платежів, якими відповідно до законів України обкладаються товари під час ввезення на митну територію України в режимі імпорту та вивезення за межі митної території України у митному режимі експорту.

Пункт 27 частини 1 Статті 4 МКУ визначає, що митні платежі складаються з:

- а) мита;
- б) акцизного податку із ввезених на митну територію України підакцизних товарів (продукції);
- в) податку на додану вартість із ввезених на митну територію України товарів (продукції).

Відповідно до частини 1 Статті 272 та частини 1 Статті 273 МКУ ввізне мито встановлюється на товари, що ввозяться на митну територію України, вивізне мито встановлюється законом на українські товари, що вивозяться за межі митної території України.

Згідно з частиною 4 Статті 280 цього Кодексу ввізне мито на товари, митне оформлення яких здійснюється в порядку, встановленому для підприємств, нараховується за ставками, встановленими Законом України «Про Митний тариф України» від 05.04.2001 № 2371-III (далі – Митний тариф України).

При цьому частиною 5 Статті 280 МКУ визначено, що ввізне мито є диференційованим щодо товарів, що походять з держав, які спільно з Україною входять до митних союзів або утворюють з нею зони вільної торгівлі. У разі встановлення будь-якого спеціального преференційного митного режиму згідно з міжнародними договорами, згода на обов'язковість яких надана Верховною Радою України, застосовуються преференційні ставки ввізного мита, встановлені Митним тарифом України.

До товарів, що походять з України або з держав - членів Світової організації торгівлі, або з держав, з якими Україна уклала двосторонні або регіональні угоди щодо режиму найбільшого сприяння, застосовуються пільгові ставки ввізного мита, встановлені Митним тарифом України, якщо інше не встановлено законом.

До решти товарів застосовуються повні ставки ввізного мита, встановлені Митним тарифом України.

Згідно з Митним тарифом України пільгова та повна ставки ввізного мита, яке справляється з товару (електроенергії), що ввозиться на митну територію України, становить 2 відсотки. У разі застосування преференційної ставки ввізного мита – мито не справляється.

Діючим законодавством не передбачено встановлення вивізного мита на електричну енергію.

Відповідно до Статті 215 Податкового кодексу України від 02.12.2010 № 2755-VI (далі – ПКУ) електроенергія не входить до переліку піддакцизних товарів.

Щодо податку на додану вартість, то згідно з підпунктами "в" та "г" пункту 185.1 Статті 185 ПКУ об'єктом оподаткування є операції платників податку з ввезення товарів на митну територію України та вивезення товарів за межі митної території України. Пунктом 194.1 Статті 194, підпунктом «а» пункту 193.1 Статті 193 та пунктом 10 підрозділу 2 перехідних положень цього Кодексу ставка податку встановлюється від бази оподаткування при ввезенні товарів на митну територію України у розмірі 20 відсотків, а підпунктом «а» пункту 195.1.1 Статті 195 та підпунктом «б» пункту 193.1 Статті 193 цього Кодексу операції з вивезення товарів за межі митної території України у митному режимі експорту оподатковуються за нульовою ставкою.

Разом з тим, інформуємо, що проект положення, що визначає аварійні ситуації, коли скорочення пропускної спроможності є можливим, може бути підготовлений як окремий нормативний акт, але ґрунтуватись він повинен на визначених поняттях форс мажорних обставин, зокрема, будь-яка непередбачувана та/або незвична подія чи ситуація поза межами контролю Системного Оператора, що виникла не через вину Системного Оператора і яку не можливо було уникнути чи подолати усіма прийнятними зусиллями, яка не може бути вирішена заходами, які з технічної, фінансової та/або економічної точки зору були б можливими для Системного Оператора, яка фактично трапилась і може бути об'єктивно доведена, і яка робить неможливим для Системного Оператора виконання тимчасово або повністю своїх зобов'язань;

Відповідно до статі 30 Закону України «Про електроенергетику» доступ до пропускної спроможності міждержавних мереж України для експорту електричної енергії надається на умовах аукціону, а переможцем аукціону визначається суб'єкт електроенергетики, який запропонував найвищу ціну. Відповідно до Закону України «Про ціни та ціноутворення» та Господарського кодексу України ціна є вираженим у грошовій вартості формі еквівалентом одиниці товару, що підлягає продажу.

Таким чином, на сьогоднішній день доступ до пропускної спроможності міждержавних електричних мереж України повинен бути оплачений.

Разом з тим зазначаємо, що врахування у Порядку проведення аукціонів щодо доступу до пропускної спроможності міждержавних мереж України для експорту електричної енергії всіх зауважень Секретаріату Енергетичного Співтовариства буде здійснюватися паралельно із внесенням змін до чинного законодавства України.

Слід відмітити, що Українська сторона вважає, що на сьогодні відсутні будь-які перешкоди щодо вирішення зазначених питань для врегулювання суперечливих питань відносно процедури розподілу міждержавної пропускної спроможності на міждержавних лініях електропередач України, та підтримує Вашу пропозицію щодо необхідності прийняття нових узгоджених правил розподілу пропускної спроможності до проведення річного аукціону на 2014 рік.

Разом із тим, користуючись пропозицією СЕС щодо спільного розгляду рекомендацій і пропозицій Секретаріату та вирішення питань їх дотримання, звертаємось з проханням, шановний пане Копач, розглянути можливість на прикладах інших Сторін Договору про заснування Енергетичного Співтовариства і держав-членів ЄС, а також із урахуванням рекомендацій, піднятих в Відкритому Листі, розробити силами фахівців СЕС новий Порядок проведення аукціонів щодо доступу до пропускної спроможності міждержавних електричних мереж України для експорту та імпорту електричної енергії.

З повагою

Заступник Міністра



С.Чех

**Director
Energy Community Secretariat
Mr. KOPAČ Janez**

Dear Mr. KOPAČ!

Ministry of Energy and Coal Industry of Ukraine expresses the assurance of its high respect, and According to the Minutes of Meeting held between the representatives of Energy Community Secretariat (hereinafter – ECS), Ministry of Energy and Coal Industry of Ukraine, National Energy Regulatory Commission (hereinafter – NERC), SE “Energorynok” and NPC “UKRENERGO” in Kyiv on June 12, 2013 we hereby inform you about the following.

First of all, one should mention that NERC has worked out the draft Amendments to the Procedure for Auctions of Cross-Border Transmission Capacity Allocation of Ukrainian Interconnectors for Electricity Export (hereinafter – Procedure) being at present under public discussions. We hereby provide you with the translation of the mentioned draft Amendments to the Procedure for ECS consideration (see attached).

Also, according to the Article 13 of the Law of Ukraine «On licensing of certain kinds of activities», the activity in energy sector is subject to licensing according to the specific laws.

Thus, according to the Article 6 of the Law of Ukraine “On nature monopolies”, activity on energy supply belongs to related markets being regulated by this Law. Article 7 of this Law stipulates that both activity of nature monopolies’ entities in areas, defined by the Law, and activity of economic entities in related markets are subject to licensing according to the legislation.

According to the Article 13 of the Law of Ukraine “On electricity”, *activity on production, transportation and supply of electricity in Ukraine is provided subject to certain license acquisition, granted by the National Energy Regulatory Commission. The license is granted separately depending on the kind of activity according to the instruction, conditions and rules of realization of certain kinds of activities, which are approved by the National Energy Regulatory Commission.*

Thereby, in case of realization of activity on electricity supply, economic entity has to obtain a corresponding license.

NERC issues licenses on rights of conduct of certain kinds of economic activity in energy sector in accordance with the Instruction on order of license issuance by the National Energy Regulatory Commission on realization of certain kinds

of entrepreneurial activity, which is approved by NERC Regulation dated 06.10.99 № 1305 (hereinafter – Instruction).

According to points 2.2, 2.3, 2.5 and 2.6 of the Instruction, in order to obtain a license on every kind of activity, entrepreneurial activity entity submits the application (of the set form given in Appendix 1 to the Instruction) to NERC. According to the List of documents on certain kind of entrepreneurial activity (Appendices 2 - 7, 24, 25), the corresponding documents are attached to the application.

The list of documents to be attached to the application on license issuance on electricity supply by non-regulated tariff is defined in Appendix 6 to the Instruction and includes the following:

- power of attorney on right of representation of the applicant (is necessary),
- documents on confirmation of payment for the issuance (re-issuance) of license,
- notarized copy of Charter,
- description of the announced activity,
- document confirming the Standard of owned assets sufficiency of the entrepreneurial activity entities (copy of accounting reporting form № 1 for the reporting period).

According to the point 2.7 of the Instruction, NERC decides on license issuance during no more than 30 days beginning from the day of the application and corresponding documents receipt. At present, based on actual licenses issuance by NERC, the average term for license issuance on electricity supply by non-regulated tariff is 10 working days beginning from the day of the application and corresponding documents receipt.

We also inform you that as of July 01, 2013 261 economic entities obtained licenses on electricity supply by non-regulated tariff.

In addition, one should be noted that for the Ukrainian Party it's fundamental to agree the technical conditions of export/import electricity supply execution, therefore TSO requires to agree the following:

1. Direction, maximum capacity of cross-border electricity supply,
2. List of cross-border transmission lines actually used for electricity supply from/to IPS of Ukraine (or its part) to/from corresponding power systems of neighbouring countries (energy associations),
3. Settlement period of electricity supply,
4. The order of electricity supply scheduling and electricity accounting by CET,
5. Regulation of supply scheduling,
6. Provision on electricity supply schedule correction when weekly and/or daily planning,
7. Provision to the effect that unforeseen changes in corrected daily schedules of electricity supply may be agreed by the TSOs (technical executors) in on-line mode with further notifications to the Contracting Parties,
8. Provision to the effect that the electricity supplies may be operatively curtailed or suspended at the moment when Force Majeure occurs,
9. Provision on calculation of actual volume of supplied electricity for the settlement period taking into account the technical agreements provisions with neighbouring TSOs and actual electricity flows on cross-border transmission lines indicated in the list, estimated to the conditions of the supply,
10. Confirmation of obtained EIC code when supplying electricity to Slovakia, Hungary, Romania and Poland,

11. Provision on operative correction of schedule of non-guaranteed electricity supply in direction of export from “Burshtyn TPP Island” with confirmation of its agreement by one or more RG CE TSOs of neighbouring power systems. Operative correction of agreed schedule of electricity export from “Burshtyn TPP Island” has to be formalized as Additional Agreements on Emergency Supply Provision or capacity purchase, etc.

At the same time, we consider reasonable to reflect the mentioned conditions in the agreement directly with NPC “UKRENERGO”, e.g. in the Contract for Access to Transmission Capacity of Ukrainian Interconnectors. Or, as it was proposed by the representatives of ECS on the meeting, introduce the registration of auction participants and include the mentioned conditions as the obligations of exporter/importer in the registration form. This issue is under discussion and it will be solved during the Procedure review.

In addition, we would like to mention that charges and fees are paid by the electricity exporters and importers in accordance with customs legislation of Ukraine.

According to part 1 of the Article 75 and part 1 of Customs Code of Ukraine dated 13.03.2012 № 4495-VI (hereinafter – CCU) the Import customs regime may be applied to the commodities arriving to the customs territory of Ukraine, and Export customs regime may be applied to the commodities assigned to be removed from the customs territory of Ukraine and to the commodities already removed outside the customs territory of Ukraine and being under the customs supervision. At that, payment of customs fees imposed according to the legislation of Ukraine on the commodities arriving to the customs territory of Ukraine in Import customs regime and commodities removing outside the customs territory of Ukraine in Export customs regime is specified in point 2 of part 3 of the Article 75 and point 2 of part 2 of the Article 83 of CCU.

Point 27 of part 1 of the Article 4 of CCU stipulates that customs fees comprise the following:

- a) duty;
- b) excise tax imposed on the excisable commodities (products) imported to the customs territory of Ukraine;
- c) value-added tax on the commodities (products) imported to the customs territory of Ukraine.

According to part 1 of the Article 272 and part 1 of the Article 273 of CCU, import duty is imposed on the commodities imported to the customs territory of Ukraine, and export duty is imposed by the law on Ukrainian commodities exported outside the customs territory of Ukraine.

According to part 4 of the Article 280 of CCU, import duty imposed on commodities which customs clearance is executed by the order established for the enterprises, is calculated according to the rates determined by the Law of Ukraine “On Customs Tariff of Ukraine” dated 05.04.2001 № 2371-III (hereinafter – Customs Tariff of Ukraine).

In addition, part 5 of the Article 280 of CCU stipulates that import duty is differentiated with respect to the commodities from the countries that, together with Ukraine, are members of customs unions or form the free trade area with Ukraine. In case of applying any specific preferential customs regime in accordance with foreign agreements, consent of obligatoriness of which is granted by Verkhovna Rada of Ukraine

(the Parliament), the preferential import duty rates, defined by the Customs Tariff of Ukraine, are applied.

The preference import duty rates, defined by the Customs Tariff of Ukraine, are applied (if other is not defined by the legislation) to the commodities from Ukraine or countries-members of WTO, or from countries having bilateral or regional agreements with Ukraine as regards the Most Favored Nation Treatment.

To the rest of commodities full import duty rates are applied, defined by the Customs Tariff of Ukraine.

According to the Customs Tariff of Ukraine, preference and full import duty rates, charged from the commodity (electricity) imported to the customs territory of Ukraine, is 2 percents. In case of applying the preferential import duty rate – duty is not charged.

Valid legislation does not foresee the application of export duty on electricity.

According to the Article 215 of Tax Code of Ukraine dated 02.12.2010 № 2755-VI (hereinafter – TCU), electricity is not included to the list of excisable commodities.

As regards the value-added tax, according to subpoints "B" and "r" of point 185.1 of the Article 185 of TCU, taxable objects are operations of taxpayers as to importing commodities to the customs territory of Ukraine and exporting commodities outside the customs territory of Ukraine. According to point 194.1 of the Article 194, subpoint «a» of point 193.1 of the Article 193 and point 10 of subsection 2 of the transitional regulations of TCU, the tax rate is defined from the base of taxation when importing commodities to the customs territory of Ukraine in amount of 20 percents, and according to subpoint «a» of point 195.1.1 of the Article 195 and subpoint «б» of point 193.1 of the Article 193 of TCU operations of exporting commodities outside the customs territory of Ukraine in Export customs regime are taxable on zero rate.

In addition, we hereby inform you that draft provision as regards the emergency situations, when capacity curtailment is possible, may be prepared as a separate normative act, but it has to be based on the defined concept of Force Majeure, namely: any unforeseen and/or unusual event or situation beyond TSO control, occurred through no fault of the TSO and which could not be avoided or overcome by any effort, which cannot be resolved by the facilities being feasible for the TSO from technical, financial and/or economical point of view, which actually happened and may be objectively proved and which makes it impossible for the TSO to temporarily or completely fulfill its obligations;

According to the Article 30 of the Law of Ukraine “On electricity”, the access to the transmission capacity of Ukrainian interconnectors for electricity export is granted based on the auction, and the winner of the auction is the energy sector entity which offered the highest price. According to the Law of Ukraine “On Prices and Price Formation” and Commercial Code of Ukraine, the price is equivalent of unit subject to selling, denominated in form of monetary value.

Thereby, at present the access to the transmission capacity of Ukrainian interconnectors has to be paid.

At the same time we inform you that incorporation in the Procedure for Auctions of Cross-Border Transmission Capacity Allocation of Ukrainian Interconnectors for Electricity Export all the ECS comments and remarks will be implemented in parallel with the incorporation of changes to the valid legislation of Ukraine.

We would like to stress that Ukrainian Party believes that at present there are no barriers for resolving the mentioned controversial issues related to the rules of cross-border transmission capacity allocation of Ukrainian interconnectors, and we support your proposal of the necessity to have the new compliant capacity allocation rules adopted before the annual auction for 2014 is held.

In addition, having ECS proposal regarding the common consideration of recommendations and comments of Secretariat and joint decision on its compliance, we address you, dear Mr. Kopač, with the request to consider the possibility, based on other Energy Community Treaty countries and EU member states example and taking also into account the recommendations raised in the Opening Letter, to work out a new Procedure for auctions of cross-Border transmission capacity allocation of Ukrainian interconnectors for electricity export and import by the ECS experts.

Sincerely yours,

Sergiy CHEKH
Deputy Minister

Energy Community Secretariat

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Mr. Sergey TITENKO, President
National Electricity Regulatory Commission
(NERC).
19 Smolenska Str.
Kiyv 03680
UKRAINE

Dear Mr. Titenko,

Vienna, 05 June 2014

UA-ECS/O/05-06-14

I am addressing you in relation to the Draft Regulation of NERC dated 19 May 2014 on Procedure of online auctions for allocation of transfer capacities of cross-border electricity networks (Auction Rules) available at NERC's website for public consultation.

The Secretariat reviewed the draft Auction Rules against Ukraine's obligations as a Contracting Party to the Treaty establishing the Energy Community, to which it acceded in February 2011. We believe improvement is still needed in order to achieve compliance with the Energy Community *acquis* and our **main concerns** relate to the following:

- The requirement for a purchase/supply contracts with the Wholesale Electricity Supplier *Energorynok* as a precondition for participating in an auction is discriminatory and represents an administrative barrier to trade. The electricity market should be clearly separated from the access to interconnectors' capacity, as the later is a right to system users pursuant to the Directive 2003/54/EC and not a market. This issue of non compliance was already expressed in the Opening Letter sent to UA in Case ECS-1/12, and was part of all the follow-up discussions held with the Ukrainian institutions and companies. The incompliance should be removed with the new Auction Rules and not as from 2017 pursuant to the new electricity market model.
- Priority reservation of capacity to interconnectors amounts to discrimination and infringes one of the main principles of Energy Community *acquis* expressed in Article 7 of the Energy Community Treaty. All capacity should be allocated at auction and no reservation according to legislation in advance shall be allowed.
- The draft Auction Rules define only unilateral auctions. Instead, they shall include elements allowing for joint allocations and a common congestion management procedure, which is a requirement pursuant to the Congestion Management Guidelines and the Regulation (EC) 1228/2003.

Besides these main concerns, the Secretariat has prepared a comprehensive review and more detailed comments on specific provisions from the draft rules are available and could be shared if so requested. However, the concerns expressed above represent essential requirements for achieving compliance by Ukraine pursuant to its obligations under Energy Community law, and if

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not addressed with the new Auction Rules the Secretariat will continue with further enforcement through the dispute settlement procedure initiated in Case ECS-1/12.

Given the importance of the issues addressed, we strongly believe that it would be mutually beneficial for Ukraine and the Secretariat to coordinate the efforts in elaborating Auction Rules compliant with the Energy Community *acquis*. In that regards, the Energy Community Secretariat finds of significant importance to discuss the document before its adoption with NERC, as an institution responsible for drafting and adopting allocation rules, as well as with the transmission system operator *Ukrenergo*, as an undertaking responsible for their implementation.

Having that in mind, the Energy Community Secretariat would like to invite experts from both NERC and *Ukrenergo*, for a meeting in Vienna in order to discuss in details the draft Auction Rules in light of their compliance with the Energy Community law.

We would like to propose **17 June 2014** for the meeting in Vienna.

Based on the results of this meeting, the Energy Community Secretariat would be ready to support an additional meeting between *Ukrenergo* and its neighbouring TSOs aimed at strengthening TSO cooperation on cross-border capacity allocation in line with the *acquis*.

For any further questions or comments related to this proposal, the Energy Community Secretariat remains at your disposal. We are looking forward to your confirmation at your earliest convenience.

Regards,

On behalf of the Deputy Director/Legal Counsel,
Mr. Dirk Buschle

Rozeta Karova
Energy Lawyer



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Copy to:

- Anatolii KHODAKIVSKYI, Director of *Ukrenergo*
- Oleg SHEVCHENKO, Ministry of Energy and Coal Industry of Ukraine

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Mr. Sergey TITENKO, President
National Electricity Regulatory Commission
(NERC).
19 Smolenska Str.
Kiyv 03680
UKRAINE

Dear Mr. Titenko,

Vienna, 22 July 2014
UA-ECS/O/22-07-14

I am addressing you with a follow-up to the very constructive meeting we had with representatives from the National Electricity Regulatory Commission of Ukraine (*NERC*), *Ukrenergo* and the EU twinning project in Vienna on 21 July 2014 in relation to the Draft Regulation of NERC dated 19 May 2014 on Procedure of online auctions for allocation of transfer capacities of cross-border electricity networks (Auction Rules). As you are aware, the discussion on the draft Auction Rules is a follow up to the Opening Letter sent by the Secretariat in Case ECS-1/12 initiating a dispute settlement procedure against Ukraine in relation to the procedure for allocation of cross-border capacity at interconnectors of Ukraine.

We found the meeting very relevant and useful as an expression of the cooperation between the Ukrainian institutions and companies and the Secretariat, in the process of adopting new Auction Rules and making the procedure for allocation of cross-border capacity in compliance with the Energy Community law. Notwithstanding the progress achieved with the current draft Auction Rules, during the meeting we discussed the main concerns due to which the Secretariat considers that the draft Rules still fail short of full compliance with the Energy Community *acquis*, by which Ukraine is bound as a Contracting Party to the Energy Community. The Secretariat is hereby sending you - as a summary of the discussions – the Secretariat's view and recommendations of how the incompliance should be rectified in the finalized version of the Auction Rules.

1. The requirement for a purchase/supply contracts with the Wholesale Electricity Supplier *Energorynok* as a precondition for participating in an auction is effectively discriminatory and represents an administrative barrier to trade. The electricity market should be clearly separated from the access to interconnectors' capacity, as the later is a right to system users pursuant to the Directive 2003/54/EC and the Regulation (EC) 1228/2003. This issue of non compliance was already expressed in the Opening Letter sent to Ukraine in Case ECS-1/12, and was part of all the follow-up discussions held with the Ukrainian institutions and companies.

ECS proposal: The requirement should be removed from the new Auction Rules at present and not as from 2017 (pursuant to the new electricity market model). In the Secretariat's view,

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it would not be incompliant with the current legal framework of Ukraine if agreement and debts to *Energorynok* are not stipulated as a precondition for participating to auctions for interconnection capacity, because allowing market participants to bid and effectively obtain capacity does not mean that they necessarily need to actually use (all, or parts, or any of) such capacity. If those successful bidders obtain capacity and for a certain reason do not have electricity (to export) or do not find a buyer of imported electricity, because they do not have a contract with *Energorynok*, or have a debt towards this entity, they are allowed to freely transfer it on the secondary basis, or they will lose the obtained capacity at the time of nomination on the use-it-or-lose-it (UIOLI) or use-it-or-sell-it (UIOSI) principle.

In this manner, all interested market players can participate to the auctions and will not be discriminated in any way against each other; and the UIOLI or UIOSI principles will ensure that the (excess) capacity is used or allocated in the next auction. This allows clear separation of the electricity market and the access to capacity at interconnectors where *Ukrenergo* is only tasked to deal with the allocation of the interconnectors' capacity in compliance with the EU *acquis*. In any case, if a Law or another act strictly requests such a precondition it does not need to be repeated in the Auction Rules.

- Priority reservation of capacity to interconnectors amounts to discrimination and infringes one of the main principles of Energy Community *acquis* expressed in Article 7 of the Energy Community Treaty. All capacity should be allocated at auction and no reservation according to legislation in advance shall be allowed.

During the meeting it was explained that priority reservation of interconnectors capacity only relates to possible exemption from TPA in decisions for exemption regarding new infrastructure, which can be considered and decided by NERC, on a case-by-case basis only.

ECS proposal: In order to ensure that no other exemption from TPA will be possible, and access to interconnectors shall be granted by *Ukrenergo* without discrimination, the Auction Rules shall contain one provision reading: "*Priority access to interconnectors, within these Auction Rules, is only limited to possible temporary exemptions granted by NERC, in relation to new infrastructure pursuant to the procedure developed in accordance with the Electricity Market law.*"

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3. The draft Auction Rules defines only unilateral auctions. Instead, they shall include elements allowing for joint allocations and a common congestion management procedure, which is a requirement pursuant to the Congestion Management Guidelines and the Regulation (EC) 1228/2003.

In the discussion it was underlined that *Ukrenergo* has already been considering and is planning soon to take the step of introducing coordinated auctions which is mainly a matter of available electronic platform and practical experience, with no principle legal obstacle. Therefore, the Auction Rules should address the required provisions for full compliance and to have them implemented according to their applicability (per border and/or direction).

ECS proposal: In order for Ukraine to comply with the obligation for applying common congestion management method and procedure for the allocation of capacity, the Auction Rules shall introduce one provision stipulating a possibility for either joining any of the existing common procedures, such as CAO, or to ensure establishment of any other common procedure with neighboring TSOs. Such provision may read: *“The transmission system operator shall cooperate with neighbouring transmission system operators on coordinating congestion management methods and implementing common allocation procedures. The transmission system operator shall be entitled to delegate the allocation of interconnection capacities and the provision of secondary trading to a regional platform.”*

These three concerns represent essential requirements for achieving compliance by Ukraine pursuant to its obligations under Energy Community law, and if not addressed with the new Auction Rules the Secretariat will continue with further enforcement through the dispute settlement procedure initiated in Case ECS-1/12. The Secretariat believes that the proposals for overcoming the outlined incompliance could be implemented within the existing Ukrainian legal framework. Please note however, that this is without prejudice to any amendment of the primary law regarding implementation of the Third energy package when any further incompliance with Energy Community law shall be addressed.

Besides these main concerns, the Secretariat has already submitted to NERC a comprehensive review and detailed comments on specific provisions from the draft Auction Rules and since concerns regarding those comments were not raised by the Ukrainian representatives during the meeting, the Secretariat presumes that they could be implemented in the finalised Auction Rules. Some of these aspects such as the definition of “product”, the treatment of consumers/generators

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in the scope of market participants allowed to participate in the allocations, aspects of imports and transits of electricity etc, were discussed at the meeting and it is Secretariat's strong advice to consider their adequate application. In case however NERC has further questions or problems with implementing any of those remarks, the Secretariat is at your disposal for clarification.

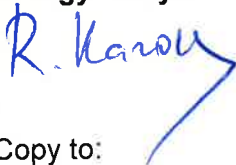
Finally, during the meeting the Ukrainian representatives informed that the framework Access Agreement that shall be signed by all interested auction participants shall be developed and published together with the Auction Rules as an Annex. In this line, the Secretariat would like to draw your attention and to invite you developing and publishing also a form for the bank guarantee together, as an Annex to the Auction Rules. Since submitting a proper financial guarantee is one of the preconditions for participation to the auctions, having a clear form and information on how such guarantee should look like is very important for compliance with the principle of legal certainty. For that reason, we are sending you attached the Hungarian example that you could use as a model.

As a next step, the Secretariat expects to receive the finalized version of the Auction Rules and to follow their timely implementation. In case you have difficulties and/or problems and you need more information or explanation during the drafting process, please do not hesitate to write an email or call us directly.

Regards,

On behalf of the Deputy Director/Legal Counsel,
Mr. Dirk Buschle

Rozeta Karova
Energy Lawyer



Copy to:

- Kostiantyn V.USHCHAPOVSKYI, Direktor of *Ukrenergo*
- Oleg SHEVCHENKO, Ministry of Energy and Coal Industry of Ukraine



УКРАЇНА

НАЦІОНАЛЬНА КОМІСІЯ, ЩО ЗДІЙСНЮЄ ДЕРЖАВНЕ
РЕГУЛЮВАННЯ У СФЕРІ ЕНЕРГЕТИКИ
(НКРЕ)

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e-mail: box@nerc.gov.ua, веб-сайт: www.nerc.gov.ua

21.07.2014

№

4361/14/44-14

на № _____

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

Національна комісія, що здійснює державне регулювання у сфері енергетики, висловлює свою повагу та щирю вдячність Секретаріату Енергетичного Співтовариства за ґрунтовний аналіз та детальні коментарі і пропозиції щодо положень проекту Порядку проведення електронних аукціонів з розподілення пропускної спроможності міждержавних електричних мереж (далі-Порядок).

У той же час, на думку Комісії, надані Секретаріатом Енергетичного Співтовариства коментарі та пропозиції в більшій мірі стосуються положень та термінології, визначених Законом України «Про засади функціонування ринку електричної енергії України» (далі – Закон України).

Так, враховуючи те, що Порядок був розроблений на виконання Закону України, в положеннях Порядку використовується поняття «енергопостачальник», у той час як пропозиції Секретаріату Енергетичного Співтовариства вказують на необхідність використання поняття «учасник ринку», що в певній мірі не кореспондується з положенням Закону України, оскільки його положеннями визначено, що «доступ до пропускної спроможності міждержавних електричних мереж з метою здійснення операцій з експорту та /або імпорту електричної енергії мають енергопостачальники які мають ліцензію на здійснення діяльності з постачання електричної енергії».

Порядком також визначено, що доступ до пропускної спроможності міждержавних електричних мереж надається виключно з метою здійснення операцій з експорту та /або імпорту електричної енергії, в той час як в рекомендаціях Секретаріату Енергетичного Співтовариства йдеться про

доступ до пропускної спроможності міждержавних електричних мереж надається з метою *передачі* електричної енергії.

Не в повній мірі зрозуміло необхідність заміни положень, що стосуються *пріоритетного доступу* на інші, оскільки Законом України визначено, що «Додаткові (збільшені) обсяги пропускної спроможності міждержавних електричних мереж, створені за рахунок інвестицій юридичної особи, що не є пов'язаною прямо або опосередковано відносинами контролю з підприємством, яке здійснює централізоване диспетчерське управління об'єднаною енергетичною системою України і передачу електричної енергії магістральними та міждержавними електричними мережами, можуть бути звільнені від процедури електронного аукціону» та «Пріоритетний доступ до додаткового (збільшеного) обсягу пропускної спроможності мають особи, за рахунок інвестицій яких відбулося збільшення пропускної спроможності міждержавних електричних мереж», що на думку Комісії у повній мірі відповідає вимогам Регламенту № 1228/2003 Європейського Парламенту та Ради від 26 червня 2003 року про умови доступу до мережі міжнародного обміну електроенергією.

Враховуючи зазначене, Комісія вважає за можливе запропонувати Секретаріату Енергетичного Співтовариства спільно з українською стороною продовжити роботу щодо опрацювання та за необхідності розробки необхідних змін до діючих нормативно-правових актів, які регулюють діяльність у сфері електроенергетики України з урахуванням положень Регламентів та Директив, які діють в енергетичній сфері Європейського Союзу.

З повагою,
Голова Комісії



С. Тітенко



UKRAINE

**NATIONAL COMMISSION FOR STATE ENERGY REGULATION
(NERC)**

вул. Смоленська, 19, м. Київ, 03680, тел./факс: (044) 277-30-47, тел.: (044) 204-48-27,
e-mail: box@nerc.gov.ua, веб-сайт: www.nerc.gov.ua

№ _____
на № _____

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

National Commission for State Energy Regulation sincerely thanks the Energy Community Secretariat for thorough analysis and detailed comments to the provisions of the draft Procedure of online auctions for allocation of transfer capacities of cross-border electricity networks (hereinafter – the Auction Rules).

However, in Commission opinion, comments provided by the Energy Community Secretariat are related mostly to the provisions and definitions determined by the Law of Ukraine “On the principles of electricity market operation in Ukraine” (hereinafter – the Law).

So, taken into account that the Auction Rules have been developed to implement the Law, the definition “**energy supplier**” is used in the provisions of the Auction Rules, while the ECS proposals indicate the need to use the definition “**market participant**”, that to some extent is not in line with the provisions of the Law, as it states that “*access to the capacity of cross-border electricity networks with the aim to perform activity of export and / or import of electricity have the **energy suppliers**, which received the license to perform activities from electricity supply*”.

The Auction Rules also defines that access to the capacity of cross-border electricity networks is provided only with the aim to perform activity of **export and / or import** of electricity, while the ECS recommendations envisage access to the capacity of cross-border electricity networks with the aim to **transmit** electricity.

It is not completely clear the need to replace provisions related to **priority access** with other provisions, since the Law defines that “New (incremental) capacity of cross-border electricity networks, built at the expense of investments of legal person, which directly or indirectly does not exercise the control over an undertaking performing centralized dispatching of united energy system of Ukraine

and transmission of electricity through transmission and cross-border electricity networks can be exempted from the procedure of online auction” and “Priority access to new (incremental) capacity have the entities at the expense of which investments and the increase of capacity of cross-border electricity networks took place”, that in Commission opinion is completely in line with the requirements of Regulation (EC) No 1228/2003.

Taking into account above mentioned, Commission considers as possible to offer the Energy Community Secretariat to continue together with the Ukrainian side the work on reviewing and if needed the development of necessary amendments to electricity legislative framework in force, taking into account the provisions of EU Regulations and Directives in energy sector.

Sincerely yours,
Chairman of NERC

S. Titenko

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

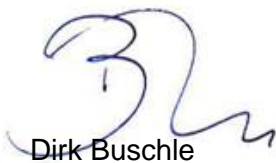
Vienna, 14 March 2017
UA/MIN/dbu/07/14-03-2017

REF. Reasoned Opinion in Case ECS-1/12

EXCELLENCY,

Please find attached a Reasoned Opinion in relation to the Case ECS-1/12 addressed to your attention.

Sincerely,



Dirk Buschle
Deputy Director and Legal Counsel of the Energy Community Secretariat

Energy Community Secretariat

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Reasoned Opinion
in Case ECS-1/12

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 10 of the Procedural Act No 2008/01/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty ("Dispute Settlement Procedures"), the Secretariat shall carry out a preliminary procedure before submitting a reasoned request to the Ministerial Council.
- (2) On 4 January 2012, the Secretariat received a complaint concerning the cross-border capacity allocation organized by the Ukrainian transmission system operator *Ukrenergo*. The complaint under Article 90 of the Treaty was registered under Case ECS-1/12. On 7 June 2012, the Secretariat received another complaint against Ukraine related to the same issue – allocation of cross-border capacity and the auctions organized by the Ukrainian transmission system operator *Ukrenergo*. Finally, on 30 October 2014, the Secretariat was addressed with a third complaint related to the same issue. Since the three complaints concerned the same subject matter, they were joined under the same case number pursuant to Article 5(2) of the Dispute Settlement Procedures.
- (3) The Ministry of Energy and Coal Industry of Ukraine ("the Ministry") was notified already of the first complaint and the Secretariat's assessment of the Auction Rules during a mission on 14 to 16 March 2012 in Kiev. On 4 April 2012 the Secretariat sent a letter to the Ukrainian Deputy Minister. In that letter, the Secretariat offered its assistance to Ukraine in drafting new Rules for allocation of cross-border capacity, and suggested Ukraine organizing a working meeting, inviting representatives from all interested parties in the country, such as the National Electricity Regulatory Commission ("NERC") and the transmission system operator. To support this, the Secretariat sent its assessment of the Auction Rules also to NERC. The issue of non-compliance of the Auction Rules was raised also at the *Day of Ukraine in the Energy Community* held on 19 April 2012 where a large delegation of Ukrainian representatives visited the Secretariat.
- (4) In absence of any response from the Ukrainian authorities, and given the importance of cross-border capacity allocation for the establishment of an internal market as pursued by the Treaty establishing the Energy Community, on 26 February 2013, 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 3(1), 9(e), 20(1) and 23(2)a) of Directive 2003/54/EC, Articles 1, 2(1), 4, 6(1), 6(2), 6(4) and 9 of Regulation (EC) 1228/2003, Sections 1.1, 1.2, 1.6, 2.1, 2.7, 2.10, 2.12, 2.13, 5.6 and 6.1 of the Congestion Management Guidelines by

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maintaining in force the Auction Rules adopted by NERC and by their application by the system operator *Ukrenergo*. Under Article 2(2) of the Dispute Settlement Rules, a violation of Energy Community law by public authorities such as NERC or public companies such as *Ukrenergo* is attributable to Ukraine as a Contracting Party to the Treaty.

- (5) The Opening Letter set a deadline of two months for a reply by the Government of Ukraine. In its reply to the Opening Letter dated 22 April 2013, 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 some of the issues of concern are linked to the existing market model of the Ukrainian electricity market that was expected to be changed with a new Electricity Market Law, which was in the process of adoption at that time.
- (6) Having assessed the information and arguments put forward in the Reply, as well as all the follow-up activities undertaken for rectifying the breaches identified in the Opening Letter (detailed in Section II.3 below), 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.¹
- (7) The concerns of the Secretariat concerning the non-compliance of the procedure for allocation of cross-border capacity in Ukraine have been expressed in its Implementations Reports since 2013.²
- (8) Under these circumstances, the Secretariat decided to submit the present Reasoned Opinion.

II. Factual background

1. The electricity sector in Ukraine

- (9) The electricity market of Ukraine is organized according to a single buyer model, based on the Electricity Sector Law of 1998.³ The wholesale electricity market of Ukraine (WEM) functions 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 NERC as well as by the Antimonopoly Committee of Ukraine. There are no direct bilateral contracts with consumers,

¹ 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.

² ECS, Annual Implementation Report, 1 August 2014, p.188; ECS, Annual Implementation Report, 1 August 2014, p.159

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

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and there is no functioning balancing market and market of ancillary services. Instead, they are an integral part of the WEM Agreement. All participants of WEM must sign the WEM Agreement with the administrator of the market, *Energorynok* as a precondition for obtaining a status of member to the WEM. This Agreement defines the target and conditions of energy activities, rights and obligations of WEM participants together with their responsibility towards the WEM. The WEM is the exclusive wholesale market place in Ukraine, any other wholesale trade in electricity is prohibited.⁵

- (10) The WEM Rules are an integral part of the Agreement and 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
- (11) The State owned enterprise *Energorynok* acts as market administrator for the WEM. It 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*.
- (12) 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
- (13) 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 *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),

⁵ Subparagraph 15 of paragraph 4 of Title VI of the Law of Ukraine 'On the principles of the functioning electricity market in Ukraine' № 663-VII as from 24.10.2013 amends the Article 15 of the Electricity Sector Law 1998.

⁶ Article 15 of *Electricity Sector Law of 1998*

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

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- increase/decrease of export,
 - organize import,
 - limitation the volume of electricity consumption by energy suppliers.
- (14) Electricity transmission is operated by the State owned company *Ukrenergo*, which owns and operates the high voltage network including cross-border interconnection lines.
- (15) 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. *Ukrenergo* operates export transmission capacities primarily with Russia (3000 MW), Moldova (700 MW) and Belarus (900 MW).¹⁰ These interconnections are used in the first place to provide security in the balancing of the system of Ukraine in cases of emergency. There is usually no commercial utilization of those capacities except of the interconnection with Moldova (which belongs to the main system of Ukraine and transits through Moldova back to Ukraine to supply the electricity in the region of Odessa).
- (16) Only 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 consumption, the Burshtyn island's export capacity ranges between 500 MW and 650 MW (550 MW in summer).¹² As regards the interconnector capacities linking the Burshtyn island to the ENTSO-E network, the NTC values are Ukraine – Hungary: 800 MW; Ukraine – Slovakia: 400 MW and Ukraine – Romania: 400 MW. However, only around 550 MW of the total interconnectors' capacities are used for export.
- (17) 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.
- (18) As detailed in the Opening Letter,¹³ in the period 2011-2013 there was more demand for interconnection capacity than was actually put on auction and the only undertakings being allocated cross-border capacity eventually were from the *DTEK* group (*DTEK Shidenergo* and *DTEK Trading*). This practice continued even in the aftermath of the Opening Letter; only approximately 500MW of the available 1600MW capacity has been allocated at auctions. Namely, at the annual auction for 2017 (auction held on 19 December 2016),¹⁴ only 500 MW

¹⁰ Annual Report of NEURC for 2015 (table 2.2.3.) http://www.nerc.gov.ua/data/filearch/Catalog3/Richnyi_zvit_NKREKP_2015.pdf

¹¹ Burshtyn power plant (2351 MW), Kaluska Combined Heat and Power plant (200 MW) and Tereblya-Rikhska hydroelectric power plant (27 MW) are the generation plants installed in this area.

¹² http://www.nerc.gov.ua/data/filearch/Catalog3/Richnyi_zvit_NKREKP_2015.pdf

¹³ Opening Letter in Case ECS-1/12, p.2

¹⁴ <http://www.ukrenergo.energy.gov.ua/Pages/ua/DetailsNew.aspx?nID=3388&urlNews=/pages/ua/auctionresults.aspx>

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of cross-border capacity have been allocated for Burshtyn Island (450 MW at the interconnector with Hungary and 50 MW at the interconnector with Romania).

- (19) In 2015, again *DTEK Trading* was awarded capacity for interconnectors between Burshtyn Island and ENTSO-E (with Slovakia, Hungary, Romania). For 2016¹⁵ *DTEK Pavlogradvugillya* and *ERU Trading LLC* were awarded cross border capacity for exports from the Burshtyn Island. At that auction for 2017,¹⁶ *DTEK Trading* and *ERU Trading LLC* have been awarded interconnection capacity export to Romania, and *ERU Trading LLC*, *DTEK Trading*, *Donbasenergo* and *TEK LLC* were awarded cross border capacity for export to Hungary.
- (20) 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. This was visible also from the results of the annual auctions held by *Ukrenergo* as detailed in the Opening Letter.¹⁷ Only *DTEK Shidenergo* was winning the annual auction for all capacity at the interconnector with Moldova. The Opening Letter sent in February 2013, provided details on the annual auctions held in 2010, 2011 and 2012.¹⁸ Only 200 MW of interconnectors' capacity between Ukraine and Moldova have been allocated at the first two auctions, and 700 MW at the auction in 2012.
- (21) After the Opening Letter has been sent, at the annual auction for 2015, *DTEK Shidenergo* was again awarded cross border capacity for export to Moldova. In 2016, *Donbasenergo* and *DTEK Pavlogradvugillya* were awarded cross border capacity and in 2017 *DTEK Pavlogradvugillya*, *DTEK Trading*, *Donbasenergo*, *Ukrinterenergo*, *ERU Trading* were awarded cross border capacity for export to Moldova. At the annual auction for 2015 (held on 18 December 2014) 350 MW interconnectors' capacity has been allocated,¹⁹ and at the annual auctions for 2016 (annual auction held on 15 December 2016)²⁰ and 2017 (auction held on 19 December 2016)²¹ 200 MW were allocated at each auction.

¹⁵ <http://www.ukrenergo.energy.gov.ua/Pages/ua/DetailsNew.aspx?nID=2135&urlNews=/pages/ua/auctionresults.aspx>

¹⁶ <http://www.ukrenergo.energy.gov.ua/Pages/ua/DetailsNew.aspx?nID=3425&urlNews=/pages/ua/auctionresults.aspx>

¹⁷ Opening Letter in Case ECS-1/12, p.2

¹⁸ Opening Letter in Case ECS-1/12, Section I.a), p.2

¹⁹ <http://www.ukrenergo.energy.gov.ua/Pages/ua/DetailsNew.aspx?nID=2135&urlNews=/pages/ua/auctionresults.aspx>

²⁰ <http://www.ukrenergo.energy.gov.ua/Pages/ua/DetailsNew.aspx?nID=2135&urlNews=/pages/ua/auctionresults.aspx>

²¹ <http://www.ukrenergo.energy.gov.ua/Pages/ua/DetailsNew.aspx?nID=3388&urlNews=/pages/ua/auctionresults.aspx>

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2. The legal framework governing the allocation of cross-border capacities in Ukraine at the moment of sending the Reasoned Opinion

a. Primary legal framework

- (22) Before the adoption of the Electricity Market Law²² of 2013, the Electricity Sector Law of 1998 was governing the allocation procedure and was providing a legal basis for adoption of Auction Rules by *NERC*.
- (23) The Electricity Market Law adopted in 2013 came into force on 1 January 2014.²³ Article 10 of the Electricity Market Law governs 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. At the same time, extensive and detailed provisions are governing the transitional period between the entry into force of the Law in January 2014 and expected start of functioning of a new electricity market model in July 2017. This means that Article 10 of the Electricity Market Law governing the cross-border allocations of capacity should come into force three years after entry into force of the Law, on 1 July 2017, when the new market model was supposed to become effective.
- (24) In the transitional period, since both the Electricity Sector Law of 1998 and the Electricity Market Law of 2013 continue to exist in parallel, the Electricity Market Law amended Article 30 of the Electricity Sector Law of 1998 governing allocation procedures. Those changes to Article 30 of the Electricity Sector Law entered into force on 1 December 2014 and are to be applied by 1 July 2017, provided that the new electricity market model is introduced by then.
- (25) However, as from the adoption of the Electricity Market Law in 2013 until the time of issuing this Reasoned Opinion, the Electricity Market Law of 2013 has not been implemented and work on a new electricity market model, the precondition for enforcing the main text of the Law, has not been performed. Therefore, the electricity market in Ukraine is currently still governed by the transitional provisions of the Electricity Market Law, which are based on the model established and governed by the Electricity Sector Law of 1998.
- (26) In parallel to the envisaged implementation of the Electricity Market Law, in the last couple of years, a new Electricity Market Law transposing the Third Energy Package²⁴ was drafted by a Working Group set up within the Ministry. However, the draft Law has not been adopted yet. Even if adopted immediately, the latest version of the draft Law envisages a new transitional period until July 2019 at the earliest before the new market model would enter into force. In the meantime, the WEM operated by *Energorynok* established by the Electricity

²² Electricity Market Law, No 663-VII, dated 24.10.2013

²³ 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

²⁴ The deadline for transposing the Third Energy Package expired on 1 January 2015.

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Sector Law of 1998 would again remain in force. Therefore, the primary law provision governing the allocation of cross-border capacity would remain Article 30 of the Electricity Sector Law, as amended by the Electricity Market Law of 2013.

(27) Pursuant to Article 30 of the Electricity Law 1998, as amendment by the Electricity Market Law of 2013,²⁵ an electricity supplier intending to export electricity shall purchase the required volume on the WEM of Ukraine under WEM prices, established by the WEM Rules and approved by NERC. 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. The transmission of electricity intended for export is to be 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.

(28) Article 30 of the Electricity Sector Law of 1998 as amended, does not govern in details the procedure for import of electricity. However, 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, and any other wholesale electricity market is prohibited.

b. Secondary legal framework

(29) 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 2009.²⁶ Afterwards, Auction Rules adopted by *NERC* in December 2012²⁷ have been applied. Under those Rules, the interconnectors' capacity was sold at a price regardless of whether congestion occurs.²⁸

(30) Those Auction Rules of 2012 were subject to the Opening Letter initiating the infringement proceedings against Ukraine in the present case.

²⁵ 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.

²⁶ 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)

²⁷ 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).

²⁸ Article 1(2) Auction Rules of 2012

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- (31) The Auction Rules from 2012 were amended several times before being replaced by the Auction Rules from February 2015 that are now applied by *Ukrenergo*.²⁹
- (32) 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.
- (33) The Auction Rules of 2015 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.³⁰ 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.³¹ Yearly, monthly and daily explicit auctions are to be organized.³² 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.³³
- (34) Those rules 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 to participate they have to acquire the status of allocation participant.³⁴ *Ukrenergo*, verifies if the supplier has the status of WEM participant, whether it has open debts for electricity bought from the WEM and whether it has a supply license.³⁵ The approved allocation participants have to pay a guarantee fee or to provide a bank guarantee, which is calculated by multiplying the maximum value of the bid price and the maximum value of capacity in MW planned to be obtained.³⁶ Approved allocation participants are not allowed to take part in auctions in case they have financial obligations towards the auction office or if their supply license is canceled.³⁷ 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.³⁸
- (35) 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 does not submit its daily hourly schedule,³⁹ and the costs paid for the unused capacity are not compensated to the participant. Also, in case a participant has been allocated

²⁹ NEURC, "On approval of the Rules of electronic auctions on capacity allocation of cross-border electricity lines" No. 176 dated 12.02.2015

³⁰ Article 1.1. Auction Rules of 2015

³¹ Article 2 Auction Rules of 2015

³² Article 4 Auction Rules of 2015

³³ Article 10.1 Auction Rules of 2015

³⁴ Article 5 Auction Rules of 2015

³⁵ Article 2.2. Auction Rules of 2015

³⁶ Article 6.3 Auction Rules of 2015

³⁷ Article 6.14 Auction Rules of 2015

³⁸ Article 5.11 Auction Rules of 2015

³⁹ Article 12.4 and 12.8 Auction Rules of 2015

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capacity in a yearly auction, and during one month it uses the obtained capacity for less than 70% of the corresponding booked capacity (as indicated in the submitted schedules to *Energorynok* for daily exports during that month) then it loses all the rights for all months following the auction until the end of the year.⁴⁰ Finally, in case when the successful allocation participant does not pay for the allocated cross-border capacity, that participant loses the allocated capacity, and the costs are covered by its bank guarantee or the guarantee fee.⁴¹

- (36) 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.⁴²
- (37) 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 However, until now the fallback mode turned out to be the default solution as electronic auction are still not taking place. Even though *Ukrenergo* has purchased an electronic platform, it is still being tested and is still not used for performing electronic auctions in practice.
- (38) For the sake of convenience, the relevant provisions of domestic law will be introduced and discussed in connection with the provisions from the *acquis communautaire* under section IV below.

3. The complaints and follow-up actions

- (39) The present case ECS-1/12 has been initiated upon several complaints addressed to the Secretariat in 2012, against Ukraine in relation to the allocation of cross-border capacities at interconnectors. The Opening Letter has been sent to Ukraine on 26 February 2013.
- (40) In the Opening Letter, the Secretariat preliminarily concluded that, by maintaining in force the Auction Rules adopted by NERC in 2012 and by their application by the system operator *Ukrenergo*, Ukraine fails to comply with Articles 7 and 41 of the Treaty, Articles 3(1), 9(e), 20(1) and 23(2)a) of Directive 2003/54/EC, Articles 1, 2(1), 4, 6(1), 6(2), 6(4) and 9 of Regulation (EC) 1228/2003, Sections 1.1, 1.2, 1.6, 2.1, 2.7, 2.10, 2.12, 2.13, 5.6 and 6.1 of the Congestion Management Guidelines.
- (41) In its reply to the Opening Letter dated 22 April 2013, the Government did not contest the presentation of the national legal and factual situation. The reply rather acknowledged that some of the issues of non-compliance are linked to the existing market model of the Ukrainian

⁴⁰ Article 12.9 Auction Rules of 2015

⁴¹ Article 17.2 Auction Rules of 2015

⁴² Article 13 Auction Rules of 2015

⁴³ Article 11 Auction Rules of 2015

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electricity market which was expected to be changed with a new Electricity Market Law, which was in the process of adoption at that time.

- (42) The reply to the Opening Letter contained also a proposal for establishing a working group of national experts from *NERC* and *Ukrenergo* and a request for assistance by experts from the Secretariat for drafting compliant Auction Rules.⁴⁴
- (43) As a follow up to the Opening Letter, draft amendments to the Auction Rules of 2012 were prepared by *NERC* and published for public consultation. The Secretariat reviewed the proposed amendments and on 12 June 2013, discussed all points raised in the Opening Letter with the relevant stakeholders. During the meeting, as presented in the Minutes of the meeting, the Ukrainian institutions agreed to immediately start drafting amendments to the Auction Rules, taking into account the Secretariat's recommendations.⁴⁵
- (44) As a follow-up to the meeting, the Secretariat sent to all institutions involved recommendations of how the incompliance could be rectified based on examples from other Contracting Parties and EU Member States. It also considered that the draft amendments to the Auction Rules are not sufficient for rectifying the breach of Energy Community law identified in the Opening Letter.⁴⁶ On 6 August 2013, the Ministry submitted a letter to the Secretariat in which it agreed about the necessity to have new compliant Auction Rules adopted before the annual auction for 2014.⁴⁷ In a letter dated 16 September 2013, the Secretariat invited *NERC* to request services from the framework contractor under EU technical assistance for drafting compliant Auction Rules.⁴⁸
- (45) On 30 September 2013, *NERC* submitted a new set of draft amendments.⁴⁹ –The improvements concerned the timing between adoption and application of the Auction Rules, the mechanism of curtailment of allocated capacity in cases of “unplanned deficit of electricity,” the instruments for provision of financial guarantees, the price for access to interconnectors in case of non-congestion as well as the period for which the auction participant may be considered an inappropriate auction participant. *NERC* informed that addressing the remaining issues of non-compliance identified in the Opening Letter depended on changes in the primary legal framework and the adoption of the new Law.
- (46) In October 2013, the Secretariat concluded⁵⁰ that the non-compliance of the procedure for allocation of cross-border capacity identified in the Opening Letter have not been addressed fully with the proposed amendments to the Auction Rules of 2012. The Secretariat recommended that completely new Auction Rules, based on and in compliance with the

⁴⁴ Letter from Deputy Minister of Ministry of Energy and Coal Industry, No.01-18-0469, dated 17.04.2013

⁴⁵ Minutes of the meeting of 12.06.2013, communicated per email by the Secretariat on 18.06.2013

⁴⁶ *Ibid*

⁴⁷ Letter from Deputy Minister of Ministry of Energy and Coal Industry, No.03-18-4026, dated 31.07.2013

⁴⁸ ECS Letter, ECS-1/12/O/09-09-2013, dated 16.09.2013

⁴⁹ NERC Letter, No.6610/14/47/13, dated 26.09.2013

⁵⁰ ECS Letter, ECS-1/12/O21-10-2013, dated 21.10.2013

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Energy Community Law should be drafted and adopted. However, on 21 November 2013, *NERC* approved the amendments to the Auction Rules without further changes. On 24 October 2013, the new Electricity Market Law was adopted. The amendments to the Auction Rules were based on the transitional provisions of that Law and on the Electricity Sector Law of 1998.

- (47) According to Section VI of the Electricity Market Law of 2013,⁵¹ rules for electronic auctions for allocation of cross-border transmission capacity should have been developed and adopted within 6 months after entry into force, i.e. by 1 July 2014 and should have become operational by 1 December 2014. Based on this legal basis, new draft Auction Rules have been prepared and presented for public consultation by *NERC* in June 2014. On 5 June 2014, the Secretariat addressed *NERC*⁵² with a letter, in which it informed that improvements to the draft new Auction Rules were needed in order to achieve full compliance with the Energy Community *acquis*, attaching detailed comments on specific provisions from those draft rules.
- (48) On 21 July 2014, a meeting was held in Vienna with representatives from both *Ukrenergo* and *NERC*. At the meeting, the main concerns of the Secretariat regarding the draft Auction Rules were discussed. As a follow-up to the meeting, the Secretariat sent to *NERC* its recommendations⁵³ for ensuring compliance. In a Letter to the Secretariat,⁵⁴ *NERC* considered that the main comments were related mostly to the provisions and definitions in the Electricity Market Law of 2013 and could not be rectified through secondary legislation.
- (49) In the meantime, *NERC* was dissolved, and the National Commission for State Energy and Public Utilities Regulation (*NEURC*) was created by Decree of the Ukrainian President.⁵⁵ On 17 September 2014, the new Commission took a decision to publish again for public consultation the developed draft Auction Rules. It did so only on 3 November 2014. The public consultation ended on 4 December 2014. After that *NEURC* was supposed to approve the new Auction Rules, submit them to the Ministry of Justice for registration. The new Auction Rules should have come into force after the registration and official publication.
- (50) In parallel to the process of creating new Auction Rules, on 31 October 2014, *Ukrenergo* published information regarding the annual auctions for 2015 on its website. The auctions were to be held on 18 December 2014. *Ukrenergo* informed that there are two options for holding the auctions – either according to the rules from 2012, or electronic auctions if the new Auction Rules are adopted by then. On 3 December 2014, *Ukrenergo* publicly informed that the annual auctions would be held according to the Auction Rules from 2012.

⁵¹ Part 2. 2) para.1

⁵² ECS Letter, ECS/O/05-06-2014, dated 05.06.2014

⁵³ ECS Letter, ECS/O/22-07-2014, dated 22.07.2014

⁵⁴ NERC Letter, No.4361/14/47/14, dated 21.07.2014

⁵⁵ NERC was dissolved on 27 August 2014 with a Presidential Decree No.693/2014 and the new Commission was created on the same day by Presidential Decree No. 694/2014

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(51) NEURC finally adopted new Auction Rules in February 2015.⁵⁶

(52) In the meantime, the Ukrainian authorities started working on drafting a new Electricity Market Law with the aim to transpose the Third Energy Package. The Secretariat was closely involved in the drafting procedure. However, despite the fact that the deadline for implementing the Third Energy Package expired on 1 January 2015, the new Electricity Market Law is still not adopted to date.

(53) In this situation, the Electricity Sector Law of 1998 and the WEM operated by *Energorynok* as established under that Law remain in force, and the Auction Rules continue to be linked with the existing electricity market model.

(54) In the process of amending and replacing the Auction Rules of 2012, a number of issues of non-compliance with Energy Community law as identified in the Opening Letter have been rectified (see below at point II.4.).

(55) However, several issues of non-compliance persist which indeed could not be addressed on the level of secondary legislation as they are intrinsically linked to the electricity market model currently in place under the Electricity Sector Law of 1998 and the Electricity Market Law of 2013, including their application by the relevant Ukrainian authorities and undertakings.

4. Breaches of Energy Community law rectified after the Opening Letter

(56) A number of issues of non-compliance with Energy Community law, raised in the Opening Letter and relating to the Auction Rules of 2012, have been addressed and the breaches have been rectified by the Auction Rules from February 2015. The Secretariat will not pursue them further in this Reasoned Opinion.

a. The effect of the warranty deposit on trade in electricity

(57) The Secretariat considered the guarantee deposit as calculated by the Auction Committee according to a formula defined in the Auction Rules of 2012 which was required to be paid before submitting an application for participation in the auction, to be disproportionate and to infringe Article 41 of the Energy Community Treaty.⁵⁷ The Secretariat was concerned that the formula for calculating the deposit leads to an excessive burden in the form of the amount payable by market participants as a precondition for participating at the auctions. In particular, this deposit had the effect of deterring small undertakings from participation.

⁵⁶ NEURC, "On approval of the Rules of electronic auctions on capacity allocation of cross-border electricity lines" No. 176 dated 12.02.2015

⁵⁷ ECS Opening Letter, Section III.3), p.20

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(58)The Auction Rules of 2015 require calculating the amount of the bank guarantee by “multiplying the maximum value of Bid(s) price and maximum value of capacity in MW planned to be obtained by the allocation participant on the corresponding auction.” The rules furthermore specify that the “amount of guarantee fee and/or bank guarantee has to be equal or more than the total value of all Bids submitted by the auction participant on the corresponding auction and value of obtained and non-paid capacity at the moment of holding of the corresponding auction.”

(59)The Secretariat considers this formula to calculate the financial guarantees required to cover the volumes for which the applicant bids as proportionate.

b.Capacity allocation in the case of non-congested interconnectors

(60)The Auction Rules of 2012 required payment of price for capacity in any case, irrespective of the existence of congestion, which constituted a restriction for access to the network in the Secretariat’s view, and amounted to an export charge prohibited under Article 41 of the Treaty⁵⁸ as well as Articles 20 and 23(2)a) of Directive 2003/54/EC, Article 4 of Regulation (EC) 1228/2003, and Section 2.7 and 6.1 of Congestion Management Guidelines.

(61)The Auction Rules of 2015 in their Article 1.7 stipulate that the marginal price is paid if the demand on cross-border capacity exceeds the value of available transfer capacity of cross-border electrical networks of Ukraine. If the demand on cross-border capacity does not exceed or is equal to the value of available transfer capacity of cross-border electrical networks of Ukraine, access is granted to the auction participants free of charge. This rectifies the breach identified in the Opening Letter.

c.Curtailing allocated capacity in cases of “unplanned shortages”

(62)The Secretariat considered the provision from the Auction Rules of 2012 allowing for the curtailment of allocated cross-border capacity in case of “unplanned shortages” as not compliant with Article 6(2) of Regulation (EC) 1228/2003 and the general principle of legal certain. The notion of “unplanned shortages” was not further defined either by Law or the Auction Rules, and not limited to emergency situations as required by Article 6(2) of Regulation 1228/2003.

(63)The Auction Rules from December 2015 stipulate clear rules for curtailment limited to technical disturbance and/or force majeure, as well as a demand by the neighboring system operators. The auction participants are compensated for each unused MW according to the marginal price of the auction in question.⁵⁹ This rectifies the breach identified in the Opening Letter.

⁵⁸ ECS Opening Letter, Section III.4), p.22

⁵⁹ See Section XV of the Auction Rules for detailed rules on curtailment.

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d. Secondary trading

(64) Article 9 of the Auction Rules of 2012 did not allow secondary trading or any transfer of capacity except in “*case of dissolution of access contract made as a result of monthly auctions.*” In the Secretariat’s view, this prohibition violated Section 2.12 of the Congestion Management Guidelines.

(65) The Auction Rules of 2015 contain rules on transfer of allocated transmission capacity,⁶⁰ as well as rules for return for resale of already allocated capacity.⁶¹ Transfer of capacity from one to another auction participant is allowed provided that the auction office is informed. The auction office may only refuse the transfer in case the auction participant transferring and receiving the capacity does not comply with the provisions of the Auction Rules or of the agreement on access to cross-border capacity. This rectifies the breach identified in the Opening Letter.

e. Practical non-compliances

(66) In the auctions for 2011, 2012 and 2013, the requirements for participation in an auction were amended at a very short notice, without allowing sufficient time for potential participants to comply with the new requirements imposed. This practice prevented them from participating in the annual auctions. The Secretariat considered that this practice violated Article 41 of the Treaty, Section 5.6 of the Congestion Management Guidelines and the principle of legal certainty.

(67) After the Opening Letter was sent, all further amendments to the Auction Rules have been published by NEURC on its website, giving all interested stakeholders to participate to a public consultation. The Secretariat is also not aware that any short-notice changes to the rules have been adopted. Therefore, the Secretariat concludes that the breaches identified in the Opening Letter have been terminated.

f. Role of the regulatory authority

(68) Under Article 9 of Regulation 1228/2003, the national regulatory authority has an obligation to ensure compliance with that Regulation, including its Congestion Management Guidelines. The Ukrainian regulatory authority NERC not only adopted the Auction Rules of 2012 which included provisions non-compliant with the Energy Community *acquis*, it has also not taken later any effective remedial action to ensure compliance of the Auction Rules and their application in practice with the *acquis communautaire*.

(69) Since the Opening Letter was sent, NERC, and later NEURC cooperated with the Secretariat, following up on its comments when amending the Auction Rules. The remaining issues of

⁶⁰ Section XIII

⁶¹ Section XIV

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non-compliance are linked to the electricity market model currently in force in Ukraine and require changes to the primary legal framework, whereas amendments to the rules adopted by the regulatory authority in themselves would not be sufficient to rectify the breach. Therefore, the Secretariat concludes that the breaches identified in the Opening Letter have been terminated.

III. Relevant Energy Community Law

(70) It is appropriate to recall at the outset that the provisions from the second energy package were applicable at the time when the facts of the case occurred. According to settled case-law of the Court of Justice of the European Union, substantive rules are usually interpreted as not applying to situations existing before their entry into force.⁶² This means that the provisions from the second energy package remain applicable even though the Third Energy Package was adopted and entered into force in the Energy Community on 1 January 2015.⁶³ This was confirmed in Case ECS-3/08 by the Advisory Committee⁶⁴ and the Ministerial Council⁶⁵ of the Energy Community. It should nevertheless be noted that the Third Energy Package did not change the substance of the provisions relevant for allocation of cross-border capacity, namely Articles 1, 2(1) and 6(1) of Regulation (EC) 1228/2003 correspond to Article 1, 2(1) and 16(1) of Regulation (EC) 714/2009, and Sections 2.1, 2.10, 1.6 and 1.1 of the Congestion Management Guidelines annexed to the Regulation (EC) 1228/2003 correspond to the same Sections of the Guidelines annexed to the Regulation (EC) 714/2009. The articles related to ensuring non-discriminatory access to the grids from the Directive 2009/3/EC, namely Articles 20, 23(2)a and 9(e) correspond to the exact wording of Article 32, 37(6)a and 12(f) of Directive 2009/72/EC.

(71) The Secretariat also notes that the Dispute Settlement Procedures adopted by the Ministerial Council in 2008 have been amended in October 2015.⁶⁶ Pursuant to Article 46(2) of the Procedural Act of 2015 amending the Dispute Settlement Procedures, however, „[c]ases initiated already before 16 October 2015 shall be dealt with in accordance with the Procedural Act applicable before the amendments adopted on that date.“ The Secretariat thus addresses the Ukrainian authorities with the present Reasoned Opinion under the Dispute Settlement Procedures of 2008.

⁶² Case C-61/98, De Haan Beheer BV and Inspecteur der Invoerrechten en Accijnzen te Rotterdam, ECR 1999 I-05003, para.13. See also: Joined Cases 212/80 to 217/80 Salumi and Others [1981] ECR 2735, para. 9, Joined Cases C-121/91 and C-122/91 CT Control (Rotterdam) and J CT Benelux v Commission [1993] ECR I-3873, para. 22

⁶³ For a discussion on the principle *tempus regit actum* and the principle that administrative measures do not have retrospective effect, see: T-190/00, Regione Siciliana v Commission of the European Communities, 27.11.2003, para.86 and the case law cited.

⁶⁴ Energy Community Advisory Committee Opinion in Case ECS-3/08, 10.10.2016

⁶⁵ Ministerial Council Decision D/2016/02/MC-EnC: on the failure by the Republic of Serbia to comply with the Energy Community Treaty in Case ECS-3/08

⁶⁶ PA/2015/04/MC-EnC of 16 October 2015 amended Procedural Act No 2008/01/MC-EnC of 27 June 2008.

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(72) 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.

(73) Energy Community Law is defined in Article 1 of the Rules of Procedure for Dispute Settlement under the Treaty (“Dispute Settlement Procedures”)⁶⁷ 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).

(74) 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.

(75) Article 7 of the Treaty reads:

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

(76) Article 10 of the Treaty reads:

*Each Contracting Party shall implement the *acquis communautaire* on energy in compliance with the timetable for the implementation of those measures set out in Annex I.*

(77) Article 11 of the Treaty reads:⁶⁸

*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.*

(78) Article 41 of the Treaty reads:

⁶⁷ Procedural Act No 2008/01/MC-EnC of 27 June 2008.

⁶⁸ 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) No 714/2009 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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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.*

(79) Article 2 of the Protocol concerning the accession of Ukraine to the Treaty establishing the Energy Community reads:

*1. For the purpose of compliance with Title II of the Treaty establishing the Energy Community and its related Annexes, the timetable for implementation of the *acquis communautaire* is defined as follows:*

Directive 2003/54/EC Concerning Common Rules for the Internal Market in Electricity by 1 January 2012

Regulation (EC) No 1228/2003 on the Conditions of the Access to the Network for Cross-Border Exchanges in Electricity by 1 January 2012.

Commission Decision 2006/770/EC amending the Annex to Regulation 1228/2003 on conditions for access to the network for cross-border exchanges in electricity by 1 January 2012

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

Member States ... shall not discriminate between these undertakings as regards either rights or obligations.

(81) Article 9 of Directive 2003/54/EC (“Tasks of Transmission System Operators”) reads:

Each transmission system operator shall be responsible for:

[...]

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

(82) Article 20 of Directive 2003/54/EC (“Third party access”) reads:

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1. *Member States 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.*
2. *The operator of a transmission or distribution system may refuse access where it lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3. Member States shall ensure, where appropriate and when refusal of access takes place, that the transmission or distribution system operator provides relevant information on measures that would be necessary to reinforce the network. The party requesting such information may be charged a reasonable fee reflecting the cost of providing such information.*

(83)Article 23(2)(a) of Directive 2003/54/EC (“Regulatory authorities”) reads:

The regulatory authorities shall be responsible for fixing or approving, prior to their entry into force, at least the methodologies used to calculate or establish the terms and conditions for:

(a) connection and access to national networks, including transmission and distribution tariffs. These tariffs, or methodologies, shall allow the necessary investments in the networks to be carried out in a manner allowing these investments to ensure the viability of the networks.

(84)Recital 14 of Regulation (EC) 1228/2003 reads:

The precondition for effective competition in the internal market is non-discriminatory and transparent charges for network use including interconnecting lines in the transmission system.

(85)Article 1 of Regulation (EC) 1228/2003 (“Subject-matter and scope”) reads:

This Regulation aims at setting fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal electricity market, taking into account the specificities 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.

(86)Article 2(1) of Regulation (EC) 1228/2003 (“Definitions”) reads:

For the purpose of this Regulation, the definitions contained in Article 2 of 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 repealing Directive 96/92/EC (1) shall apply with the exception of the definition of ‘interconnector’ which shall be replaced by the following:

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'interconnector' means a transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States.

(87)Article 6 of Regulation (EC) 1228/2003 (“General principles of congestion management”) reads:

6.1. 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.

(88)Article 9 of Regulation 1228/2003 (“Regulatory authorities”) reads:

The regulatory authorities, when carrying out their responsibilities, shall ensure compliance with this Regulation and the guidelines adopted pursuant to Article 8.

(89)Section 1 of the Congestion Management Guidelines (“General provisions”) reads:

1.1. TSOs shall endeavour to accept all commercial transactions, including those involving cross-border-trade.

1.2. When there is no congestion, there shall be no restriction of access to the interconnection. Where this is usually the case, there need be no permanent general allocation procedure for access to a cross-border transmission service.

1.6. No transaction-based distinction may be applied in congestion management. A particular request for transmission service shall be denied only when the following conditions are jointly fulfilled:

- (a) the incremental physical power flows resulting from the acceptance of this request imply that secure operation of the power system may no longer be guaranteed, and*
- (b) the value in monetary amount attached to this request in the congestion management procedure is lower than all other requests intended to be accepted for the same service and conditions.*

(90)Section 2 of the Congestion Management Guidelines (“Congestion management methods”) reads:

2.1. Congestion management methods shall be market-based in order to facilitate efficient cross-border trade. For this 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.

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2.10. *In principle, all potential market participants shall be permitted to participate in the allocation process without restriction. To avoid creating or aggravating problems related to the potential use of dominant position of any market player, the relevant Regulatory and/or Competition Authorities, where appropriate, may impose restrictions in general or on an individual company on account of market dominance.*

2.13. *The financial consequences of failure to honour obligations associated with the allocation of capacity shall be attributed to those who are responsible for such a failure. Where market participants fail to use the capacity that they have committed to use, or, in the case of explicitly auctioned capacity, fail to trade on a secondary basis or give the capacity back in due time, they shall lose the rights to such capacity and pay a cost-reflective charge. Any cost-reflective charges for the non-use of capacity shall be justified and proportionate. Likewise, if a TSO does not fulfil its obligation, it shall be liable to compensate the market participant for the loss of capacity rights. No consequential losses shall be taken into account for this purpose. The key concepts and methods for the determination of liabilities that accrue upon failure to honour obligations shall be set out in advance in respect of the financial consequences, and shall be subject to review by the relevant national Regulatory Authority or Authorities.*

IV. Legal Assessment

(91) 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 NEURC and *Ukrenergo* are attributable to Ukraine and may constitute an infringement of Energy Community law by that Party.

(92) In the following, the Secretariat will assess the legal framework as well as the actions by NEURC and *Ukrenergo* in light of Ukraine's obligations under the Treaty. It will thereby take into consideration the Ukrainian Reply to the Opening Letter as well as the follow-up actions as displayed in Section II.3 above.

1. Introduction

(93) The subject-matter of case ECS-1/12 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, as identified in the Opening Letter.

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(94)The Secretariat takes into account that the Auction Rules from 2012, after several amendments, have been replaced with new rules adopted in February 2015 in order to address the remarks of the Energy Community in the Opening Letter in Case ECS-1/12. Despite these efforts, the Secretariat finds that Auction Rules based on and intrinsically linked to the existing electricity market mode are not suitable to achieve compliance.

(95)The Secretariat further notes that despite the amendments to the primary legislative framework in Ukraine made by the Electricity Law of 2013, and in particular the amendments to Article 30 of the Electricity Sector Law of 1998, as well as the adoption of Auction Rules in 2015, their application by *Ukrenergo* in line with the electricity market model in place in Ukraine fails to comply with Energy Community law.

2. Issues of non-compliance with Energy Community law

(96)In the following, the Secretariat further elaborates on several breaches of Energy Community law already identified in the Opening Letter related to the access to interconnector capacity.

a. Different treatment of electricity imports and export

i. Import and export of electricity in Ukraine

(97)Article 30(1) of the Electricity Sector Law of Ukraine⁶⁹ and the Auction Rules of 2009⁷⁰ stipulated that the procedures for allocation of capacity (i.e. the auction) are performed only for export of electricity. For imports, an “*authorized central executive body responsible for ensuring realization of the public policy in the fuel and energy shall determine the conditions of the use of free transmission capacity for the purpose of electric power import and transit across the territory of Ukraine.*”⁷¹ The Ministry was the authorized central executive body which was responsible for allocating the interconnectors capacity for import and transit. The Ministry used to give an authorization for imports and approves a planned import volume.

(98)This provision is not part of the Auction Rules of 2012. The Auction Rules of 2012⁷² stipulated that procedures for allocation of capacity (in the form of auctions) are performed only for the export of electricity (Articles 1(1) and 1(11) of the Auction Rules of 2012). The procedure for import and transit of electricity is not dealt with by these Auction Rules. However, the Ministry remained in charge for approving the balance of electricity and imports could be allowed only in case of lack of domestic generation to satisfy the demand.

⁶⁹ Article 30(1) Electricity Sector Law of Ukraine, 1998 as amended last time on 17.12.2010.

⁷⁰ Article 1(1) and 1(12) Auction Rules

⁷¹ Article 1(11) Auction Rules from 2009..

⁷² Article 1(1) and 1(11) Auction Rules

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- (99) In the Opening Letter, 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(11) of the Auction Rules violate 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.
- (100) In the aftermath of the Opening Letter, Article 30 of the Electricity Sector Law has been amended by the Electricity Market Law from 2013. The provision now allows allocation of interconnector capacity also for imports of electricity.⁷³ In addition, the Auction Rules of 2015, in their Article 1(1) stipulate that auctions are to be held for access to cross-border capacity for export and/or import of electricity.
- (101) While these amendments put an end to formally differentiating between exports and imports of electricity, and dealing with the latter by way of non-market based procedures, these provisions are not applied and implemented in practice. Even though the Auction Rules of 2012 and of 2015 have deleted the reference to the Ministry as the authority responsible for import, in practice such approval is still required.
- (102) On the occasion of several meetings with *Ukrenergo*, as well as in communication by email,⁷⁴ the Secretariat has been informed that imports are performed in Ukraine only if approved by the Ministry in the electricity balance.
- (103) In this respect it needs to be recalled that according to the legislation currently in force (as described above), all the imported electricity is sold to *Energorynok* as the single buyer in the WEM. The Ministry is in charge of approving the electricity balance, and only in case where there is a lack of domestically produced electricity, the Ministry allows imports of electricity to be performed. The Ministry for Energy and Coal Industry is still responsible for the electricity balance⁷⁵ pursuant to an Order of the Ministry for Energy and Coal Industry of 2016 approving the procedure for preparing the annual and monthly balance of electricity.⁷⁶
- (104) Only after such approval, *Ukrenergo* allocates the necessary transmission capacity to be used for the allowed import, i.e. is performing auctions. But the Ministry's involvement goes further than just omitting imports from the electricity balance. Since there are no imports planned in the electricity balance for 2017, for instance, the Ministry has sent a letter to

⁷³ The relevant subparagraph of Article 30 of the Electricity Sector Law of 1998 as amended reads: „Electricity suppliers who are members of the wholesale electricity market of Ukraine with 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 operations of export and / or import of electricity.”

⁷⁴ Email communication with Ukrenergo employee, dated 25.01.2017 stating that could not share the letter from the Ministry addressed to Ukrenergo

⁷⁵ Para.4.5 of Regulation of the Ministry, approved by Decree of the President of Ukraine No382/2011, dated 06.04.2011.

⁷⁶ 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

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Ukrenergo asking it not to perform auctions for allocation of interconnectors capacity for import.⁷⁷

(105) Since usually Ukraine's domestic generation capacity satisfies the consumption in the country, imports are allowed rarely and for short-terms only. Such imports usually come from the Russian Federation. Imports for commercial motives, however, are essentially not taking place in Ukraine. Even in cases where the price of electricity in another Party to the Energy Community would be cheaper, the Ukrainian customers are not benefitting from them.

(106) Moreover, the fact that the capacity allocated on the interconnectors with the Burshtyn island in western Ukraine, i.e. on the borders with Slovakia, Hungary and Romania is significantly reduced by *Ukrenergo* from an NTC value of altogether some 1600 MW to match the Burshtyn island's export capacity which ranges between 500 MW and 650 MW⁷⁸ (see above), shows that the interconnector capacities on the borders with other Parties to the Treaty are indeed used only for export. The reason for not allowing imports to Burshtyn island is evidently to protect the domestic generators based on the territory of the island, namely the Burshtyn power plant (2351 MW), Kaluska Combined Heat and Power plant (200 MW) and Tereblyya-Rikhska hydroelectric power plant (27 MW).

(107) Under these circumstances, the Secretariat considers the legal assessment made in the Opening Letter still valid despite the changes made in domestic legislation, as will be demonstrated in the following.

ii. *Breach of Articles 1 and 2(1) of Regulation (EC) 1228/2003*

(108) According to its Article 1, Regulation (EC) 1228/2003 aims at setting fair rules for the allocation of available capacities of interconnections between national transmission systems. The reason for this is enhancing competition within the internal market. Article 2 of the said Regulation defines interconnector as "*a transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States.*"⁷⁹ Read together, these two provisions imply that fair rules for allocation of capacity shall be developed for all interconnectors without distinguishing between the different directions of export, import or transit.

(109) In Ukraine, allocation of cross-border capacity for export is performed by *Ukrenergo* under the Auction Rules of 2015. As was shown in the preceding section, allocation of electricity for import is performed subject to the approval by the Ministry, and only in case the

⁷⁷ Supra note 81. On 3 February 2017, the Secretariat addressed a Request for information to the Ministry related to the issue of import and transit of electricity. To date, the Ministry has not replied nor submitted the requested information.

⁷⁸ http://www.nerc.gov.ua/data/filearch/Catalog3/Richnyi_zvit_NKREKP_2015.pdf

⁷⁹ Article 2(1) Regulation (EC) 1228/2003

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electricity balance requires import of electricity for satisfying the domestic demand, thus excluding allocation of cross-border capacity for commercial imports. Therefore, the Secretariat concludes that allocation of cross-border capacity is performed through different procedures based on the directions of the flow of electricity.

(110) The Secretariat thus considers that maintaining different procedures for the allocation of capacity in different directions is not in line with Articles 1 and 2(1) of Regulation (EC) 1228/2003 because it fails to comply with the requirements for establishing fair rules of capacity allocation irrespective of the direction of the electricity flow.

iii. Non-compliance with the obligation to grant non-discriminatory third-party access

(111) In the Secretariat's view, the allocation of interconnection capacity for import in accordance with procedures based upon unilateral administrative action of the Ministry fails to respect the principle of regulated access to the transmission network as embedded in Articles 20(1) and 23(2)(a) of Directive 2003/54/EC. These provisions require that access to the networks is granted without discrimination and based on published tariffs. The Directive also tasks an independent national regulatory authority with "*fixing or approving, prior to their entry into force, at least the methodologies used to calculate or establish the terms and conditions*" for access to the transmission network.

(112) Granting access to interconnectors based on Ministry's instructions, letters and minutes of meetings fails to respect these provisions.

(113) Moreover, to grant access to interconnector capacity in Ukraine for import only upon the Ministry's approval violates the prohibition of discriminating between the electricity undertakings interested in transporting electricity through the Ukrainian interconnectors for imports. The principle of non-discrimination requires that comparable situations are not treated differently unless such difference in treatment is objectively justified.⁸⁰ 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*",⁸¹ the *acquis* places further obligations not to discriminate on both the transmission system operator and on the State. Article 3(1) of Directive 2003/54/EC requires Contracting Parties not to discriminate between electricity undertakings as regards either rights or obligations. Article 20 of Directive 2003/54/EC commits them to ensure access to the transmission system for all third parties in an objective manner and without discrimination. Besides, under Article 9(e) Directive 2003/54/EC the transmission system operator is responsible for ensuring non-discrimination as between system users or classes of system users. In accordance with Article 6(1) of Regulation (EC) 1228/2003, "[n]etwork congestion problems shall be addressed with non-discriminatory market based solutions."

⁸⁰ C-17/03 Vereniging voor Energie, Milieu en Water (VEMW) [2005] ECR I-4983, paragraph 48

⁸¹ Case C-17/03 VEMW [2005] ECR I-4983, paragraph 47.

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- (114) 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 allegedly concluded in performing a public service obligation.⁸² 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.
- (115) The Court furthermore differentiated between discriminatory capacity allocation based on specific measures taken by the transmission system operator by refusing system access to individual undertakings, and State measures not attributable to the system operator. The former are prohibited under what is Article 9(e) Directive 2003/54EC. Discriminatory capacity allocation based on State measures, on the other hand, and in particular statutory rules established by State authorities, are banned by the rules related to third-party access, Article 20 of Directive 2003/54EC.⁸³
- (116) In practice, imports to Ukraine are only allowed from Russia in case of a necessity to satisfy the domestic consumption. Imports from EU Member States (to the Burshtyn island) have never taken place for satisfying the demand of the customers based there, even in cases where imports would make economic sense due to lower prices in another Party of the Energy Community. Even though no imports are performed for electricity produced elsewhere to be consumed in Ukraine, the Secretariat has been notified of applications for transit of electricity via Ukrainian territory.⁸⁴ However, similarly as for imports, the Ministry is responsible for allowing transit of electricity via Ukrainian territory, and allocation of cross-border capacity depends on Ministry's approval. Currently, only one State-owned undertaking, *Ukrinterenergo*, has been tasked by the Ministry to transit electricity and no commercial transits are allowed. In the Secretariat's view since transit encompasses electricity flows in both directions – from a Party to the Treaty to Ukraine and from Ukraine to another Party to the Treaty, transit also includes import of electricity.
- (117) Hence, maintaining and applying an allocation procedure which differentiates between the different system users based on the direction of electricity flow, encroaches

⁸² Case C-17/03 VEMW [2005] ECR I-4983, paragraphs 50-56.

⁸³ Case C-17/03 VEMW [2005] ECR I-4983, paragraphs 35 and 36.

⁸⁴ On 27 August 2015, the Secretariat received a complaint from *ERU Trading* Private Enterprise from Ukraine, which was registered under Case ECS-8/15. The complainant informed the Secretariat that in the course of 2015, it was applying to *Ukrenergo* for receiving cross-border capacity to be used for transit of electricity through Ukraine along the following routes: Hungary => Slovakia and/or Romania; Slovakia => Hungary and/or Romania and Romania => Slovakia and/or Hungary. *Ukrenergo* refused all schedules for transit submitted by *ERU Trading*, based on minutes of a meeting dedicated to electricity export and transit via the Burshtyn island dated 17.06.2014, in which the Ministry of Energy and Coal Industry entrusted the State owned company *Ukrinterenergo* as the only company in Ukraine allowed to perform transit of electricity.

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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. Suppliers, who would be interested in importing electricity in cases where commercial justification would exist, and where prices in other systems (of EU Member States neighbouring Ukraine) would be lower, are prevented from doing so in the current Ukrainian electricity market. Allocating interconnector capacity through an auction – a non-discriminatory and market based allocation procedure – only for exports of electricity discriminates the system users which would like to import electricity to Ukraine.

(118) In accordance with the case law of the Court of Justice referred to above, Articles 7 of the Treaty, as well as Articles 3(1), 9(e) and 20(1) of Directive 2003/54/EC and Article 6(1) of Regulation (EC) 1228/2003 rule out maintaining and applying discriminatory allocation procedures such as the one applied by the Ministry and *Ukrenergo*. Under Article 2(2) of the Dispute Settlement Rules a violation of Energy Community law by *Ukrenergo* is attributable to Ukraine as a Contracting Party. Compliance with Energy Community law would require the application of the same non-discriminatory and market-based allocation procedures applied to exports also to imports at the interconnectors with the Parties to the Energy Community, that is the interconnectors of the Burshtyn island (towards the EU Member States) as well as the interconnectors with Moldova.

(119) Consequently, the Secretariat concludes that Ukraine has failed to comply with its obligations under Article 7 of the Treaty as well as Articles 3(1), 9(e) and 20(1) of Directive 2003/54/EC and Article 6(1) of Regulation (EC) 1228/20039.

(120) Article 3(8) of Directive 2003/54/EC provides a possibility for derogation from Article 20 of that Directive *“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 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 2003/54/EC. In particular, any such obligation *“shall be clearly defined, transparent, non-discriminatory,⁸⁵ verifiable and shall guarantee equality of access for EU electricity companies to national consumers....”*, and would have to be within 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. Nonetheless, the Reply to the Opening Letter did not make any reference to exemption from access to interconnectors for imports due to reasons of ensuring public service obligations, as a justification for preventing use of cross-border capacity for imports.

(121) Furthermore, the Court of Justice emphasised in its *VEMW* judgment that the effect of a discriminatory measure such as the one at issue would significantly imperil and even

⁸⁵ 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.

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block the access of new operators to the market, and protect the position of the national producers, *in casu* the ones based on the territory of the Burshtyn island, against competition. Maintaining discriminatory 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.*”⁸⁶

(122) Even if one assumed that the restrictions on imports are related to concerns about the security of supply to domestic customers in the case at hand, allowing energy undertakings to import electricity to Ukraine is done in a non-transparent manner, and only related to imports from Russia. No import has been allowed to the territory of the Burshtyn island, even in cases where prices of electricity might have been cheaper in those countries. Moreover, transits of electricity -including imports – have been also prevented, without any link to preserving security of supply. The restriction applied to electricity imports can thus not serve as a basis for the imposition of a public service obligation for performing import of electricity under Article 3 of Directive 2003/54/EC, as the conditions of Article 3(2) of Directive 2003/54/EC as well as proportionality and non-discrimination are not complied with.

(123) In any event, it is for the Contracting Party concerned to not only invoke and sustain possible justification grounds for a discriminatory access scheme such as the one at issue, but also to show that all conditions required – in particular those set by Articles 3(8) and 3(2) of Directive 2003/54/EC – are fulfilled.

iv. Breach of the obligation for performing market-based allocation of cross-border capacity

(124) Article 6(1) of Regulation (EC) 1228/2003 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.

(125) As described above, the Electricity Sector Law of Ukraine,⁸⁷ as well as Article 1(1) of the Auction Rules of December 2015 stipulates that auctions are to be held for access to cross-border capacity for export and/or import of electricity. However, as demonstrated in Section 3.a).i. of this Reasoned Opinion, it is still the Ministry of Ukraine in charge of giving an approval based on the energy balance and the necessity to import or not electricity for satisfying the demand of domestic consumption. Linking the necessity to import electricity with allocating cross-border capacity, prevents participation to auctions for cross-border capacity to energy undertakings without the Ministry’s approval, as in such cases auctions for import of electricity are not even held.

⁸⁶ Case C-17/03 VEMW [2005] ECR I-4983, paragraph 62.

⁸⁷ Article 30(1) Electricity Sector Law of Ukraine

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(126) To require a unilateral administrative decision by the Ministry as a basis for the allocation of (actually or potentially congested) interconnectors, and not via 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 6(1) of the Regulation (EC) 1228/2003 and Section 2.1. of the Congestion Management Guidelines.

v. Breach of Article 41 of the Treaty

(127) 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.⁸⁸ Measures requiring prior authorization,⁸⁹ even as a pure formality,⁹⁰ have been considered by the Court of Justice of the European Union as measures having equivalent effect to import restrictions. Making the import of electricity dependent on the prior approval of the Ministry makes the import of electricity in Ukraine more difficult than purely domestic supply, and thus constitutes a measure prohibited by Article 41 of the Treaty. 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 Ukraine.

(128) 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.⁹¹ 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.*"

vi. Conclusions

(129) The Secretariat concludes that by maintaining and applying a special, non-market based regime for electricity imports Ukraine failed to comply with Articles 7 and 41 of the Treaty as well as Articles 3(1), 9(e) and 20(1) 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.

⁸⁸ Case 8/74 Procureur du Roi v Dassonville, [1974] ECR 837, para. 5

⁸⁹ 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

⁹⁰ 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

⁹¹ Case C-159/94 Commission v France [1997] ECR I-5815, para. 94.

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b. Limiting access to interconnectors for electricity exports
i. Limiting the categories eligible for participation in cross-border capacity allocation procedures

(130) Before the changes made by the Electricity Market Law in 2013, Article 30 of the Electricity Sector Law as well as Article 3 of the Auction Rules of 2012 limited the categories eligible for participation in cross-border capacity allocation procedures (for exports) to suppliers that have a license for supply. In its Opening Letter, the Secretariat preliminarily concluded that Article 3 of the Auction Rules encroaches upon Articles 3(1), 9(e) and 20 of Directive 2003/54/EC as well as Section 2.10 of the Congestion Management Guidelines.

(131) In the wake of the Opening Letter, the Secretariat has been informed that obtaining a supply license in Ukraine does not represent a barrier for participation in the allocation procedure in practice, since all producers and even large customers intending to export electricity need to buy that electricity from *Energorynok*, as a precondition for participating in the WEM they have to obtain a supply license first.⁹²

(132) NEURC is the responsible authority for licensing energy undertakings pursuant to the Law of Ukraine 'On Licensing of the Types of Economic Activities',⁹³ the Electricity Sector Law of 1998 and the Licensing rules established by Resolutions of NEURC. Article 7 of the Law on Licensing, before its amendments from September 2016,⁹⁴ stipulated that the activity in the electricity sector should be licensed in accordance with the features set out in the Electricity Sector Law, *except of the supply of electricity at non-regulated tariff (supply by the independent electricity supplier)*, meaning that the license of supply of electricity at non-regulated tariff which was mentioned in the Electricity Sector Law was cancelled with the adoption of the Law on Licensing in 2015. This Law has been amended in September 2016, and now it stipulates only that economic activities conducted on the electricity sector are subject to licensing as specified in the Electricity Sector Law.⁹⁵ 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.

(133) Licenses are issued and have to comply with the licensing conditions issued by NEURC. On 31 January 2017, NEURC has published for public consultation two Draft

⁹² According to information from NERC, 261 economic entities obtained licenses on electricity supply by non-regulated tariff already in July 2013. See: NERC Letter, No.4361/14/47/14, dated 21.07.2014

⁹³ 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>

⁹⁴ Amendments with Law No. 1540, dated 22.09.2016

⁹⁵ 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)

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Resolutions, one ‘On approval of licensing conditions for economic activities on electricity production’⁹⁶ and another one ‘On approval of licensing conditions for economic activities on electricity supply’.⁹⁷ Those two regulations have not been adopted yet. In the meantime, pursuant to Article 20 of the Law on Licensing, 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.

- (134) The requirement of a valid supply license has not been changed with the amendments to the primary and secondary legal framework in Ukraine. Pursuant to Article 30 of the Electricity Sector Law, as amended by the Electricity Market Law of 2013, only “*electricity suppliers who are members of the wholesale electricity market of Ukraine with 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 operations of export and / or import of electricity.*” Article 5 of the Auction Rules of 2015 also stipulates that “*only energy suppliers are allowed to participate in auctions, and in order to participate they have to acquire the status of allocation participant,*”⁹⁸ while Article 2.2 of the Auction Rules of 2015, in order to grant the status of allocation participant, *Ukrenergo* needs to verify if the candidate has the status of a WEM member, whether it has some debt for the electricity bought from the WEM and whether it has a valid supply license.⁹⁹
- (135) Article 3(1) of Directive 2003/54/EC requires Contracting Parties, including Ukraine, not to discriminate between electricity undertakings as regards either rights or obligations. The *acquis* confers on all potential system users a right to access the interconnectors and to bid for cross-border capacity for import and/or export of electricity.
- (136) This right is also guaranteed by Article 20 of Directive 2003/54/EC. The latter requires Ukraine “*to 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.*” This is a subjective right of market participants and customers, and constitutes one of the essential measures which the Contracting Parties are required to implement in order to bring about the internal market in electricity.¹⁰⁰ By limiting access to interconnectors for the export of electricity only to users with a valid license to supply, and by excluding other system users, such as generators, traders and (eligible) customers from access to interconnection capacity provided that they have not obtained a supply license (but having already either a license for generation, or being large customers as end-users), Article 30 of the Electricity Sector Law,

⁹⁶ The Draft Resolution ‘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>

⁹⁷ The Draft Resolution ‘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>

⁹⁸ Article 5 Auction Rules of 2015

⁹⁹ Article 2.2. Auction Rules of 2015

¹⁰⁰ See Case C-439/06 citiworks AG [2008] ECR I-3913 paragraph 44 and Case C-239/07 Julius Sabatauskas and Other [2008] ECR I-07523, para. 43

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as well as Articles 2.2 and 5 of the Auction Rules of 2015 deprive all other system users to benefit from that right. Therefore, the requirement for every system user interested in obtaining interconnector capacity to apply and get a supply license as a precondition (in addition to its generation license for instance) – irrespective of how simple the licensing procedure for supply license may be – encroaches upon the right for non-discriminatory treatment of *system users* guaranteed under Article 20 of Directive 2003/54/EC.

(137) This limitation encroaches further upon Article 9(e) Directive 2003/54/EC, as it fails to ensure non-discrimination between system users or classes of system users, despite the task imposed on *Ukrenergo*, as a transmission system operator pursuant to Article 9(e) of Directive 2003/54/EC to ensure non-discrimination as between system users or classes of system users.

(138) Moreover, limiting access to market participants holding a license for supply is also in breach of Section 2.10 of the Congestion Management Guidelines which stipulates that “*in principle, all potential market participants shall be permitted to participate in the allocation process without restriction.*” This provision requires that other interested market participants than licensed suppliers, such as generators, traders and eligible customers, shall have the possibility to participate in auctions. Section 2.10 allows for limiting this right to participation in the allocation procedure only if the regulatory authority or the competition authority finds it necessary to take measures “*to avoid creating or aggravating problems related to the potential use of dominant position of any market player.*” This is not the case with the Ukrainian primary and secondary legislation, because they restrict participation in cross-border capacity allocation *per se* by limiting access to only one category of (potential and actual) market participants, i.e. suppliers.

(139) The Secretariat does not deny that a system operator must be able to identify energy market participants in order to perform successfully its tasks assigned by Article 9 of Directive 2003/54/EC and in particular to ensure a secure, reliable and efficient electricity system. Those powers of the transmission system operator should indeed be embedded in legislation. However, such identification could be ensured by mere registration with the system operator of all energy market participants that are interested in participating to auctions for allocation of cross-border capacity in Ukraine.¹⁰¹ In Ukraine instead, the effect of this requirement is that each undertaking that would be interested in accessing the interconnectors, has to apply and get a supply license. Even if this procedure for obtaining a supply license would not be difficult, it constitutes a barrier for effectively using the third party access right enshrined in the Directive for all other system users, such as generators, or large customers as end-users.

¹⁰¹ In Europe, such identification is ensured by issuing an Energy Identification Code (EIC) that represents a unique code which enables a more efficient electronic data exchange. See: <http://www.eles.si/en/for-business-users/descriptions.aspx> (12.02.2013) Since issuing an EIC is based on filling an application form with basic information about the energy entity, in case of lack of EIC, such identification could be ensured by mere registration with the system operator of all energy market participants.

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(140) Such a requirement amounts also to a restriction of trade, since the Court of Justice has considered that measures requiring prior authorization,¹⁰² even as a pure formality,¹⁰³ amount to measures having equivalent effect to import restrictions and are thus contrary to Article 41 of the Treaty.

(141) Therefore, the breach of the Energy Community law still persists even after the Opening Letter and all the legislative changes performed afterwards. As the restriction is based upon Article 30 of the Law on Electricity, as amended in 2013, (as well as in Articles 2.2 and 5 of the Auction Rules of 2015), rectifying the breach requires amendments to the primary legal framework.

(142) The Secretariat therefore concludes that Ukraine, by limiting the access to interconnectors as part of the transmission grids of Ukraine only to undertakings holding a supply license fails to comply with the rules on ensuring third party access as one of the main rights under the energy *acquis* pursuant to Articles 3(1), 9(e) and 20 of Directive 2003/54/EC as well as Section 2.10 of the Congestion Management Guidelines.

ii. The existence and approval of purchase/supply contracts as requirements for participation in cross-border capacity allocation procedures

(143) Article 30 of the Electricity Sector Law and the Auction Rules of 2012 subject the Opening Letter listed several other requirements to be fulfilled by market participants if they want to access the interconnectors and to participate in an allocation procedure for electricity exports. This included the requirement to have a contract for purchasing electricity on the wholesale electricity market from the wholesale supplier *Energorynok*, as well as for having concluded contracts for supply of electricity with foreign entities. Both contracts had to be approved by the transmission system operator *Ukrenergo* and needed to be valid at least for the period for which allocation of capacity is required. In the Secretariat's view, these requirements violated the obligation to ensure non-discriminatory access to interconnectors to all eligible customers as enshrined in Article 7 of the Treaty, Articles 3(1) and 20 of Directive 2003/54/EC and Article 6(1) of Regulation (EC) 1228/2003. The obligation to purchase the electricity to be exported through *Energorynok* as a single seller of electricity, also encroached upon the prohibition of hindering trade among the Parties as stipulated in Article 41 of the Treaty.

(144) Subsequently, Article 30 of the Electricity Sector Law has been amended by the Electricity Market Law of 2013, and approval of the contracts with foreign entities is not any more a precondition for becoming allocation participant. The Auction Rules of 2015, based

¹⁰² 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

¹⁰³ 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

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on Article 30 as amended, do not require such contracts any more, nor do they require approval by *Ukrenergo* of those contracts in advance.¹⁰⁴ Hence, the breaches identified by the Opening Letter related to the contracts with foreign entities, their approval by *Ukrenergo* as well as their duration, have been rectified.

- (145) However, Article 30 of the Electricity Sector Law as amended still requires that in order to become allocation participant, a supplier must be a member of the Ukrainian WEM by signing the agreement with the single buyer *Energorynok* and may have no open debt for electricity purchased on the WEM. Furthermore, the Auction Rules of 2015 require that the auction office has to verify if the supplier has the status of WEM member and whether it has some debt for the electricity bought from the WEM in order to be granted a status of auction participant.¹⁰⁵ Both requirements are preconditions for participating in the auctions for exports. If not fulfilled, participation will be denied.
- (146) Unlike in the Auction Rules of 2012, where evidence for fulfilling all qualification requirements was to be submitted together with the application by the candidate,¹⁰⁶ the Auction Rules of 2015 stipulate that the auction office asks for confirmation from the *Energorynok* that the supplier applying for participating to auctions has no open debt towards *Energorynok* and that it has the status of participant to the WEM.
- (147) Thus, as a precondition for participating in capacity allocation of interconnectors, the exporters have to purchase all volumes of electricity to be exported only from *Energorynok*. For rectifying the breach identified in the Opening Letter still valid, amendments to the primary legal framework would be necessary.
- (148) The requirement for having a contract for purchasing electricity on the wholesale electricity market with the wholesale supplier *Energorynok* for the purpose of further export violates the requirements for ensuring non-discriminatory access to interconnectors to all eligible customers as enshrined in Article 7 of the Treaty, Articles 3(1) and 20 of Directive 2003/54/EC and Article 6(1) of Regulation (EC) 1228/2003. It follows from these provisions that access to interconnection capacity must be open to all potential system users, without making it dependent on the availability of supply contracts, and even less so limiting it to one single source (*Energorynok*).
- (149) Furthermore, requiring contracts with *Energorynok* imposes an obligation on the transmission system operator to differentiate between the commercial transactions of the system users applying for access to interconnectors and thus frustrates the achievement of the goal pursued by Section 1.1 of the Congestion Management Guidelines, which is to accept *all* commercial transactions. Moreover, requiring contracts with specific sellers and buyers (*Energorynok*) also violates Section 2.10 of the Congestion Management Guidelines

¹⁰⁴ Ukrenergo's approval of the contracts with *Energorynok* has been subject to Article 3 Auction Rules of 2012, and has been applied in the past, as evident from documents submitted by the complainant: Letter from Ukrenergo, Ref. No. 06/06-2-2/9391 of 15.11.2012.

¹⁰⁵ Article 2.2. Auction Rules of 2015

¹⁰⁶ Article 4 Auction Rules of 2012

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as not all potential market participants are permitted to participate in the allocation process without restriction.

(150) Finally, rules requiring certain contracts of the potential auction participants for commodity as a precondition for participating in auctions for capacity infringe Article 6(1) of Regulation (EC) 1228/2003 and Section 1.6 of the Congestion Management Guidelines, as they frustrate the transmission system operator's obligation to preferentially solve congestions with non transaction based methods, i.e. methods that do not involve a selection between the contracts of individual market participants.

(151) The obligation to purchase the electricity to be exported in Ukraine, and through *Energorynok* as a single seller, encroaches also upon the prohibition of hindering trade among the Parties as stipulated in Article 41 of the Treaty. The requirement to provide purchase and supply contracts *ex ante* to *Energorynok*, as well as the sanctions stemming from non-compliance with these requirements, constitute impediments to the cross-border trade in electricity within the meaning of Article 41 of the Treaty. Without any prejudice to possible justification under Article 41(2) of the Treaty – which would have to be put forward by the Ukrainian side – the arrangement seems to be disproportionate. Identification of participants in the auctions organized by *Ukrenergo* could be also ensured by way of registration with the system operator and submission of an EIC code which has even been introduced by Article 5 of the Auction Rules of 2015.

(152) The infringements are not of a theoretical nature. As has been described above, the requirements to provide contracts with *Energorynok* as a precondition to bid for capacity used for exports need to be fulfilled in practice. The 2015 Auction Rules do not require anymore submission of those contracts by the applicant, but instead task the auction office to verify *ex officio* by sending a confirmation request to *Energorynok*. However, this amendment does not change the fact that a contract for purchase of electricity with *Energorynok* is required. This requirement has been applied by *Ukrenergo* in the past to the effect that access to interconnectors operated by *Ukrenergo* was refused in several instances.¹⁰⁷

(153) Thus, the Secretariat concludes that Article 30 of the Electricity Sector Law as amended and Article 2.2. of the Auction Rules of 2015, in principle and as applied by *Ukrenergo*, encroach upon the right to third party access and infringe Articles 7 and 41 of the Treaty, Articles 3(1) and 20 of Directive 2003/54/EC, Article 6(1) of Regulation 1228/2003 and Section 1.1, 1.6 and 2.10 of the Congestion Management Guidelines.

iii. Consequences from not fulfilling the criteria for obtaining status as allocation participant and losing the registration as allocation participant

(154) The provisions of the Auction Rules of 2012 defined the notion of an “*ineligible participant* [неналежний учасник аукціону]” in the auction. Ineligible participants were

¹⁰⁷ Opening Letter, p.7.

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banned from participation in auctions during the following six months. A participant was considered ineligible in the following cases: if the participant that set the initial price does not register for participation in the auction (since under the Auction Rules of 2012 the capacity was sold, and there was always an initial price irrespective of whether there was congestion or not, and this price was set before the auction) or does not raise the card to confirm that it is willing to accept the capacity after the first announcement of the initial price; if the winner of the auction subsequently does not conclude a contract for allocation of transmission capacity with *Ukrenergo*, or does not pay the sale price, i.e. the price at which it “bought” the capacity, or if the participant fails to fulfill conditions from the agreement with the wholesale electricity supplier.

(155) The Auction Rules of 2015 do not contain a provision defining “*ineligible participants*” anymore. However, as explained above, Article 30 of the Electricity Sector Law still requires that only electricity suppliers who are members of the wholesale electricity market and have no open debt for electricity purchased on the wholesale electricity market shall have access to transmission capacity of cross-border electricity networks in order to export electricity. Pursuant to Article 5(7) of the Auction Rules of 2015, “*based on the results of examination of the application on acquirement of allocation participants and also the documents attached to the application and the information from wholesale electricity supplier concerning indebtedness of the energy supplier, the auction office decides on whether to register the supplier as allocation participant or to refuse this registration.*” Therefore, even though not called ineligible participants anymore, the restrictions and the breach identified in the Opening Letter related to refusing access to interconnectors for failure to participate to the WEM still persists and amending the existing electricity market model by amending the wording of the Auction Rules did not rectify the breach.

(156) Moreover, 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.¹⁰⁸ This also shows that status of WEM member and lack of indebtedness for the electricity purchased from *Energorynok* is a precondition for participating to the auctions for capacity, which has to be verified annually.

(157) Finally, once the applicant has been successful with its bids in the auctions, and has been allocated certain cross-border capacity in a yearly auction, it can lose the remaining capacity for the whole year in case it uses the obtained capacity less than 70% during a month.¹⁰⁹ This provision was also part of the Auction Rules of 2012,¹¹⁰ and remains in force in the Auction Rules of 2015 as well.

(158) According to Article 20(2) of Directive 2003/43/EC, access to the transmission networks (including cross-border interconnectors) may be refused only where there is a lack

¹⁰⁹ Article 12.9 Auction Rules of 2015

¹¹⁰ Article 8.3 Auction Rules of 2012

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of capacity in which case duly substantiated reasons must be given. Besides, Article 3(8) Directive 2003/54/EC entitles Contracting Parties to not apply Article 20 from Directive 2003/54/EC “where its application would obstruct performance of obligations imposed on electricity undertakings in the general economic interest and in so far as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community.”

- (159) It is for Ukraine to ascertain whether an unrestricted access to the system would obstruct the performance of *Ukrenergo*’s public service obligations and whether the performance could not be achieved by means other than refusal to participation in the auctions for access to interconnectors for each refusal ground separately.¹¹¹
- (160) In the Secretariat’s view, the first requirement – refusing access to interconnector because the applicant does not make a bid during an year after the date of registration as allocation participant, as well as the second requirement – refusing access to interconnectors by making the allocation participants lose the right they have obtained in auction in case they use the obtained capacity for less than 70% fails to comply with Article 20 of Directive 2003/54/EC, because it prevents third party access for reasons other than those allowed by Article 20(1) of the Directive 2003/54/EC, i.e. lack of available capacity, provided that no exemption under Article 3(8) of Directive 2003/54/EC has been obtained either.
- (161) Even if the reasons for withdrawing the right to use the allocated capacity in the abovementioned cases are the prevention of abuse by single market participants that would obtain but not use large portions of interconnector capacity and the possibility for *Ukrenergo* to be able to allocate the unused capacity further, this regulatory measure is not appropriate. Namely, sanctioning an allocation participant by withdrawing its right to capacity if it uses less than 70% as a regulatory measure imposed *ex ante* corresponds to capacity release usually imposed as a structural remedy addressing competition law infringements and abuse of market power *ex post*. In this case, the withdrawal of the whole capacity for the remaining months of the year is disproportionate as there seem to be other, less-restrictive means to achieve the same objective. Section 2.13 of the Congestion Management Guidelines provide for financial consequences of failure to honour obligations associated with the allocation of capacity. According to the Auction Rules in Ukraine, the deposit made available in advance will serve to guarantee the financial obligations stemming from the agreement for capacity allocation. Moreover, the use-it-or-lose-it¹¹² has been introduced in the Auction Rules of 2015¹¹³ and should be applied in which case another applicant should be allocated the capacity in question. This principle means that if the capacity allocated at annual auctions is not scheduled on the daily schedules, then *Ukrenergo* would be able to use what has not been utilised by the winner of the auction. However, the application of this principle does not give

¹¹¹ See Case C-439/06 *citiworks*, para. 60

¹¹² Section 2.5 Congestion Management Guidelines

¹¹³ Article 12.8 Auction Rules of 2015

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a right to the transmission system operator to withdraw the right of using all of the awarded capacity until the end of the year as a consequence for not using certain percentage of it.

- (162) Denying access to interconnectors to entities for the above-mentioned reasons under the Auction Rules irrespective of whether there is capacity available, thus infringes the right for access to the transmission grids enshrined in Article 20 Directive 2003/54/EC.
- (163) In addition, denying participation in the auction for the above-mentioned reasons is not compliant with Section 1.6 of the Congestion Management Guidelines. This provision lists only one possibility for denying request for transmission service if two conditions are jointly fulfilled, namely when *“the incremental physical power flows resulting from the acceptance of this request imply that secure operation of the power system may no longer be guaranteed, and when the value in monetary amount attached to this request in the congestion management procedure is lower than all other requests intended to be accepted for the same service and conditions.”*¹¹⁴ The first of these criteria refers to situations when security of supply would be endangered if the request for access was accepted, while the second criterion refers to situation when – if congestion occurs, the price offered by the denied applicant is lower than the price offered by the another applicants and due to lack of capacity such offer with the lower price could not be accepted.¹¹⁵ None of them allows for the refusal of participation in capacity auctions when the applicant does not make a bid during an year after the date of registration as allocation participant, or use the obtained capacity for less than 70%.
- (164) Moreover, Section 2.13 of the Congestion Management Guidelines provides for financial consequences of failure to honour obligations stemming from the allocation of capacity. The Guidelines stipulate that where market participants fail to use the capacity that they have committed to use, or, in the case of explicitly auctioned capacity, fail to trade on a secondary basis or give the capacity back in due time, they shall lose the rights to such capacity and pay a cost-reflective charge. Any cost-reflective charges for the non-use of capacity shall be justified and proportionate and the *“key concepts and methods for the determination of liabilities that accrue upon failure to honour obligations”* shall be set out in advance in respect of the financial consequences, and shall be subject to review by the relevant national regulatory authority. This provision in essence stipulates that a use-it-or-lose-it principle shall apply. Besides losing non-used capacity, the consequence of not using acquired capacity is the payment a cost-reflective charge defined in advance. Section 2.13 lists the consequences of non-usage of capacity in an exhaustive manner, and does not allow for further sanctions such as those at issue under the Auction Rules of Ukraine. Cost-reflective sanctions pursuant to Section 2.13 of the Congestion Management Guidelines have not been introduced in the Auction Rules of 2015.

¹¹⁴ Section 1.6 Congestion Management Guidelines

¹¹⁵ When a merit order list is established from the bids for capacity, acceptance of bids starts from the highest offer towards the lowest and bids are accepted up to the moment that free cross-border capacity is available.

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(165) Denial of access to interconnectors and depriving an undertaking to participate in auctions for capacity is not allowed by any of the provisions of the *acquis*, and is not considered as a possibility even in cases when the undertakings fail to honour their obligations from the auctions. Furthermore, the consequences envisaged by Section 2.13 of the Congestion Management Guidelines can be triggered only after capacity has been allocated and the winning undertaking has failed to use such capacity, or has failed to trade it on secondary basis. These consequences may not be turned into precondition for participation in an auction, as it is done with the preconditions set by the Auction Rules of Ukraine.

(166) The Secretariat therefore concludes that excluding an applicant from participating in an auction when it does not satisfy the qualification requirements from Article 2.2 of the Auction Rules of 2015 related to not making a bid during a year after the date of registration as allocation participant,, as well as sanctioning a use of obtained interconnectors' capacity in less than 70% by losing the whole capacity obtained, goes beyond the possibilities for refusal granted by Article 20 of Directive 2003/54/EC and Sections 1.6 and 2.13 of the Congestion Management Guidelines, and thus infringes those provisions.

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V. Conclusion

(167) In the light of the foregoing, the Secretariat concludes that, by failing to adopt, within the prescribed time limit, the national measures necessary to implement Articles 7 and 41 of the Energy Community Treaty, Articles 3(1), 9(1) and 20 of Directive 2003/54/EC, 1, 2(1) and 6(1) of Regulation (EC) 1228/2003, as well as Sections 1.1; 1.6; 2.1; 2.10 and 2.13 of the Congestion Management Guidelines Ukraine has failed to fulfill its obligations under the Energy Community Treaty.

(168) 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

14 May 2017.

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

28 March 2017

Vienna, 14 March 2017



Janez Kopac
Director



Dirk Buschle
Legal Counsel/Deputy Director



Про НКРЕКП Засідання НКРЕКП Документи Проекти Державний контроль Зв'язок з громадськістю Публічна інформація Контакти

ЕЛЕКТРОЕНЕРГІЯ

ГАЗ ПРИРОДНИЙ

ТЕПЛО

ВОДА ХОЛОДНА

ВІДХОДИ

Документи

Головна сторінка / Документи / Постанови / 2017 року / НКРЕКП. Постанова від 28.03.2017 № 426 "Про затвердження Порядку проведення електронних аукціонів з розподілення пропускної спроможності міждержавних електричних мереж"

версія для друку

Дата розміщення на сайті: 31.03.2017

ОБҐРУНТУВАННЯ ПРИЙНЯТТЯ ПОСТАНОВИ

НАЦІОНАЛЬНА КОМІСІЯ, ЩО ЗДІЙСНЮЄ ДЕРЖАВНЕ РЕГУЛЮВАННЯ
У СФЕРАХ ЕНЕРГЕТИКИ ТА КОМУНАЛЬНИХ ПОСЛУГПОСТАНОВА
28.03.2017 № 426

Про затвердження Порядку проведення електронних аукціонів з розподілення пропускної спроможності міждержавних електричних мереж

Відповідно до статті 30 Закону України «Про електроенергетику», законів України «Про засади функціонування ринку електричної енергії України» та «Про Національну комісію, що здійснює державне регулювання у сферах енергетики та комунальних послуг» Національна комісія, що здійснює державне регулювання у сферах енергетики та комунальних послуг, ПОСТАНОВЛЯЄ:

1. Затвердити Порядок проведення електронних аукціонів з розподілення пропускної спроможності міждержавних електричних мереж, що додається.
2. Визнати такою, що втратила чинність, постанову Національної комісії, що здійснює державне регулювання у сферах енергетики та комунальних послуг, від 12 лютого 2015 року № 176 «Про затвердження Порядку проведення електронних аукціонів з розподілення пропускної спроможності міждержавних електричних мереж», зареєстровану в Міністерстві юстиції України 13 травня 2015 року за № 521/26966.
3. Ця постанова набирає чинності з дня, наступного за днем її опублікування в офіційному друкованому виданні – газеті «Урядовий кур'єр».

Голова НКРЕКП

Д.Вовк

ЗАТВЕРДЖЕНО
Постанова НКРЕКП
28.03.2017 № 426

Порядок проведення електронних аукціонів з розподілення пропускної спроможності міждержавних електричних мереж

I. Загальні положення

1.1. Цей Порядок визначає процедуру організації та проведення електронних аукціонів щодо доступу до пропускної спроможності міждержавних електричних мереж України для здійснення експортних та/або імпорتنних операцій з електричною енергією з урахуванням особливостей роботи ОЕС України та окремих її складових частин.

1.2. У цьому Порядку терміни вживаються в таких значеннях:

адміністратор аукціонної платформи – працівник аукціонного офісу, який має повноваження здійснювати контроль за дотриманням цього Порядку, правил та умов проведення аукціонів, проводити аукціони, зняття всіх наявних Заявок на участь в аукціоні у випадку виникнення технологічного порушення, технічних проблем у роботі аукціонної платформи та/або форс-мажорних обставин, перевірку надходження грошових внесків/подання банківських гарантій, прийом Заяв та пакета документів про набуття статусу учасника розподілення, підписання протоколів проведення аукціонів у разі застосування резервного механізму та виконувати інші дії, передбачені цим Порядком;

аукціонна платформа – автоматизована система, за допомогою якої проводяться електронні аукціони відповідно до цього Порядку;

аукціонний офіс – підприємство, яке здійснює централізоване диспетчерське управління об'єднаною енергетичною системою України;

банківська гарантія – вид забезпечення виконання зобов'язань, відповідно до якого банк-гарант бере на себе грошове зобов'язання перед аукціонним офісом сплатити кошти за учасника розподілення вільної пропускної спроможності в разі невиконання останнім у повному обсязі або частково своїх фінансових зобов'язань перед аукціонним офісом. Банківська гарантія є безвідкличною та безумовною;

відкриття торгів – час дня, з настанням якого до аукціонного офісу можуть надходити заявки на участь в аукціоні від учасників розподілення;

вільна пропускна спроможність (далі – ВПС) (available transfer capacity, ATC) – доступна пропускна спроможність, за вирахуванням розподіленої на аукціонах величини пропускної спроможності та пропускної спроможності, щодо якої відповідно до законодавства надано пріоритетний доступ. При розрахунку добової вільної пропускної спроможності враховується невикористана величина пропускної спроможності, розподіленої на попередніх аукціонах;

RULES

on holding electronic auctions for capacity allocation of cross-border electrical networks

I. General provisions

1.1. Given Auction Rules defines the procedure for organization and holding of electronic auctions on access to the cross-border transfer capacity of electrical networks of Ukraine ~~for export and/or import of electricity for conducting operations on electricity export and/or import taking into account the particularities of the work of the Ukrainian Unified Electricity System and its separate parts.~~

1.2. In the given Auction Rules the terms and definitions used are the following:

administrator of the auction platform – employee of the auction office authorized for control of this Auction Rules compliance, rules and conditions of holding of auctions, to hold auction, withdraw all available Bids in case of technical disturbance ~~, or~~ technical problems with the auction platform and/or Force-Majeure, to check incomings of ~~guarantee fees~~ payments and bank guarantees, ~~control of concluding the agreements on access and Annexes of the agreement on access,~~ accept Applications and documents on acquisition of the status of allocation participant, signing of auctions holding minutes ~~by electronic digital signature~~ in case of the application of the fallback mode and carry out other actions according to this Auction Rules;

~~auction platform – information system comprising hardware and software (complex of databases, technical, program, hardware, telecommunication systems, monitoring systems, systems of electronic documents circulation and electronic digital signature and other devices providing the feasibility of collection, loading, saving, processing and dissemination of information necessary for auctions holding and validation of operations realization foreseen herein) and used for electronic auctions holding according to this Auction Rules;~~

auction platform – automate system for holding electronic auctions in line with this Rules.

auction office – enterprise providing centralized dispatching control over Interconnected Power System of Ukraine;

bank guarantee – type of ensuring of obligations fulfillment implicating the guarantor bank undertakes the cash obligation towards the auction office to pay for the allocation participant in case of its non-fulfillment in full or partially of financial obligations towards the auction office. Bank guarantee is irrevocable and unconditional;

gate opening – time of a day when auction office may obtain Bids for participation in the auction from allocation participants;

available transfer capacity (ATC) – net transfer capacity less already allocated capacity and priority capacity granted according to the legislation. In

calculations of the daily ATC the unused capacity allocated on previous auctions is taken into account;

marginal value of the export and import of daily electricity operations – D (hereinafter – marginal values) – maximum hourly volumes of electricity and capacity of the export and import of electricity, ensuring secure and uninterrupted UES of Ukraine and electricity supply to consumers, defined in accordance with the law and/or legal acts.

marginal price – minimal access price out of satisfied Bids defined by the auction platform software by each reserve of each cross-border section;

auction calendar – calendar of yearly, monthly and daily auctions published on auction office official web-site;

financial contribution (fee, payment) – funds, paid by allocation participants in yearly and/or monthly, and/or daily auctions and which in case on non-fulfillment by the allocation participants of its obligations pursuant to the contract on access to the capacity of the interstate electricity networks of Ukraine are transferred to the ownership of the auction office as a fine.

~~guarantee fee – type of ensuring the fulfillment of obligations, according to which the allocation participant pays the guarantee fee to the account of the auction office as the type of ensuring of its financial obligations towards the auction office as to the payment for the access to the transfer capacity of the cross-border electrical networks of Ukraine;~~

D – the day on which the access to the transfer capacity is granted;

D-1 – the day prior to the day D;

D-2 – the day prior to the day D-1;

D-3 – the day prior to the day D-2;

auction details – information on auction parameters defined in subpoint 7 of point 3.1 herein;

daily reserve – available transfer capacity proposed on allocation on daily auctions, in MW;

agreement on access – agreement on access to the transfer capacity of cross-border electrical networks of Ukraine which defines conditions and procedure of provision of access to the transfer capacity of cross-border electrical networks of Ukraine and is concluded between the auction participant and auction office through the accession of the auction participant to the agreement in full. The agreement is drafted by the auction office;

access to the transfer capacity of cross-border electrical networks of Ukraine – the right of the energy supplier on obtaining a service on transmission of electricity over the cross-border electrical networks of Ukraine, granted in accordance with the given Auction Rules, with the view of carrying out export and/or import of electricity operations;

net transfer capacity (NTC) – value of maximum transmission capacity that can be transferred from the power system of one country to the power system of another country in the corresponding direction (cross-border section) on the condition of guaranteed ensuring of safety and reliability of IPS of Ukraine functioning;

electronic auction (auction) – social relations system, regulated by the given Auction Rules, between the participants of electronic interaction of the internet based auction platform used by these participants for competitive based transactions on allocation of access to the to the cross-border transfer capacity of electrical networks of Ukraine for export and/or import operation of electricity. The participants of electronic interaction of the internet based auction platform are allocation participants and auction office;

electronic registration – set of letters and numbers (login and password) assigned to the energy supplier when acquiring the status of allocation participant for personal access to the auction platform and acting in accordance to this Auction Rules;

energy suppliers – participants of wholesale electricity market that buy/sell the electricity on this market with the purpose of its resale and/or supplying to the consumers or to export and/or import;

gate closure – time of a day when auction office stops obtain Bids for participation in the auction from allocation participants;

application on acquirement of status of allocation participant – application signed and submitted by the energy supplier to the auction office to acquire : ~~Based on the results of its consideration the auction office acquires to this energy supplier~~ the status of allocation participant. The form of application on acquirement of status of allocation participant is given in Annex 1 herein;

bid on participation in the auction (Bid) – the proposal (offer) of the allocation participant submitted to the auction office in a way defined by the given Auction Rules regarding the obtaining the corresponding amount of ATC of the respective reserve proposed on the electronic auction.

Identification number for payment – set of signs, which as a result of the conduction of the respective auction is attributed by the auction office to a respective reserve and which is used by the winner of the auction when executing payments for such reserve;

~~This proposal (offer) is irrevocable on the time of gate closure;~~

Kyiv time – CET + 1 hour;

~~compensation – the amount of money to be refunded to the ATR user regarding the curtailment value of the cross-border capacity;~~

allocated transmission rights user (ATR user) – auction winner or ATR transferee having obtained the rights and obligations on using of allocated transmission rights (ATR);

cross-border section – a number of cross-border transmission lines connecting the power system of Ukraine (or its part) with others control zones and/or power systems of other countries ~~and/or unions of energy sector;~~

monthly reserve – available transfer capacity guaranteed during more than one day and not more than the quantity of calendar days in the corresponding calendar month proposed on allocation on monthly auctions, in MW;

imbalance of electricity (capacity) – difference between the volumes of electricity production and import and electricity consumption and export.

ATR curtailment – curtailment of ATR carried out by the auction office in case of technological disturbance and/or Force-Majeure and also on demand by the neighbouring TSO;

wholesale electricity supplier (WES) – entity having a license for wholesale energy supply and which provides this kind of licensed activity;

ATR transferee – allocation participant obtaining the access to the ATR on contractual basis as a result of ATR transfer from the ATR transferor;

ATR transferor – ATR user carrying out on contractual basis the ATR transfer obtained on the auction to the other allocation participant;

ATR transfer – a method defined herein of transfer of the right of access to the cross-border electrical networks of Ukraine capacity carried out from the ATR user to the ATR transferee;

auction winner – auction participant having a satisfied Bid;

repayment – return of funds to the user of ATR with regards to the value of restriction and/or termination of the access to the transmission capacity of the cross-border electricity networks;

notification – any official information send by the auction office to the allocation participant ~~auction participants~~ on any processes held in the auction platform with their participation, or other information to be send by the auction office in cases, terms and procedure defined herein. Appropriate notification is the one published/placed/sent by the auction office by means of available communication channels (auction platform or, in fallback mode, e-mail or fax) on the requisites provided by the allocation participants to the auction office. All notifications of the auction office are placed on the auction platform and published on auction office web-site;

~~daily auction profile – product(s) defined herein to be allocated on the daily auctions;~~

~~rules of wholesale electricity market of Ukraine (WEM rules) – integral part of the Agreement between the members of wholesale electricity market;~~

return for resale of ATR – a method defined herein of voluntary return for resale of obtained ATR by the ATR user;

priority access – access to the additional (increased) volume of cross-border capacity developed as a result of investment of a legal person being under neither directly or indirectly control with the enterprise providing centralized dispatching control over Interconnected Power System of Ukraine and electricity transfer over trunk and cross-border electrical networks of Ukraine. This additional (increased) volume of cross-border capacity may be released from the stated in part 7 of Article 30 of Law of Ukraine “On electrical power engineering”;

registry of allocation participants (Registry) – electronic registry of allocation participants which are entered to the auction platform for the identification of these allocation participants by the software as regards granting them rights to carry out corresponding activities on the auction platform;

fallback mode – procedure of allocation of access to the cross-border capacity applied by the auction office due to technical problems with the auction platform by e-mail or fax;

yearly reserve – available transfer capacity ~~guaranteed~~ in one calendar year during more than 30 calendar days and not more than 365 or 366 (leap year) calendar days proposed on allocation on yearly auction, in MW;

allocated transmission rights – allocated transmission capacity related to which the auction winner obtained the rights and obligations;

auction platform system time – current time and date for every activity of all auction platform users. Auction platform system time relates to Kyiv time;

neighbouring TSO – TSO of Slovakia, Romania, Poland, Hungary, Moldova, Belarus or Russia;

technical problems with the auction platform – technical ~~and/or technological~~ malfunction of proper functioning of hardware and/or software used for holding electronic auctions, full cutoff from the Internet and/or loss of all web applications and/or failure of auction platform operation (servers, databases or system fault of auction platform);

technological disturbance – situation resulted in danger of violation of operational regime of IPS of Ukraine or its part, in particular due to deficit of electricity and/or power, reduction of frequency below the boundary acceptable limits, violation of permissible power flows regime and overload of network elements, reduction of voltage in control nodes of power system up to the emergency level, which is defined in accordance with the legislation and/or legal acts;

unique identifier – set of letters and numbers automatically assigned by the auction platform to any ATR allocated on the electronic auction;

authorized person – a person having authorities in accordance with the valid legislation to represent the interests of energy supplier and act on behalf and at cost of this energy supplier participating in the auction;

auction participant – allocation participant which submitted its Bid;

allocation participant of available transfer capacity (allocation participant) – energy supplier that meets the requirements of this Auction Rules and been entered into the Registry;

Force-Majeure – emergency, unforeseen and irresistible events that happen regardless the desire and are beyond the control of the auction office and energy suppliers (regardless the status they have according to this Auction Rules) and appear the circumstances that exempt from liability for breach of obligations;

time stamp – auction platform system time assigned to any activity of any allocation participant or auction office;

CET – Central European Time;

EIC-code (energy identification code) – personal identification code necessary for participation in allocation of available transfer capacity of cross-border electrical networks of Ukraine in direction to Hungary, Slovakia, Romania and Poland.

Terms “cross-border electrical network”, “interconnected power system of Ukraine” used are taken from Law of Ukraine “On electrical power engineering”.

1.3. Access to the transfer capacity of cross-border electrical networks of Ukraine is granted to the auction participants exclusively on the results of the auction foreseen herein excluding the priority capacity granted according to the legislation.

Upon the results of the auction, the energy suppliers have the right to use the transfer capacity for electricity export and/or import operations.

1.4. Auction office calculates the net transfer capacity in accordance with the Methodic approved by the Central Executive Body providing state politics in power sector. The NTC value is agreed with the corresponding TSO and/or TSO of neighbouring country.

1.5. Auction office carries out allocation of all available transfer capacity on of the cross-border electrical networks of Ukraine on yearly, monthly and daily auctions according to the procedure of electronic auction using electronic documents circulation and electronic digital signature excluding the cases defined in Law of Ukraine “On electrical power engineering”.

1.6. Available transfer capacity is calculated by the auction office by subtraction from the net transfer capacity both allocated capacity and priority capacity granted according to the legislation. In calculations of the monthly ATC the unused capacity allocated on yearly auction is taken into account. In calculations of the daily ATC the unused capacities allocated on yearly and monthly auctions are taken into account, as well as the value of free transfer capacity after the adjustment of the schedules of ATR users based on yearly and monthly auctions results to the marginal values. ₮

The marginal values of electricity export/import operations for the day D shall be defined based on the scheme and parameters of the main network and the planned capacity balance of the UES of Ukraine and the ‘Burstyn Island CHP’. The marginal values of the electricity export and import operations for the respective period shall be published by the auction office in details of the daily auction.

When defining the marginal values for the daily auction, the hourly capacity volumes of the submitted schedules of ATR usage as a result of yearly and monthly auctions shall be taken into account.

1.7. If the demand on capacity of cross-border electrical networks of Ukraine exceeds the value of available transfer capacity of cross-border electrical networks of Ukraine, the auction is held on the principle of preferential satisfaction of Bids with the biggest price. In such case the marginal price on the corresponding direction is determined as the minimal price of accepted Bids.

1.8. If the demand on capacity of cross-border electrical networks of Ukraine does not exceed or is equal to the value of available transfer capacity of cross-border electrical networks of Ukraine, auction office grants the access to

the transfer capacity of cross-border electrical networks of Ukraine to the auction participants on a free of charge bases.

~~1.9. In case when yearly auction winner uses the obtained capacity by each reserve during a month less than 70% (including the transferred ATR and excluding both returned ATR for resale and curtailed ATR), such auction participant loses the obtained access, and the given capacity becomes available and is to be further allocated on monthly and daily auctions. At the same time this ATR user is not dispensed from the liabilities towards the auction office regarding the payment on obtained yearly capacity.~~

1.9~~10~~. Yearly and monthly auctions are held in accordance with the auction calendar published annually by the auction office on its web-site not later than November 01 of the current year. The auction calendar also comprises the deadlines for publishing the auction details.

1.10. In the event if the last day as indicated in the Rules is a public holiday, as defined in the Labor Code of Ukraine, all the actions which shall be taken pursuant to this Rules are subject to implementation not later than the last working day, prior to the public holiday.

~~1.11. Auction participants should refrain on illegal actions that may result in violation of law on economical competitiveness protection or behaviour that may have negative impact on competition.~~

1.1~~12~~. The language of auctions, documents exchanging and circulation is Ukrainian.

1.1~~23~~. Auction platform is available for every allocation participant for carrying out activities regarding the preparation and participation in the auction, review of information on auction results, monitoring of amounts of ~~guarantee~~ fees and bank guarantees of ~~allocation~~~~auction~~ participants and other activities foreseen herein.

To implement the above-mentioned actions, the allocation participant shall have an internet access and use the electronic registration.

~~The allocation participant in order to have an access to the auction platform has to have an internet access and use the electronic registration.~~

Auction platform shall be available to all other users exclusively for public information without a right to take other actions. ~~functioning maintenance is provided by the auction office.~~

1.1~~34~~. Auction office shall cooperate with the neighbouring TSOs regarding the coordination of mechanisms of congestion management and realization of common procedures of allocation of cross-border capacities with the view of creation of single auction platform in the future.

1.145. Auction office, WES and allocation participants have a right to initiate changes incorporation into the given Auction Rules.

1.156. National Regulator monitors the rules compliance on capacities allocation of capacities of cross-border electrical networks of Ukraine.

II. Auction office

2.1. Auction office is responsible for organization and holding electronic auctions on access to the cross-border transfer capacity of electrical networks of Ukraine for electricity export and/or import ~~operations of electricity~~.

2.2. For the reasons given above the auction office carries out the following:

ensures the non-discriminatory conditions of energy suppliers to the ~~trunk~~ and cross-border electrical networks of Ukraine for electricity export and/or import perations. for export and/or import of electricity;

draws up and publishes the auction calendar;

reviews the applications on acquirement of status of allocation participant;

registers and maintains the Registry;

accepts the Bids via the auction platform;

formalizes the corresponding auction results papers;

coordinates the capacity allocation with the neighbouring TSOs;

acts as an administrator of the auction platform, publishes the information foreseen herein on the auction platform web-site;

registers the notifications on transfer and return for resale;

allocates the ATC;

curtails the ATR pursuant to the effective legislation and/or legal acts;

carries out adjustment of daily hourly schedules to the marginal values;

carries out control of the percentage of use of obtained yearly ATR;

defines the costs to be returned ~~carries out the compensation~~ to the ATR user;

notifies on the ~~ensures the publication of notifications on~~ registration of energy suppliers as the allocation participants on the auction platform in due form given in Annex 2 herein,

notifications to the ATR user on the loss of obtained ATR in due form given in Annex 3 herein;

notifications on fallback mode in due form given in Annex 4 herein and procedures as defined by this Rules;

meets the operational challenges during the auction process;

applies the fallback modes if necessary;

defines ~~on~~ the date prior to ~~of~~ the gate opening for yearly and monthly auctions checks the allocation participants on the presence/absence of the WEM member status by sending the corresponding request to the WES;

calculates the NTC and ATC;

agrees the NTC with the neighbouring TSOs;

on the date prior to the gate opening of yearly and monthly auctions ~~determines of final term of submitting the application on acquirement of status of allocation participant and on the date of the gate opening for yearly and monthly auctions checks on~~ the presence of the overdue indebtedness of the allocation participants for the electricity bought on the wholesale electricity market of Ukraine by sending the corresponding request to the WES;

~~on the date of the gate opening for yearly and monthly auctions checks on the presence/absence of the electricity supply license by checking the given information on the Regulator web-site;~~

provides advisory support to all allocation participants regarding the auction platform operation.

III. Web-site publications

3.1. Auction office publishes the following information on its web-site:

1) this Auction Rules and other normative documents that regulate the issue of capacity allocation of cross-border electrical networks of Ukraine;

2) methodology for calculating the available transfer capacity;

2)3) auction calendar;

3)4) contact details (first name, last name, telephone and fax numbers, e-mails) of auction office employees responsible for organization and holding of auction, contact details and work schedule of auction platform technical support service;

4)5) on a daily basis – results of calculation of net transfer capacity and available transfer capacity to be allocated on the auctions and also the information concerning the current load of every cross-border section;

5)6) notifications foreseen herein;

6)7) ~~types of the~~ agreement on access to the transfer capacity;

7)8) auction details:

available transfer capacity ~~devided~~ by each reserve and marginal values;

period (year/month/day/number of hours);

cross-border section;

direction (export/import);

daily auction profile;

gate opening and gate closure time (time period between gate opening and gate closure for yearly and monthly auctions cannot be less than 2472 hours);

time for auction results publishing;

other information related to the auctions;

8)9) auction results by all cross-border section by each reserve:

ATC in MW;

ATR in MW;

list of auction winners by all cross-border section indicating the value of obtained ATR;

marginal price in UA hryvnia per MW per hour (UAH/MWx hour);

~~9)~~10) information on ATR curtailment (date, hour, duration and reason for such a curtailment);

~~10)~~11) information on transfer and return for resale of ATR;

~~11)~~12) information on centers of keys certification;

13) information on the registration and/or cancellation of registration of allocation participants;

~~12)~~14) other information foreseen herein.

3.2. Auction details for the yearly auction are published not earlier than ~~20 calendar days and not later than~~ 10 calendar days and not later than 5 working days prior to the date of holding of the given auction.

3.3. Auction details for the monthly auction are published not earlier than ~~510~~ calendar days and not later than 37 calendar days prior to the date of holding of the given auction.

3.4. Auction details of the daily auction are published before 10:0009:45 Kyiv time ~~D-21~~ every calendar day except days-off and non-working days defined in Ukraine Code on Labour. Auction details of the daily auction to be held on days-off and non-working days and for the first day after days-off and non-working days are published before 10:0009:45 Kyiv time of the day D-1 prior to the day preceded to the days-off and non-working days.

3.5. Auction office is obliged to publish on its web-site the auction dates and auction details publishing dates that deviate from the dates defined in the auction calendar. Explanation of these changes has to be published on auction office web-site and on auction platform simultaneously with the auction date time change. In case of yearly auction date change the auction office is obliged to publish the information on updated auction dates subject to minimal limiting time frames regarding the auction details publishing defined in p. 3.2 and p. 3.3 herein.

IV. Yearly, monthly and daily auctions

4.1. On the yearly auction the capacity of cross-border electrical networks of Ukraine is offered being the available capacity of the corresponding cross-border section with the length of period of access to the transfer capacity more than 30 calendar days and not more than a number of calendar days in the given year (yearly reserve).

4.2. On the monthly auction the capacity of cross-border electrical networks of Ukraine is offered being the full available capacity of the corresponding cross-border section with the length of period of access to the transfer capacity more than 1 calendar day and not more than a number of calendar days in the given month (monthly reserve).

4.3. In calculations of yearly and monthly reserves the auction office follows the principle of maximum uninterrupted access provision to the capacity

of cross-border electrical networks of Ukraine. The auction office is not allowed both to divide the uninterrupted access provision period and merge the yearly and monthly reserves.

4.4. On the daily auction is offered the unallocated and unused transfer capacity allocated on yearly and monthly auctions, the value of the free transfer capacity, that was made available after the adjustment of schedules of ATR users based on yearly and monthly auctions to marginal values, and to which the suspension mechanism is applied. ~~the capacity of cross-border electrical networks of Ukraine is offered being the available capacity of the corresponding cross-border section with the daily auction profile defined by the auction office.~~

4.5. ~~Daily auction profile is defined as follows:~~

1) ~~if based on the results of all daily hourly schedules of the capacity obtained on the results of yearly and monthly auctions submitted to the auction office the ratio of ATC value obtained on the results of these yearly and monthly auctions and value of available transfer capacity during at least one hour of the corresponding day is less than 0,7, the daily auction profile equals to 24 hours of the corresponding day (23 or 25 hours in case when the clock are put forward or back in winter or summer);~~

2) ~~in other case the daily auction profile equals to 1 hour and the value of available transfer capacity is defined separately for each hour of a day.~~

The daily reserve is equal to one hour, the value of the free daily transfer capacity for each hour of the respective day is defined separately.

4.6. Yearly and monthly auctions are held in time frames foreseen herein sufficient for preparation and submission of Bid(s) by the allocation participants, submission of bank guarantees and/or ~~guarantee~~ fees transfer, payment for obtained access to the transfer capacity based on the issued invoice and submission of daily hourly schedules ~~of export/import of electricity~~ by the ATR users.

4.7. Minimal value of capacity of yearly, monthly and daily reserves is equal to 1 MW.

V. Procedure of energy suppliers registration to participate in the auction and changes incorporation to the energy suppliers information

5.1. In order to participate in the auction and/or obtain the ATR via ATR transfer the energy supplier is obliged to acquire the status of allocation participant.

5.2. In order to acquire the status of allocation participant the energy supplier submits to the auction office a completed application on acquirement of status of allocation participant in due form given in Annex 1 herein. All requisites of the application on acquirement of status of allocation participant

have to be filled. The application on acquirement of status of allocation participant cannot comprise any limitations.

The application on acquirement of status of allocation participant is submitted on the blank of energy supplier and has to be signed by the authorized person of energy supplier. The following documents have to be signed by the authorized person of energy supplier and submitted with the application on acquirement of status of allocation participant:

du~~lye~~ completed form(s) for creation, withdrawal or adjustment of an account of the authorized person of energy supplier (up to 3 forms). All sections of the form (first name, last name, fax and telephone numbers and also e-mails) have to comprise full and error-free information (the form is given in Annex 5 herein);

original power of attorney or other document authorizing the authorized persons of allocation participant to commit transactions on access to the transfer capacity of cross-border electrical networks of Ukraine;

~~reference of the energy supplier compiled in a text free form and signed by the energy supplier authorized person on the assignment of the EIC code to the energy supplier (in order to participate in allocation of transfer capacity of cross border electrical networks of Ukraine in the direction to Hungary, Slovakia, Romania and Poland);~~

original power of attorney or other document authorizing the person submitting on behalf of the energy supplier the application on acquirement of status of allocation participant. For CEOs acting without the power of attorney on the basis of foundation documents – copy of election protocol and/or the order of appointment or other confirmatory document.

5.3. By submitting the application on acquirement of status of allocation participant the energy supplier confirms that it meets the requirements of this Auction Rules, becomes party to the access agreement and agrees on terms and conditions of electronic auctions holding defined herein and undertakes to fulfill the financial responsibilities according to the agreement on access.

5.4. Auction office verifies the restrictions related to the registration of energy supplier as the allocation participant foreseen herein.

5.5. Time for examination of the submitted documents by the auction office cannot exceed 10 calendar days beginning from the day of submitting full package of documents defined in p.5.2 herein. In the given time frames the auction office may address the request to the energy supplier with the view of adjustment the data given in the documents attached to the application on acquirement of status of allocation participant. The request has to be sent on the addresses of all authorized persons of the energy supplier during 3 days beginning from the day of receiving of package of documents.

5.6. In case of non-submission by the energy supplier of the reply to the Abandonment of the energy supplier on the auction office's request during 5 calendar days beginning from the date of the submission of such request, the

~~auction office cancels the registration procedure of such energy supplier. results in suspension of the registration of the given energy supplier by the auction office.~~

5.7. Based on the results of examination of the application on acquirement of status of allocation participant and also the documents attached to the application ~~and the information from WES concerning the indebtedness of the energy supplier,~~ the auction office decides on whether register the energy supplier as the allocation participant or refusal on this registration. Auction office in the time frames defined in p.5.5 herein publishes the information on registration of the allocation participant or refusal on this registration with the indication of reasons resulted in this refusal and also sends the given information personally to the e-mail address of the energy supplier authorized person.

Registering the energy supplier the auction office assigns the individual code of the allocation participant.

The due forms of notification on registration of energy suppliers as the allocation participant on the auction platform or notification on refusal on this registration are given in Annex 2 and Annex 6 herein.

5.8. Auction office cannot not refuse the energy supplier on registration as the allocation participant excluding the cases of non-compliance by the energy supplier with the requirements defined in p.5.2 – 5.4 herein.

~~5.9. After receiving the notification on registration of energy suppliers the allocation participant authorized person sends by e-mail to the auction office address published on its web site the information comprising the electronic registration comprising the identification of the allocation participant authorized person.~~

Auction office creates and/or changes and/or enters the account of the allocation participant authorized person to the auction platform during 5 calendar days after the receipt of the application pursuant to Annex 5 of this Rules.~~receiving the information on electronic registration and/or changes incorporation to the registration data.~~

Auction office informs every allocation participant authorized person on creation or change of its account on e-mail address given in the submitted form.

5.10. Energy supplier has to inform the auction office in written form on any change in its information given in the submitted form during 10 days and also provide the duly verified copies of confirmatory documents.

5.11. In case when the allocation participant did not make any Bid in any auction during a year beginning from the date of its registration, the registration of this allocation participants is withdrawn and the auction office sends the corresponding notification to the given allocation participant. At the same time this allocation participant is not forfeited on submitting another ~~the~~ application on acquirement of status of allocation participant. ~~on further corresponding auctions.~~

VI. Requirements to the auction participants

6.1. In order to take part in the yearly and/or monthly, and/or daily auctions, the allocation participant shall submit on the day prior of the date of the gate opening of the yearly and/or monthly and/or daily auction a fee to the auction office no later than 13:00 Kyiv time of the date prior to the date of the gate opening of the respective yearly and/or monthly and/or daily auction, the original bank guarantee. The acceptance or refusal to accept the bank guarantee with a respective justification shall be forwarded by the auction office not later than within 3 working days from the date of its receipt. ~~=Not later than 13:00 Kyiv time of the day prior to the day of gate opening the allocation participant has to transfer the guarantee fee to the auction office account and/or provide an original bank guarantee. The acceptance of the bank guarantee has to be confirmed by the auction office not later than during one day.~~

6.2. The amount of ~~guarantee~~ fee and/or financial obligation secured by the bank guarantee (the size of the bank guarantee) of the allocation participant in the yearly, monthly and daily auctions is composed of the value, which exceeds or is equal to the 100 minimal wages, as defined in the current legislation of Ukraine for the date prior to the date of the gate opening of the auction. ~~is calculated by the allocation participant by means of multiplication of maximum value of Bid(s) price and maximum value of capacity in MW planned to be obtained by the allocation participant on the corresponding auction. The amount of guarantee fee and/or bank guarantee has to be equal or more than the total value of all Bids submitted by the auction participant on the corresponding auction and value of obtained and non-paid capacity at the moment of holding of the corresponding auction.~~

The bank guarantee for participation in the yearly auction shall be valid for the period not less than the period covering the date of the gate opening of the yearly auction until the last day of the month (including) prior to the last reserve month;

The bank guarantee for participation in the monthly auction shall be valid for the period not less than the period covering the date of the gate opening of the monthly auction and 20 (twenty) calendar days from this date.

The bank guarantee for participation in the daily auction shall be valid for the period covering not less than the date of the gate opening of the daily auction and 30 calendar days from this date.

All settlements, including settlements of fees and/or financial obligation, secured by the bank guarantee are made in the national currency of Ukraine.

~~In order to ensure the financial guarantee of the capacity obtained on the results of yearly auction, the amount of guarantee fee of the yearly auction winner has to be not less than amount of monthly payment, foreseen in p.17.5 herein, for the ATR obtained on the results of this auction, during all period of provision of access to this capacity.~~

~~All settlements including guarantee fees and bank guarantees are made in Ukrainian hryvnia (UAH).~~

6.3. ~~Guarantee~~ Fee is considered as paid when it is received on the auction office current account with special treatment.

6.4. Control of the correspondence of provided bank guarantee and transferred ~~guarantee~~ fee to the requirements defined herein and in the Bid is made by the auction office.

6.5. All expenses related to the ~~guarantee~~ fee payment and/or provision of a bank guarantee are covered by the allocation participant.

~~Auction office has a right to use the bank guarantee and/or guarantee fee for the ATR only. i~~In case of breach of payment procedure defined in the agreement on access by the auction winner, the fee or bank guarantee shall be retained by the auction office as a fine in the amount of 100 (one hundred) minimal wages. With this, in order to participate in the next auction, such allocation participant shall renew its payment of the fee or submit a bank guarantee to the auction office pursuant to the requirements as provided in point 6.1 and 6.2 of this Title.-

~~Bank guarantee has to guarantee the fulfillment of financial obligations of the allocation participant towards the auction office on the results of the auction held.~~

~~6.7.8.~~ Bank guarantee is withdrawn by the auction office as the due ensuring of obligations fulfillment of the allocation participant if the given bank guarantee does not meet the requirements defined herein and valid legislation. The auction office immediately informs by e-mail and/or fax the allocation participant on withdrawal of its bank guarantee as the due ensuring of obligations fulfillment of the allocation participant.

~~The Bids of the allocation participant which are not ensured by the bank guarantee and/or guarantee fee according to the requirements defined in p. 6.1—6.7 herein are withdrawn by the auction office. Auction office is supervising the amount of provided bank guarantee and/or guarantee fee amount of the allocation participants on a daily basis until 09:30 Kyiv time.~~

~~While controlling the amount of the bank guarantee and/or paid cash deposit of the allocation participants for participation in daily auctions, the auction office takes into account the financial obligations of the yearly and monthly auction winners.~~

~~6.8.10. Allocation participants and auction participants have a right for full or partial repayment of the guarantee fee paid to the auction office or return reduction of the bank guarantee. For this purpose the auction participant or allocation participant has to address the auction office through an the auction platform and/or official letter on repayment full or partial repayment of the guarantee fee or giving its consent on return reduction of the bank guarantee. The repayment of fee and/or bank guarantee is possible only in case of full payment for the acquired allocated transfer capacity.~~

~~6.9.11. Auction office considers the inquiry of the allocation participant within 2 (two) working days from the date of the receipt of the inquiry and and takes a decision on repayment of the guarantee fee or consent on return reduction of the bank guarantee by notifying its decision on the same date through the auction platform or in case of application of the fallback mode by e-mail and/or fax to the allocation participant. taking into account the requirements defined in p.6.2 herein and financial obligations for the obtained ATR on the previous auctions.~~

~~6.10. The repayment of the fee shall be made by the auction office within 5 working days from the moment of the notification sent to the allocation participant from the auction office in line with the requirement of paragraph 6.9 of this Title.~~

~~6.12. Repayment of the guarantee fee is carried out by the auction office during 5 bank days.~~

~~6.13. Allocation participant has to inform the auction office on reduction of the bank guarantee.~~

~~6.1.14. Allocation participants is not allowed to participate in the yearly, monthly and daily auctions or loses the obtained ATR in the corresponding auction and in the following cases:~~

~~if the allocation participant has an overdue financial obligations towards the auction office according to the agreement on access;~~

~~if the allocation participant has overdue debts for the electricity purchased at the WEM of Ukraine;~~

~~in case of the cancellation of the status of WEM participant.~~

With this, such allocation participant shall not be released from the obligations pursuant to paragraph 14.9 of the Title XIV of this Rules.

6.12. The allocation participant loses its ATR acquired as a result of an auction in the following cases:

If the participant has overdue financial obligations to the auction office in accordance with the agreement on the access to transfer capacity;

In case of the cancellation of the status of the WEM participant.

With this such allocation participant shall not be released from the obligations pursuant to paragraph 14.9 of the Title XIV of this Rules.

~~cancellation and/or determination of the allocation participant license on electricity supply.~~

VII. Requirements to the Bid

7.1. Every Bid has to comprise the following data:

name of the energy supplier ~~(first name, last name);~~

~~cross-border section,~~ reserve;

~~direction (export/import);~~

~~period (year/month/day);~~

Bid price (in UAH/MW per hour with two decimals. The Bid has to be positive);

value of transfer capacity in MW without decimal number ~~and multiple of 1 MW~~. Minimal value of transfer capacity on any ~~all~~ cross-border sections is 1 MW_t.

7.2. Bids that do not meet the requirements defined herein are automatically withdrawn by the auction office.

7.3. Every Bid submitted by the allocation participant is automatically assigned by the time stamp of the auction platform.

7.4. Each allocation participant has the right during the period of opening and closing of gates to adjust (correct) its bids unlimited number of times.

7.5. Bid submitted by the auction participant on the time of gate closure is the irrevocable proposal (offer) on acquiring the ATC amount not exceeding the one defined in this Bid out of the proposed ATC but he auction office on electronic auction.

~~7.6. 5. Bid for the daily auction has the following requirements:~~

~~If the daily auction profile is defined by the auction office as 1 hour, the~~
The auction participant has to define the transfer capacity in the Bid submitted

for daily auction and the proposed Bid price for each hour of a day. For those hours of a day not to be proposed by the auction participants, a figure “0” is to be put.

~~If the daily auction profile is defined by the auction office as 24 hours, the auction participant has to define the transfer capacity in the Bid for all 24 hours and the proposed Bid price for 24 hours of a corresponding day (23 or 25 hours in case when the clock are put forward or back in winter or summer).~~

VIII. Auction process

8.1. The auction office shall ensure equal conditions for all auction participants. Bid contents before and after gate closure are confidential. Auction office takes measures to keep the confidentiality of the Bids contents of the auction participants.

~~Neither auction participant is privileged. Bid contents before and after gate closure is confidential. Auction office takes measures on keeping the confidentiality of the Bids contents of the auction participants.~~

8.2. Every auction participant may submit his Bid(s) during gate open and gate closure as defined in the auction details for the corresponding reserve. ~~auction according to the provided bank guarantees and/or transferred guarantee fees.~~ Before gate closure the Bid(s) may be withdrawn and/or changed.

8.3. Auction participant may submit not more than 20 Bids for each reserve.

8.4. Auction office is not responsible if the auction participant cannot connect to the auction platform if there are no technical problems with the auction platform.

8.5. Because of the technical problems with the auction platform the auction office postpones or cancels the auction. In that case the auction results are cancelled and the auction participants are informed by e-mail or fax of the allocation participants authorized persons about receiving the erroneous auction results and other information related to the auction.

Auction office not more than during 1 hour beginning from the moment of detection of technical problems with the auction platform informs the auction participants and publishes on its web-site during a day when the auction was cancelled the reasons resulted in auction cancellation.

8.6. Yearly, monthly and daily auction are held in accordance with the auction calendar published annually by the auction office on its web-site not later than November 01 of the current year. The auction calendar also comprises the deadlines for publishing the auction details.

8.7. Daily auctions are held during a year in every calendar day in ~~D-24~~ except days-off and non-working days. Daily auctions for days-off and non-working days are held in a day D-1 prior to the ~~first~~ day-off and non-working day for the term of duration of days-off and non-working days and for the first day after days-off and non-working days.

8.8. Gate opening and gate closure for daily auctions are the following:
gate opening – ~~1340~~:00 Kyiv time ~~D-24~~;
gate closure – ~~1340~~:30 Kyiv time ~~D-24~~.

8.9. Every allocation participant has to be informed on the results of its Bid(s) not later than 30 minutes after gate closure of the daily auction (i.e. not later than ~~1444~~:00 Kyiv time ~~D-24~~). Daily auction results are published on auction office web-site not later than 30 minutes after gate closure of the daily auction.

IX. Auction platform

9.1. Auction office organizes and holds the auctions on access to the cross-border transfer capacity in electronic format on the auction platform on yearly, monthly and daily basis. Auction platform is installed in the auction office as a web application with the view of holding the auctions. Auction office provides the documentation and instructions on using the auction platform.

9.2. Auction office provides the assistance to all auction participants on auction platform operation. Contact information and operating hours of the auction platform support service are published on auction office web-site.

9.3. All information concerning the time frames defined herein (in particular, deadlines for data provision, auction results publishing etc.) is brought into correspondence with the auction platform system time. User interface has to operate based on the auction platform system time.

9.4. Allocation participant authorized person carries out the operations on configuration of its account in user interface.

9.5. In order to ensure the communication between the allocation participants, including the intensions on ATR transfer, auction office creates and maintains the notice board.

9.6. Notice board is solely the instrument for publishing the notifications of the allocation participants. Notice board is not directly connected to the functional capabilities of the auction platform (excluding the allocation participant identification) and therefore the notifications on intension to transfer or obtain the ATR and/or other notification published by the auction platform users are not checked by the auction office. If the authorized person publishes the information on a notice board on behalf of the corresponding allocation

participant, this allocation participant is responsible for the content and validity of the published information. No operations are carried out through any module of the auction platform.

All information, related to the work of the auction office and auction platform shall be published exclusively by the staff of the auction office.

9.7. Auction office is not responsible for any direct or indirect costs or expenses incurred by any auction platform user as regards the notice board operation or resulted from using or impossibility of using the notice board. Auction office is not responsible for any web-sites and materials published on the notice board.

9.8. Notice board is used for publishing the information related exclusively to the auctions.

9.9. Information integrity, availability, confidentiality and its unauthorized access security are realized on the auction platform according to the requirements of the valid legislation of Ukraine.

9.10. Auction platform software has to meet the requirements of the valid normative and legislative documents of the system of technical and program informational security.

9.11. Every allocation participant authorized person is obliged to have its electronic registration for the access to the system. All operations carried out through the auction platform are saved by the corresponding auction platform user and operation time.

9.12. Every allocation participant undertakes all security rules defined herein. In particular, the allocation participant is obliged to ascertain the following:

allocation participant authorized person having a right to submit Bids is storing its personal closed key in secrecy so nobody else could not get an access to the key;

allocation participant authorized person having a right to submit Bids is using its personal closed key and electronic registration exclusively in the cases and according to the requirements defined herein;

allocation participant authorized person having a right to submit Bids immediately informs the auction office on the third party access to the personal closed key information and its divulging (with this the auction office upon an official request of the allocation participant shall block its personal key until its next change). All direct and/or indirect losses related to the access to the information on the personal key by third persons and its disclosure shall be

borne by the allocation participant, form the fault of which such disclosure of information occurred. -

9.13. Data exchange between the allocation participants authorized persons and the auction office is carried out by e-mail and/or fax, by uploading or sending the documents or manually through the user interface of the auction platform.

9.14. Energy suppliers when registering on the auction platform have to define the e-mail address for transferring and receiving and automatic exchanging of the auction office notifications. Auction office can exchange data with the allocation participants exclusively through the auction platform or in case of the application of fall-back

mechanism addresses indicated when registering on the auction platform. In cases when e-mail is not available the allocation participant has to inform the auction office about this. Notifications on the auction platform are carried out only through the administrator of the auction platform and allocation participant authorized person.

9.15. With the view of control of integrity and validity of the electronic information and also the confirmation of its authorship while participating in auctions and/or acquiring the ATR through ATR transfer, the auction office uses the electronic digital signature.

X. Auction results determination

10.1. Auction platform ranks the Bids of the auction participants and determines the auction winners according to the following principles:

- 1) if the total amount of the transfer capacity according to the submitted Bids does not exceed or is equal to the ATC value, the access to the transfer capacity is granted on a free of charge bases;
- 2)) if the total amount of the transfer capacity according to the submitted Bids exceeds the ATC value, the marginal price is equal to the minimal Bid price satisfied out of all Bids.

10.2. Auction results for each reserve of each cross-border section are determined by the auction platform in the following way:

- 1) for each reserve of each cross-border direction the Bids are ranked by Bid price in the descending order;
- 2) the Bid(s) with the maximum price is(are) satisfied until all ATC value for this reserve of this cross-border section is depleted. Bid which value exceeds the remaining ATC value for this reserve of this cross-border section is satisfied partially to the remaining ATC value;

3) if two or more Bids have the same price and the total value of transfer capacity of these Bids exceeds the remaining ATC value, the mentioned Bids are satisfied in proportion to the value of transfer capacity of these Bids and the resulting value is rounded to the nearest value in MW;

4) the price of the last satisfied Bid becomes the marginal price.

10.3. Determination of the auction participant as an auction winner results in the acceptance by the auction office of the proposal offered by the auction participant of the auction participant proposal given in its allocation participant's Bid by the auction office. ~~At the same time the accepted is the ATC value defined by the auction platform on the results of the electronic auction which is equal or less than the one proposed in the allocation participant Bid with the price Bid equal to the marginal price.~~ Auction office informs about full or partial acceptance of the auction participant Bid by publishing the corresponding notification on auction office web-site and sending the electronic notification to the addresses of the electronic auction participants authorized persons in terms defined herein.

10.4. Each ATR value is assigned by the unique identifier and time stamp of the auction platform.

10.5. Every auction participant ~~and allocation participant whose Bid was rejected~~ is informed through the auction platform about the corresponding auction results not later than 30 minutes after gate closure and by notification on auction results sent by e-mail and/or fax.

Notification on auction results set to the auction participants has to comprise the following information: transfer capacity allocated to the auction participant according to the auction results and marginal price.

10.6. Auction participants have a right to appeal against the auction results in accordance with the valid legislation.

XI. Fallback mode

11.1. In cases when there is no technical feasibility of holding through the auction platform of yearly or monthly auction according to the auction calendar, auction office decides on postponing the date of the corresponding auction on 2 working days, and the notification by e-mail and fax are sent to the allocation auction participants on this matter.

In case of impossibility to eliminate the technical malfunction until the holding of repeated yearly or monthly auction, auction office applies the fallback mode. Fallback mode for yearly and monthly auctions is both a change of tools for submitting Bids and time frames for holding these auctions

In this case auction office sends the notification to the auction participants by e-mail or fax ~~or through the auction platform~~ on the decision to apply the fallback mode mentioning also the auction details and publishes this information

on auction office web-site. The due form of notification on fallback mode is given in Annex 4 herein. Fallback mode in this case is the following:

auction is held in premises and in time defined by the auction office;

auction is held as an explicit auction and with participation of energy suppliers authorized persons;

administrator of the auction platform in presence of all interested parties opens the envelopes comprising auction participants Bids and notifies on every Bid on every proposed reserve of this auction;

during one working day ~~the auction office the administrator of the auction platform~~ ranks the Bids ~~for the corresponding auction for each reserve of the respective auction~~ and informs on the general results the auction participants on the auction results by e-mail and/or fax and also publishes this information on auction office web-site.

Within the next working day, the auction office shall forward the detailed results to the auction participants per each Bid by e-mail and/or fax.

Further interactions of the auction participants and auction office are held according to the given Auction Rules.

11.2. Auction office is not responsible for the cases when the auction office has no possibility to contact allocation participants authorized persons by communication channels given in p.11.1 herein due to the objective reasons being beyond auction office control, and/or publish the notification on fallback mode on auction office web-site.

11.3. Fallback mode for daily auctions is a change of tools and time frames for submitting Bid(s). In fallback mode for daily auction the Bids are submitted by e-mail and/or fax or by means as defined by the auction office until 13:45 ~~11:15~~-Kyiv time D-2~~1~~. The results are published and sent to the auction participants until 17:00 ~~11:45~~-Kyiv time D-2~~1~~. Detailed results of the auction participants per each Bid shall be forwarded to D-1.

11.4. Notification on fallback mode for daily auction has to comprise the auction details in accordance with subpoint 7 of point 3.1 herein.

11.5. Bids submitted before fallback mode are considered invalid and they have to be submitted according to the requirements defined by the fallback mode.

11.6. If the conditions foreseen by the fallback mode for daily auction cannot be realized in time frames related to this auction, then this auction is to be postponed or cancelled and the submitted Bids are automatically withdrawn, and the auction office immediately informs the auction participants by corresponding e-mails and/or fax numbers and publishes it on its web-site.

XII. Use of allocated transmission rights

12.1. Rights and obligations related to use of ATR by the auction winner are acquired only by the agreement on access. ATR users at their own risk and their own opinion by using the mechanisms foreseen herein use and/or transfer and/or return for resale the obtained ATR.

12.2. Use of ATR obtained on the results of yearly and monthly auctions is made by submitting the daily hourly schedules of export/import of electricity for respective reserve to the auction office according to the time frames foreseen herein and WEM Rules.

~~At the same time the variation ratio between the minimal mid-hourly capacity value (P_{min} , MW) and the ATR value obtained on the results of the corresponding auction (P_{min}/ATR) cannot be less than 0,7. The variation ratio between the minimal mid-hourly capacity value (P_{min} , MW) and the ATR value obtained on the results of the corresponding auction (P_{min}/ATR) can be less than 0,7 in cases of emergency maintenance or damages of transmission lines, technical limitations of loading of the power equipment.~~

~~12.3. Taking into account the peculiarities of operation of IPS of Ukraine and Polish power system in cases when the total mid-hourly capacity value according to the submitted schedules of electricity export on the cross-border section IPS of Ukraine – Polish power system does not exceed 50 MW (or other value increased in cases of emergency maintenance or damages of transmission lines, technical limitations of loading of the power equipment and published on the corresponding auction), all these given schedules are not agreed by the auction office. At the same time the auction office decides on ATR curtailment on this cross-border section up to 0 MW and carries out the compensation for each non-used MW according to the requirements defined in p.15.7 herein.~~

12.3. After the termination of the term of submission by the ATR users for each reserve to the auction office of daily hourly schedules, the auction office should examine on each ATR user the submitted schedules upon the criteria that total yearly numbers of the capacity on respective reserves from Ukraine/to Ukraine shall not exceed the rights acquired at the respective auction.

Non-fulfilment of the above-mentioned criteria leads to an automatic deviation of the submitted daily hourly schedules by the ATR users on this reserve.

In case if the capacity value as a total of submitted export/import schedules by all ATR users exceeds the established marginal values, all the submitted schedules by the ATR users shall be adjusted in line with the principle of proportionality to the defined marginal values in the following order:

Daily hourly schedules for ATR usage acquired as a result of daily auctions;

Daily hourly schedules for ATR usage acquired as a result of monthly auctions;

Daily hourly schedules for ATR usage acquired as a result of yearly auctions;

Daily hourly schedules for ATR usage, to which priority access has been applied.

Taking into account the particularities of the work of the Burshtin Island CHP, UES of Ukraine and energy systems of the Republic of Poland and in case of the submission by ATR users of the hourly daily schedules, that can not be ensured by the Burshtin CHP or Dobrotvirska CHP due to technical issues as the rate of the power load change in the normal mode, inability to stop the units on night lapse (downfall) with the lever in the morning (rise), inability to ensure the time of units' start depending on the heat condition and other technical reasons, the auction office shall adjust the submitted by ATR users hourly daily schedules for electricity export and/or import operations to ensure stable and secure work of mechanical equipment of the Burshtin CHP and Dobrotvirska CHP.

12.4. ATR users having obtained the access to the cross-border transfer capacity of electrical networks of Ukraine on yearly and/or monthly auctions in case of non-submission of daily hourly schedules of export/import of electricity in the time frames foreseen herein and WEM Rules lose the access to the cross-border transfer capacity of electrical networks of Ukraine for the corresponding day. In this case the auction office allocates the unused value of transfer capacity on the daily auction.

12.5. Use of ATR obtained on the results of yearly and monthly auctions is made by submitting the daily hourly schedules of export/import of electricity (0:00 – 24:00 of day D) by the auction participants by the corresponding reserve to the auction office prior 09:00 of the day D-2 in the planning process. The matching process of schedules of export/import of electricity of the transfer capacity obtained on the results of yearly and monthly auctions is carried out by the auction office until 09:00 Kyiv time D-1 (for days-off and non-working days of Ukraine – until 09:00 Kyiv time of the calendar day D-1 prior to the first day-off and non-working day, for the duration of days-off and non-working days and for the first working day after days-off and non-working days). The process of preliminary approval of the supply schedules of electricity export/import in accordance with the transfer capacity allocated on the yearly and monthly auctions with taking into account of marginal values by the auction office is performed before 09:30 Kyiv time at D-2 (for holidays and non-working days in Ukraine –before 09:30 Kyiv time D-1 of the calendar day, preceding the holiday

or non-working day for the period of the duration of such holidays or non-working days and for the first day after the holidays and non-working days) taking into account the requirement as defined in paragraph 12.3 of the present Title.

12.6. Use of ATR obtained on the results of daily auction is made by forming and submission by the auction winner to the auction office of ~~by the auction office~~ the daily hourly schedules of export/import of electricity on the results of the corresponding daily auction no later than 15:00 D-2. The process of the preliminary approval of the electricity supply schedules for export/import in line with the transfer capacity allocated on the daily auction with taking into account of the balance of the marginal value by the auction office shall be made before 15:30 Kyiv time on D-2 (for holidays and non-working days – before 15:30 Kyiv time D-1 of the calendar time, preceding the holiday or non-working day, for the period of the duration of such holidays or non-working days and for the first day after the holidays or non-working days) with taking into account of the paragraph 12.3 of this Title.

12.7. The auction office before 09:30 Kyiv time (accordingly before 08:30 CET) on D-1 of the calendar day, shall submit to the WEM the approved daily schedules as a result of yearly, monthly and daily auctions (for holidays and non-working days of Ukraine – before 09:30 Kyiv time of the calendar day preceding the first holiday and non-working day for the period of the duration of such holidays or non-working days and for the first day after the holidays and non-working days).:-

In case of need, the adjusted daily hourly schedules of electricity export/import to WEM are submitted by the auction office until 13:00 D-1 Kyiv time ~~If the daily auction profile is equal to 24 hours, then the variation ratio between the minimal mid-hourly capacity value (Pmin, MW) and the ATR value obtained on the results of daily auction (Pmin/ATR) cannot be less than 0,7.~~

~~12.7. The daily hourly schedules of export/import of electricity which correspond to the value of ATC to be allocated on the daily auction are sent to WES by the auction office until 09:30 Kyiv time D-1 (for days off and non-working days of Ukraine – until 09:30 Kyiv time of the calendar day prior to the first day off and non-working day, for the duration of days off and non-working days and for the first working day after days off and non-working days).~~

~~with~~ The daily hourly schedules sent to WES may be corrected by the auction office until 13:00 Kyiv time taking into consideration the daily auction results, the daily auctions results in neighbouring TSOs (for holidays and non-working days of Ukraine – before 13:00 Kyiv time of the calendar day preceding the first holiday and non-working day for the period of the duration of such holidays or non-working days and for the first day after the holidays and non-working days)

~~and under the condition of sending the notification on supply confirmation of the daily auction winners through the auction platform and/or e-mail and/or fax.~~

In case of the adjustment of daily hourly schedules, the ATR users shall submit to the auction office not later than on 12:00 on D-1 the respective notification (for holidays and non-working days of Ukraine – before 12:00 Kyiv time of the calendar day preceding the first holiday and non-working day for the period of the duration of such holidays or non-working days and for the first day after the holidays and non-working days)

In order to remove the imbalances in the process of planning of the UES of Ukraine for the day D, the auction office shall have the right to adjust the submitted daily schedules by auction participants (with taking into account the requirement of paragraph 12.3 of this Title).

The app

~~The notification on supply confirmation is sent by the daily auction winners to the auction office not later than 12:30 D-1. The notification on supply confirmation from the daily auction winners received by the auction office after 12:30 D-1 is considered invalid and not further reviewed by the auction office. The due form of the notification on supply confirmation is given in Annex 7 herein.~~

The ATR users shall submit the finally approved daily hourly schedules of electricity export/import to the auction office.

The notification on the adjustment of daily hourly schedules submitted to the auction office after 12:00 on D-1 or in any of the hourly capacity value exceeds the acquired ATR in the respective timeframe, is considered to be a failure without further consideration of the auction office.

The notification on daily hourly schedules adjustment shall include:

- Date on which such schedule is submitted;
- The country of the recipient;
- Country of the suppliers;
- Name of the recipient;
- EIC code of the recipient;
- Name of energy suppliers;
- EIC code of the energy supplier;
- Number and date of the contract;
- Type of operation (export/import);
- Hourly schedules and the total daily value of electricity.

Corrected schedules of export/import of electricity received by WES after 13:00 Kyiv time D-1 are considered invalid and not further reviewed by WES.

12.8. Use of transfer capacity obtained on the results of yearly, monthly and daily auctions is made on the “use-it-or-lose-it” principle, which means the following:

ATR obtained on the results of yearly and monthly auctions and being not confirmed by submitting the daily hourly schedules of export/import of electricity, is automatically allocated on the daily auction;

ATR obtained on the results of daily auctions and being not confirmed by submitting the ~~daily schedules of electricity export/import notification on confirmation of electricity supply~~, is not included to the daily load schedule of the corresponding day.

Costs paid for the unused transfer capacity acquired as a result of respective auctions and has not been approved through the submission of daily schedules of electricity export/import are not returned compensated to the auction winner.

12.9. In case when yearly auction winner uses the obtained capacity by each reserve during a month less than 70% (including the transferred ATR and excluding the returned ATR for resale or if restriction of ATR is applied), such auction participant loses the obtained access to the cross-border capacity of electrical networks of ~~this reserve Ukraine~~, and the given allocated capacity becomes available and is to be further allocated on monthly and daily auctions. At the same time this ATR user is not dispensed from the liabilities towards the auction office regarding the payment on obtained yearly capacity.

XIII. Transfer of ATR

13.1. ATR user has a right to transfer fully or partially the obtained and paid ATR on contractual basis to the other allocation participants having informed and registered this transfer in the auction office. ~~Both transferee and transferor have to meet the requirements set to the allocation participants.~~

~~13.2. Both transferee and transferor have to fulfill the preconditions for the access to the auction platform defined herein.~~

13.23 ATR user has a right to transfer the ATR to the ATR transferee on the following principles:

yearly ATR or as a result of acquirement of priority access –to the ATR user for – on year, month and/or day; with this, the ATR user that has been granted a priority access within the framework of ATR transfer maintains its priority status;

monthly ATR – on month and/or day.

13.3.4. Transfer of ATR obtained on the results of daily auction is not allowed.

13.45. ATR user wishing to transfer fully or partially the obtained ATR is obliged to fulfill the financial obligations regarding the ATR planned for transfer during time frames defined in the agreement on access and send the notification on transfer to the auction office and ATR transferee comprising the following information:

name of the allocation participant wishing to transfer the obtained ATR (ATR transferor);

name of the allocation participant (ATR transferee);

cross-border section, auction (monthly/yearly) reserve;

direction - to Ukraine or from Ukraine (export/import);

period (year/month/day/number of hours);

values of transfer capacity in MW in integer number. Minimal value of transfer capacity to be transferred is 1 MW.

ATR transferee sends the confirmation of transfer to the auction office during one calendar day beginning from the day of receiving the notification on transfer through the auction platform.

~~13.56. The ATR transferee may act as a guarantor of the ATR transferor as to the fulfilling the financial obligations on the agreement on access.~~

~~13.7~~ Auction office upon receiving both the notification on transfer and confirmation of transfer from the transferee checks the compliance of this transfer to the requirements defined herein within 72 hours and no later than 14:00 Kyiv time D-3 and confirms to the ATR transferor and ATR transferee the feasibility of this transfer or refuses the transfer with refusal grounds argumentation. ATR transfer has to be confirmed ~~by the ATR transferee~~ on the auction platform nor in case of the fallback mode application by forwarding a notification to the auction office by e-mail or fax by the ATR transferee within one calendar day no ~~at~~ later than 13:00 Kyiv time D-~~32~~. In other case the ATR transfer is considered as not executed and ATR remain with ATR transferor. Time of sending the transfer confirmation by the auction office is the time of executing the ATR transfer. All notifications are automatically registered. Refusal of the auction office on ATR transfer is possible only when the allocation participants are not compliant with the provisions defined herein and/or non-fulfillment of the provisions of agreement on access ~~and/or non-correspondence of the ATR transferee to the requirements set to the allocation participants.~~

13.68. ATR user has a right to transfer the ATR with no additional expenses.

13.79. In case of ATR curtailment the ~~return compensation~~ for curtailment is paid to the auction participant who transferred ~~uses~~ the ATR ~~in the point of curtailment.~~

13.810. ATR user having executed full or partial transfer of ATR obtained on the results of yearly auction is not dispensed from the liabilities defined in p.1.9 and p.12.9 herein. In case of occurrence of circumstances defined in ~~p.1.9 and~~ p.12.9 herein, both the ATR transferor and ATR transferor loses ~~all~~ the obtained ATR on each separate ~~reserve cross-border section~~ and this ATR becomes available transfer capacity and is to be allocated on monthly and daily auctions.

13.911. The transferred ATR is assigned by a new unique on the auction platform. ~~The ATR transferee has to meet the requirements set herein to the auction participant.~~

13.1012. Administrator of the auction platform ensures the information transmission to the ATR transferees on ATR obtained as a result of transfer. All history of ATR transfer is saved on the auction platform.

13.1113. ~~The notification to the acution office on ATR transfer submitted~~ Receiving the proposal on ATR transfer sent by the ATR transferor and confirmation receiving sent by the ATR transferee are automatically registered on the auction platform, and both ATR transferor and ATR transferee are informed about this not more than during 30 minutes.

13.1214. The confirmation of the ATR transferee received by the auction office on the auction platform is a key factor for determination of definitive date of the ATR transfer.

13.1315. In cases when the auction office due to technical problems with the auction platform has no feasibility to confirm the ATR transfer to the ATR transferee through the auction platform until ~~1413:00~~ Kyiv time D-32, auction office applies the fallback mode and sends the corresponding letters and notifications by e-mail and/or fax until 15:00 Kyiv time D-32.

13.1416. Auction office has no right to check the lawfulness of the ATR transfer between the ATR transferor and ATR transferor. In any case after confirmation of the ATR transfer by the ATR transferor any disputes arising between the ATR transferor and ATR transferor have no influence on results of the ATR transfer.

XIV. Return for resale

14.1. ATR user according to the requirements defined herein has a right to return fully or partially the ATR obtained on the results of yearly auction or received from the ATR transferor or acquisition of priority access. In case of full termination the ATR user shall terminate all the values of existing ATR until the end of respective reserve. In case of partial termination return of ATR, the value of the ATR shall be unchanged for the period of the work of the reserve of the respective calendar month. the period of the returned ATR has to be equal to calendar month.

14.2. Notification on termination return of ATR usage obtained on the results of yearly auction or as a result of acquisition of priority access has to be sent to the auction office or in case of the fall back mechanism application through the auction platform and by e-mail and/or fax not later than 2 10 calendar days prior to the date of publication of details ~~oiding~~ of the subsequent monthly auction.

14.3. ATR user according to the requirements defined herein has a right to return fully or partially the ATR obtained on the results of monthly auction or

received from the ATR transferor. In case of full termination, the ATR user shall terminate all value of the existing ATR until the end of its respective reserve. In case of partial termination, the ATR value shall be unchanged for the period of duration of the reserve of the respective calendar month. ~~In case of partial return of ATR, the period of the returned ATR has to be equal to the period of the reserve of the corresponding month.~~

14.4. Notification on return of ATR obtained on the results of monthly auction has to be sent to the auction office through the auction platform or in case of the fall back mechanism application through the auction platform and by e-mail and/or fax not later than 13:00 Kyiv time D-~~32~~.

14.5. Notification on return has to comprise the following information:
name of the allocation participant wishing to return for resale the obtained ATR;

cross-border section, auction (monthly/yearly) reserve;
direction - to Ukraine or from Ukraine
~~cross-border section;~~
~~direction to Ukraine or from Ukraine (example: Ukraine → Moldova and Hungary → Ukraine);~~
period (year/month/day/hours);
values of transfer capacity in MW in integer number. Minimal value of transfer capacity to be terminated transferred is 1 MW_t.

14.6. Auction office, during a day, checks the compliance of this return of ATR to the requirements defined herein and sends the notification to the ATR user on confirmation of return or refusal on return with refusal grounds argumentation.

If the return of ATR is confirmed by the auction office the ATR is decreased by the returned value of ATR.

Refusal of the auction office on ATR return is possible only when the ATR user is not compliant with the provisions defined herein and/or its non-fulfillment of the provisions of agreement on access.

14.7. The returned ATR becomes available transfer capacity and is to be allocated by the auction office on the subsequent monthly and/or daily auctions.

In case of the non-proposal by the auction office for the next monthly or yearly auctions of the transfer capacity, subject to which ATR user applied termination mechanism and in case of absence of the restrictions for this period, the auction office shall return to the allocation participant the cost of such ATR (respective reserve) for the marginal price, formed in line with the result of the respective auction and in the period as defined by the access agreement to the transfer capacity.

14.8. ATR values returned and to be allocated by the auction office on the subsequent monthly auction have to be invariable in MW during all period. ~~Minimum value — 1 MW during 1 month.~~

14.9. ATR user having returned the ATR is not dispensed from its financial obligations towards the auction office in case of full or partial allocation or non-allocation of the ATR~~is the additionally proposed capacity value was not allocated.~~ If the marginal price of the additionally proposed values of transfer capacity is less exceeds or equals to the marginal price formed in line with the results of the respective auction than the ATR cost according to the issued invoice based on the results of yearly auction, the auction office pays to the ATR user the cost defined as a result of respective auctions and by means and difference in the time frames defined in the agreement on access.

14.10. Yearly auction winner having partially returned the ATR obtained on the results of this auction is not dispensed from the liabilities defined in p.1.9 ~~and~~ p.12.9 herein in part of balance value of ATR on this reserve.

14.11. Return for resale of ATR obtained on the results of daily auctions is not allowed.

14.12. The precondition for initiation of the termination procedure by the ATR user is the receipt by the auction office of the payment for the ATR on which termination shall be applied. ~~allocation of the returned ATR is receipt by the auction office the full payment for the actually used ATR obtained on the results of yearly auction.~~

14.13. The ATR user invoices the auction office on the basis of the information to be available on the auction platform or in case of the application of the fallback mode on the official web-site of the auction office and in the notification sent to the ATR user by e-mail. Information provided by the auction office to the ATR user by e-mail comprises the list of returned ATR of the given ATR user auction participant and the return compensation sum of money to be invoiced indicating the "compensation for return" as the payment purpose.

~~The compensation sum from the auction office is determined by multiplying the corresponding marginal price in UAH/MW and the ATR value in MW allocated in the corresponding time period (days, hours).~~

14.14. The return ~~The compensation~~ is paid to the ATR user during 10 calendar days from the date of the receipt of the invoice from the ATR user to the account given by the auction participant in the application on acquirement of status of allocation participant (Annex 1 herein).

14.15. In cases when the auction office due to technical problems with the auction platform has no feasibility to confirm the return of ATR to the ATR user through the auction platform until 13:00 Kyiv time D-32, auction office applies the fallback mode and sends the corresponding letters and notifications by e-mail or fax until 15:00 Kyiv time D-32.

XV. ATR curtailment

15.1. ~~On request by the auction office and/or on demand by the neighbouring TSO~~ the ATR curtailment may be carried out in the following cases:

Technological issues;

Force majeure

At the requirement of the neighbouring system operator -

15.2. In case of ATR curtailment, auction office within one working day immediately informs all ATR users through the auction platform and e-mails on the date, time, duration and condition of the ATR curtailment. In case of the curtailment of ATR in non-working days and also on holidays and non-working days of Ukraine, the auction office shall inform all the ATR users with in the next working day and or the first day after such holidays or non-working days.

15.3. ATR curtailment is carried out proportionally. When defining the value of curtailment in line with the principle of proportionality the round value shall be applied to the closest bigger number for each ATR user. With this, the restriction of ATR shall be made with ~~and~~ the following sequence ~~has to be ensured:~~

~~–non-allocated capacity on the daily auction;~~
 - ATR obtained on the results of daily auction;
 - ATR obtained on the results of monthly auction;
 - ATR obtained on the results of yearly auction;
 - ATR subject to granted ~~priority capacity granted according to the legislation.~~

~~Every value of ATR obtained on the results of yearly, monthly and daily auction after the proportional curtailment is rounded to the nearest value in MW.~~

15.4. Notification on curtailment of ATR allocated on the yearly and monthly auctions with the corresponding grounds argumentation has to be published on auction office web-site no later than the next working day ~~not later than 16:00 Kyiv time D-2.~~

15.5. ATR for the day obtained on the results of daily auction are fixed except when the ATR curtailment is caused by Force-Majeure. In case of curtailment of daily ATR the auction participants are returned their fees for each full unused hour and in cases of ATR restriction, allocation on daily auction compensated at the rate of marginal price of this auction.

15.6. In case when the situation in the power systems has improved, the ATR have to exempt from the previous curtailment on the proportion principle in the following sequence:

ATR obtained on the results of yearly auction;

ATR obtained on the results of monthly auctions;

ATR obtained on the results of daily auctions.

ATR subject to granted priority capacity

15.7. In cases of curtailment, due to technological issues of the transmission lines of the electricity network, as defined in Annex 2 to the agreement on the access to the transfer capacity and termination of the parallel work of the UES of Ukraine (or its parts) to each winner of the auction every ATR user with curtailed ATR is compensated costs for every unused hour are returned by the auction office. for each unused MW which is equal to the marginal price of the corresponding auction even in case of non-submission of daily hourly schedules of export/import of electricity.

15.8. No later than the 5th day of the month, preceding the settling month, the auction office shall publish information on the curtailment for the settling month and sends to each ATR users with curtailed ATR the detailed calculation of values of costs return. After the receipt of the above-mentioned information each of such ATR user shall have the right to send an invoice to the auction office to receive the respective value of costs.

The return of costs to the ATR users is made within 4 working days from the date of the receipt of such invoice by the auction office on the account as indicated in the application submitted for the acquisition of the status of allocation participant (Annex 1). Auction office informs every ATR user with curtailed ATR during 3 days about the sum of compensation.

XVI. Electronic documents circulation

16.1. For the purpose of ensuring the integrity of the information electronically transferred to the auction office, the observance of time frames for processing of information defined herein, the transparency of the process of documents matching, the authenticity and validity of information and also the control of documents circulation, the auction applies the electronic documents circulation.

16.2. The electronic documents circulation system foresees the following:
 registration and storage of electronic copies of incoming and outgoing mail on auction participation and/or ATR obtaining through the ATR transfer;
 full life history of documents in electronic format on auction participation and/or ATR obtaining through the ATR transfer (registration, creation, matching, confirmation, signing);

proposal/receipt of invoices as a result of respective auctions;
creation and adjustment of the Acts of performed works as a result of auctions and/or in case of the return of ATR and/or return of costs.

ensuring the operation of a huge number of users with documentation;
creation and editing to the hour of registration in the system, search for documents;

creation, edition, support of different software versions, documents search;

ensuring the storage of documentation to be matched and storage of matched documentation in a single data base with functions of quick search by different criteria;

transparent mechanism of documentation matching, i.e. complete awareness of the participants of the matching process and interested parties on the current document status and its track;

informing about the current status of processes and procedures with the participation of users and auction participants.

16.3. The electronic documents circulation procedure foresees the following:

reporting analysis on processes status and documentation completeness;

reliable, operative and long-term documentation storage in the electronic archive with the possibility of search by different criteria;

update or register verification of auction platform users and allocation participants authorized persons on correspondence to the valid electronic registration;

archive data protection;

security and service accessibility ensuring.

XVII. Payment for ATR

17.1. The payments are carried out according to the agreement on access in UAH by transferring the corresponding amount of money on the auction office current account with special treatment pursuant to the rules of cashless payments adopted by the legislation of Ukraine.

17.2. In case when the auction winner does not pay for the ATR on respective reserve obtained on the results of yearly and/or monthly auction in the time frames defined in the agreement on access, this auction winner loses the corresponding ATR(s) ~~obtained on the results of yearly and/or monthly auction.~~

In such case the bank guarantee and/or ~~guarantee~~-fee(s) submitted by the allocation participant becomes an ownership of the auction office as a fine and are included on account of partial fulfilling the obligations according to the agreement on access, and the ATR(s) is(are) to be allocated on the subsequent auction. Such fine equals to 100 minimal wages as defined in the current legislation of Ukraine on the date of the payment of such fine. The payment of fine does not release from the obligation to pay for the submitted and unpaid invoices in full. In order to participate in the next auctions the allocation participant shall renew its payment or provide a bank guarantee in line with the requirements of paragraph 6.1 and 6.2. of the Title VI of this Rules. The registration of the allocation participant is cancelled.

17.3. In case when the auction winner does not pay for the ATR of the corresponding reserve obtained on the results of daily auction in the time frames defined in the agreement on access, the bank guarantee and/or ~~or~~ ~~guarantee~~ fee(s) submitted by the allocation participant become(s) an ownership of the

auction office as a fine. Such fine equals to 100 minimal wages as defined in the current legislation of Ukraine on the date of the payment of such fine. The payment of fine does not release from the obligation to pay for the submitted and unpaid invoices in full. In order to participate in the next auctions the allocation participant shall renew its payment or provide a bank guarantee in line with the requirements of paragraph 6.1 and 6.2. of the Title VI of this Rules. ~~and are included on account of partial fulfilling the obligations. The registration of the allocation participant is cancelled.~~

17.4. The amount to be paid by the auction winner for the ATR obtained on the results of yearly and/or monthly and/or daily auctions is determined by the auction office separately for each reserve of the corresponding cross-border section by multiplying the marginal price in UAH/MW x hour and totally obtained ATR in MW an number of hours on such reserve. -

17.5. Auction winner pays the ATR value on the following principle and payment schedule:

the value to be paid by the auction winner for the ATR obtained on the results of yearly auction is paid by the auction winner by ~~equal~~-monthly installments in the month in line with number of hours and values of acquired ATR in the access month prior to the month of provision of access to the transfer capacity;

the value to be paid by the auction winner for the ATR obtained on the results of monthly auction is paid fully by the auction winner ~~in a month prior to the settlement month~~ by the value of ATR obtained on monthly auction within the period as defined in paragraph 17.9;

the value to be paid by the auction winner for the ATR obtained on the results of daily auction is paid every ten days by the auction winner in a settlement month by the value of ATR obtained on daily auctions.

17.6. The ATR value comprises the right for using the ATR only and does not comprise any payments for using the transmission system.

17.7. Payments for the ATR are executed on the basis of the invoices issued by the auction office through web application interface of auction platform user or courier ~~transferred by courier~~ mail or being personally handed in the auction office to the allocation participant authorized person under its signature. Invoices copies are sent by e-mail and/or fax to the auction winner not later than during working day beginning from the date of their official registration. "Payment for the access to the transfer capacity" and payment number identifier (invoice No) must be indicated in the invoice. The identification number shall be submitted.

17.8. Auction office invoices the auction winners in the following time frames:

As a result of yearly acution every month not later than on 10th calendar day of the month prior to the month of rendering of services for transmission of electricity through the cross-border electrical networks of Ukraine (except January where invoice is issued not later than the next working day after publishing the yearly auction results);

As a result of monthly auction not later than the next working day after publishing the monthly auction results on auction office web-site;

As a result of daily acutiron next working day after ten-day period (decade) of the settlement month on the results of corresponding daily auction.

17.9. Payment period is ~~47~~ (seven) working days beginning from the date of receipt of issuing the invoice. The auction winner informs the auction office about the ATR payment with no delay.

~~17.10. In case when the ATR cost paid on the basis of invoice exceeds the actual ATR cost during the settlement month, the auction office is obliged to return the money not later than on 10th calendar day of the month next to the settlement month.~~

17.10~~1~~. Not later than on 5th day of the month next to the settlement month the auction office draws up and sends to the ATR user the signed Handover and Acceptance Act (in 2 copies). Not later than on 10th day of the month next to the settlement month the auction office has to receive the Handover and Acceptance Act signed by the ATR user (1 copy) and/ or respective justification of refusal. -

17.12. Date of payment is considered to be a date of receipt of money to the auction office current account with special treatment.

17.13. All bank costs of the allocation participant and costs of all other banks related to the payment to the auction office current account are covered by the allocation participant, and the costs of the auction office bank are covered by the auction office.

17.14. The auction office and allocation participants shall issues a tax return bill to the allocation participant according to the requirements of the valid legislation of Ukraine.