



Assessment of the draft Law of Ukraine On Projects of National Interest in the Energy Sector, №9138

by the Energy Community Secretariat

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PURPOSE STATEMENT

Assessment of the draft Law of Ukraine "On Projects of National Interest in the Energy Sector", No 9138, transposing into Ukrainian legislation provisions of the Regulation (EU) 347/2013 on guidelines for trans-European energy infrastructure.

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Energy Community Secretariat

Am Hof 4, 1010 Vienna, Austria

Tel: + 431 535 2222

Fax: + 431 535 2222 11

Web: www.energy-community.org

Twitter: https://twitter.com/ener_community

LinkedIn: <https://www.linkedin.com/company/energy-community/>



Ukraine Energy Market Observatory

Assessment 2/24

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Background

The present assessment follows the submission by the Cabinet of Ministers of Ukraine to the Verkhovna Rada of Ukraine of the Law No 9138 on Projects of National Interest in the Energy Sector¹ (hereinafter, the “Infrastructure Law”). The draft Infrastructure Law intends to transpose into Ukrainian legislation the provisions of the Regulation of the European Parliament and Council (EU) No 347/2013 on guidelines for trans-European energy infrastructure² (hereinafter “Regulation (EU) No 347/2013”), incorporated and adapted in the Energy Community by Ministerial Council Decision 2015/09/MC-EnC of 16 October 2015.³ Transposition and implementation of the Regulation by Contracting Parties was due by 31 December 2016. The failure of Ukraine to transpose Regulation (EU) 347/2013 amounts to a breach of the Energy Community Treaty, as established by the Ministerial Council in Case ECS-4/18.⁴

The Secretariat, through the EU4Energy Initiative, provided technical assistance to Ukraine in 2020 in preparing the draft Law on Projects of the Highest National Priority in the Field of Energy, aimed at transposing Regulation (EU) 347/2013. The draft envisaged the Cabinet of Ministers of Ukraine (CMU) to act as a national competent authority for projects of strategic importance. According to the proposal, the CMU was supposed to adopt a manual of procedures that applies to comprehensive decisions on the energy infrastructure projects of the highest national priority. The proposal also envisaged that the National Energy and Utilities Regulatory Commission (NEURC) adopts and submits to the Energy Community Regulatory Board (ECRB) the methodology and the criteria used to evaluate investments in electricity and gas infrastructure projects and make it publicly available.

Subsequently, Ukraine submitted several versions of the draft Infrastructure Law to the Secretariat in 2022 and received comments and suggestions, which were partially included in the draft version of the Infrastructure Law submitted to the Verkhovna Rada. On 22 November 2022, the Secretariat sent a letter to the Ministry of Energy of Ukraine, confirming that the draft Infrastructure Law transposes Regulation (EU) 347/2013. The Secretariat pointed out that the Infrastructure Law would bring Ukraine closer to the EU legislative framework on energy, which is also crucial for rebuilding Ukraine's energy infrastructure during the post-war period.

In the European Union, Regulation (EU) No 347/2013 was replaced by Regulation (EU) 2022/869 in 2022, which reflects the developments in the priorities of European energy policy.

¹ <https://itd.rada.gov.ua/billInfo/Bills/Card/41623>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0347>

³ https://www.energy-community.org/dam/jcr:3ba4cffb-db3d-4ea5-8baa-1c1619a4961c/Decision_2015_09_MC_INF.pdf

⁴ https://www.energy-community.org/dam/jcr:828b5931-03db-41c9-9b42-242f5ba37f05/MC_CaseECS-4_18_RR_112018.pdf

Regulation (EU) 2022/869 follows the expected changes in the energy system by acknowledging the European Green Deal, the 2030 energy and climate targets and overall climate neutrality by 2050. Regulation (EU) 2022/869 has subsequently been incorporated in the Energy Community *acquis communautaire* on 14 December 2023. Regulation (EU) 2022/869 will repeal Regulation (EU) 347/2013 on 31 December 2024.⁵ By decision of the Ministerial Council No 2021/11/MC-EnC⁶, the adoption of an Energy Community list of energy infrastructure projects every two years had already been suspended until after 2023.

The main differences between Regulation (EU) 2022/869 and Regulation (EU) 347/2013 are related to different eligible energy infrastructure categories. Projects of Common Interest (PCIs) at EU level, and Projects of Energy Community Interest (PECIs) at Energy Community level cannot include natural gas and oil projects anymore, whereas projects related to smart gas grids, off-shore grids, hydrogen and electrolysers are now eligible. Projects of mutual interest (PMI), connecting Energy Community Contracting Parties and EU Member States, are now covered exclusively by Regulation (EU) 2022/869 in the European Union, and not in the Energy Community anymore.

Impact on the markets and stakeholders in Ukraine

a) PMI and PECI projects involving Ukraine

Based on Regulation (EU) 347/2013, which the draft Infrastructure Law strives to transpose into Ukrainian legislation, the Ministerial Council adopted Decision No 2020/04/MC-EnC⁷ and Recommendation No 2020/01/MC-EnC,⁸ two electricity projects relevant for Ukraine (rehabilitation and modernisation of the overhead line 750 kV to Romania, Pivdenoukrainska – Isaccea, and 400 kV line to Slovakia, Mukacheve - V.Kapusany), and one project in oil (Ukraine - Poland oil pipeline Brody - Adamowo) had received the PMI label in 2020, which has expired due to the change in *acquis communautaire*. At the same time, one hydrogen project in which Ukraine participates (Generic corridor aiming to transmit hydrogen from Ukraine to Slovakia, Czechia, Austria and Germany)⁹ was granted PMI status under Regulation (EU) 2022/869 in the European Union in November 2023.

In the Energy Community, the new PECI list in line with Regulation (EU) 2022/869 will be adopted in December 2024. Projects on the PECI list benefit from streamlined permitting, regulatory incentives, cross-border cost allocation procedures and funding under the EU's Instrument for Pre-Accession Assistance (IPA), Neighbourhood Development and International Cooperation Instrument (NDICI) and the Ukraine Facility. Project promoters may thus have a direct financial benefit as a consequence of the inclusion of their projects in the list.

Enhancing decarbonisation, e.g. by streamlined permitting and investment support for energy infrastructure, is particularly important for Ukraine, considering that the post-war period will require investments in energy infrastructure due to the enormous damages caused by the military aggression to Ukraine and the country's commitment to building a green economy.

⁵ <https://www.energy-community.org/legal/acquis.html>

⁶ https://www.energy-community.org/dam/jcr:27c7ae84-d1c2-4b51-a068-0525214bae71/Decision%20_2021-11-MCEnC.pdf

⁷ https://www.energy-community.org/dam/jcr:7c56ea47-20fa-4c60-865c-b0f75807c863/18thMC_Decision_2020-04_MC-EnC_PECI.pdf

⁸ https://www.energy-community.org/dam/jcr:7309508a-228b-4e3a-ae78-903e8c4af54f/18thMC_Recommendation_2020-01_PECI.pdf

⁹ <https://energy.ec.europa.eu/system/files/2023-11/Annex%20PCI%20PMI%20list.pdf>

b) The draft Infrastructure Law

The draft Infrastructure Law can potentially speed up essential energy infrastructure investments and support the Energy Community's and Ukraine's goals of building a more integrated energy system, relying on higher levels of electrification based on additional renewable and low-carbon sources and the decarbonisation of the gas sector. PEI and PMI projects may also attract financial support from EU funds and international financial institutions.

According to the draft Infrastructure Law, projects of national interest in energy automatically include PEI and PMI projects. Other projects may be included in the list of projects of national interest in the field of energy at the proposal of the project promoter if they meet the criteria established by the CMU. PEI and PMI projects, for which the project promoter is the electricity transmission system operator, electricity distribution system operator, gas transportation system operator, gas storage operator or LNG installation operator, may receive priority financing under the investment programme of the relevant operator.

Compliance assessment

a) Regulation (EU) 347/2013

The draft Infrastructure Law, Ukraine largely complies with Ministerial Council Decision 2015/09/MC-EnC of 16 October 2015 and hence with Regulation (EU) 347/2013.

However, the draft Infrastructure Law in its Article 5 of the draft reads, "*Should the preparation of a project of national interest in the energy sector be at odds with the requirements for the independence of the transmission system operator and the gas transportation system operator in accordance with the Laws of Ukraine "On the Electric Energy Market" or "On the Natural Gas Market," the Cabinet of Ministers of Ukraine shall designate another central executive body as the competent authority when approving the list of projects of national interest in the energy sector*". While the Secretariat appreciates and supports the intention to safeguard the unbundling provisions, the Law should clearly assign the role of competent authority to one body in order to remove uncertainty in the process of designating and possibly changing the competent authority for the purpose of permit granting.

Besides, the draft Infrastructure Law gives the so-called interdepartmental commission the power to deal with infrastructure projects, which may create additional confusion and uncertainties. The interdepartmental commission will consist of representatives of relevant/involved state authorities and local self-governance bodies. Article 9(1) of the draft Infrastructure Law reads: "*The competent authority shall compile a procedural manual which shall be used in the course of provision of a complex decision for the implementation of projects of national interest in the energy sector in accordance with this Law, other Laws of Ukraine determining the procedure for the preparation and implementation of projects in the energy sector and normative legal acts adopted in execution thereof, and shall submit it for consideration and approval to the Interdepartmental Commission*". Dual competencies between the national competent authority, which is not explicitly defined, and the interdepartmental commission are not covered by Regulation (EU) 347/2013.

b) Regulation 2022/869

Given that Regulation (EU) Regulation 347/2013 will be repealed and replaced by Regulation (EU) 2022/869 in the Energy Community, the draft Infrastructure Law, once adopted, will become obsolete to some extent. Provisions which are not applicable any more are:

- PMI (between Ukraine and EU Member States) are not subject to Energy Community law anymore but should comply with the provisions from the original Regulation (EU) 2022/869. PMI are defined in the draft Infrastructure Law as an *“infrastructural project between Ukraine, as a Contracting Party of the Energy Community, and a Member State of the European Union, which does not have the status of project of common interest of the Energy Community has been approved by the recommendation of the Council of Ministers of the Energy Community”*. By contrast, Regulation (EU) 2022/869 defines a PMI as *“a project promoted by the Union in cooperation with third countries pursuant to letters of support from the governments of the directly affected countries or other non-binding agreements, which falls under one of the energy infrastructure categories set out in point 1(a) or (f), point 3(a), or point 5(a) or (c) of Annex II, which contributes to the Union’s 2030 targets for energy and climate and its 2050 climate neutrality objective and which is on the Union list”*;
- eligible infrastructure categories do not include natural gas and oil infrastructure projects;
- new infrastructure categories have been included (hydrogen, electrolysers, smart gas grids, off-shore grids, CO₂ networks);
- the criteria for electricity smart grid projects have been relaxed;
- reporting obligations have been slightly changed, in particular regarding the dates when project promoters must inform relevant competent authorities and the Energy Community Secretariat about the project’s progress.

Once the draft Infrastructure Law is adopted, it will thus have to be amended before the new implementation deadline, i.e. before the end of 2024.

Conclusions and Recommendations

The adoption of the draft Infrastructure Law will transpose Regulation (EU) 347/2013, as adapted for the Energy Community. It largely complies with the basic requirements of that Regulation and further expands it to other projects that Ukraine considers strategically important. Several issues in the draft Infrastructure Law still remain to be addressed, namely.

- the competent authority should be clearly defined for all cases;
- a rather supporting than decisive role should be assigned to the interdepartmental commission to eliminate uncertainty and possible inefficiency resulting from overlapping competencies;
- further measures will be necessary after the adoption to fully implement Regulation (EU) 347/2013, in particular the definition and publication of the manual of procedures and the methodology and criteria for assessing investments in energy infrastructure projects of national interest and associated higher risks.

Since Regulation (EU) 2022/869 was adopted in the Energy Community in December 2023, many provisions from the draft Infrastructure Law will soon be obsolete, and Ukraine will need to amend or change this legislation before 31 December 2024. In this situation, Ukraine should either

- redraft the draft Infrastructure Law to bring it in compliance with Regulation (EU) 2022/869, or
- swiftly proceed with the adoption of the draft Infrastructure Law and immediately prepare the amendments necessary to align it with Regulation (EU) 2022/869 to be adopted by 31 December 2024.