



**Assessment of the Law of Ukraine “On Amendments to some laws of Ukraine regarding the prevention of abuse in the wholesale energy markets” of June 10, 2023 No. 3141-IX**

**by the Energy Community Secretariat**

**July, 2023**

## PURPOSE STATEMENT

Assessment of the Law of Ukraine “On Amendments to some laws of Ukraine regarding the prevention of abuse in the wholesale energy markets” of June 10, 2023 No. 3141-IX (hereinafter - the “REMIT Law”) transposing into Ukrainian legislation provisions of the Regulation of the European Parliament and Council (EU) No. 1227/2011 of October 25, 2011 on wholesale energy market integrity and transparency.

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## Ukraine Energy Market Observatory

Assessment 14/23

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### ***Assessment of the Law of Ukraine “On Amendments to some laws of Ukraine regarding the prevention of abuse in the wholesale energy markets” of June 10, 2023 No. 3141-IX***

## Introduction

The present assessment follows the adoption by the Verkhovna Rada of Ukraine of the Law of Ukraine “On Amendments to some laws of Ukraine regarding the prevention of abuse in the wholesale energy markets” of June 10, 2023 No. 3141-IX (hereinafter, the REMIT Law). The REMIT Law transposes into Ukrainian legislation the provisions of the Regulation of the European Parliament and Council (EU) No. 1227/2011 of 25 October 2011 on wholesale energy market integrity and transparency (hereinafter, REMIT Regulation) incorporated in the Energy Community by Ministerial Council of the Energy Community by Decision 2018/10/MC-EnC of 29 November 2018. The present assessment concerns only REMIT related provision of the Law No. 3141-IX<sup>1</sup> and does not assess other provisions introduced by the REMIT Law unrelated to the subject of REMIT transposition, such as cross-border capacity allocation, functioning of the RES producers and the Guaranteed Buyer, provisions on the national regulatory authority (hereinafter, NRA).

## Background

The Ministerial Council Decision 2018/10/MC-EnC adapted the REMIT Regulation to the institutional framework of the Energy Community, excluding central data collection by the Agency for the Cooperation of Energy Regulators (hereinafter, ACER) and replaced ACER’s responsibilities on coordination of investigations by a related competence of the Energy Community Regulatory Board (hereinafter, ECRB).

By 29 November 2019 the Contracting Parties were under an obligation to transpose and by 29 May 2020 to implement the REMIT Regulation.

Following the adoption of Decision 2018/10/MC-EnC, the Energy Community Secretariat (hereinafter, the Secretariat) initiated a number of activities to assist Ukraine with the

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<sup>1</sup> At the stage of draft for the first and second reading, the registration number of the draft was 5322

transposition of the REMIT Regulation in a timely manner. In 2020, the Secretariat provided technical assistance under the EU4Energy Governance Project for the purpose of transposition and implementation of the requirements of the REMIT Regulation. The technical assistance was provided to the National Energy and Utilities Regulatory Commission (hereinafter, NEURC) as the main beneficiary<sup>2</sup>. Following the finalisation of the project, the NEURC in September 2020 published draft legislation aiming to transpose the REMIT Regulation for public consultation.

In the period 2020 – 2021 several draft laws were registered with the Verkhovna Rada's Committee on Economic Development (No. 4503 and No. 4503-1) and Committee on Energy, Housing and Utilities Services (No.5322 and 5322-1). The Secretariat revised all drafts laws and provided its recommendations and suggestions but those drafts were not adopted.

On 26 March 2021 the Secretariat initiated a dispute settlement procedure against Ukraine (Case ECS-04/21), which was closed with a Ministerial Council Decision 2021/07/MC-EnC of 30 November 2021 under Article 91 of the Treaty. In its decision, the Ministerial Council established a breach of the obligations of Ukraine to timely transpose the REMIT Regulation and urged Ukraine to take all appropriate measures to rectify the breaches and ensure compliance with Energy Community law by July 2022.

On 20 September 2022 draft Law No. 5322 has been voted by the Verkhovna Rada of Ukraine in a first reading. On 10 July 2023 the law was adopted by the Verkhovna Rada with registration No.3141-IX, and entered into force on 2 July 2023. The Secretariat closely worked with the Verkhovna Rada Committee on Energy, Housing and Utilities Services (hereinafter, "EHU Committee") on revision the draft law and its amendments in course of finalization of the final draft.

The REMIT Law, inter alia, introduces ban of market manipulation and instruments of prevention thereof, data publication requirements, requirements of inside information disclosure, obligation to report suspicious transactions, functioning of transparency platforms, new monitoring and investigatory authorities of NEURC incl. market participants registration and enhanced level of penalties as well the process of information exchange with the ECRB.

The main concerns of the Secretariat communicated on 9 January 2023 to the EHU Committee in terms of the compliance were accommodated in the adopted REMIT Law, namely:

- the terms and definitions should be in compliance with the REMIT Regulation;
- to foresee the option that information on wholesale energy market transactions, including orders to trade, shall be provided by wholesale market participants not only through third parties but also by themselves;
- persons professionally arranging transactions in wholesale energy products (including electricity and gas TSOs and Market Operator) should maintain effective arrangements and procedures to identify breaches (e.g. monitoring system) for all types of transactions they arrange (capacity allocation, balancing, spot markets, electronic auctions, etc) and report the results of such monitoring to the NRA;
- to align the definition of market manipulation with the one in REMIT Regulation, in particular, to cover the case of persons acting in collaboration;

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<sup>2</sup> Technical assistance covered involvement of the EC Support Group for Ukraine, the Verkhovna Rada of Ukraine, the Ministry of Energy and Environmental Protection of Ukraine, National Securities and Stock Market Commission, EU Delegation to Ukraine.

- to ensure that the NRA should without delay inform the ECRB and the Secretariat where it has reasonable grounds to suspect that acts in breach are being, or have been, carried out either in Ukraine or in another Contracting Party, as well as provide and exchange relevant information with the ECRB;
- the penalties that the NRA would be empowered to impose must be effective, dissuasive and proportionate, reflecting the nature, duration and seriousness of the infringement, the damage caused to consumers and the potential gains from trading on the basis of inside information and market manipulation.

## Impact on the markets and stakeholders in Ukraine

### a) General impact on the economy and rebuilding of Ukraine

The transparent functioning of the energy sector as a whole and of the wholesale energy markets in particular, are key for economic growth and strengthening of the Ukrainian economy. In particular, this is important in the context of losses to economy caused by Russian war of aggression against Ukraine and challenges of future rebuilt of Ukraine.

### b) Impact on the integration of Ukraine's energy market with those of the Parties to the Energy Community

With the emergency synchronization of the control block of Ukraine and Moldova with Continental Europe, which ensured diversified and secure electricity supply during the winter of 2022/2023, the REMIT Law has even greater significance. REMIT Law should ensure the integrity of national energy markets as well cross-border market monitoring that will play a central role in facilitating growing commercial exchanges, joint cross-border transmission capacity allocation, and the eventual electricity market coupling between Ukraine and the EU and the Energy Community. These developments are in line with the market integration path outlined in the new electricity package adopted by the Ministerial Council in December 2022, as well as the Roadmap for Further Market Integration devised by the High-Level Working Group on Energy Market Reforms between the EU and Ukraine. Specifically for the autumn-winter period of 2023/2024 an onwards commercial exchanges between Ukraine and the Parties to the Energy Community will be key in the context of security of supply. Creation of a level playing field by adopting the REMIT Law in Ukraine will ensure that Ukrainian market participants operate under the same framework as in the EU and Energy Community.

### c) Impact on the market participants

The activity of the market participants will be largely affected by the provisions of the REMIT Law. That will include building new internal processes to adhere to the new requirements on reporting and information disclosure, revision of trading strategies to be compliant with REMIT Law to avoid new significant penalties. The level of maximum penalties approved by the REMIT Law for market manipulation and insider trading, as summarized below, is not only comparable to those applied in the Energy Community and the EU<sup>3</sup>, but by far higher than in some countries of comparable or larger market size<sup>4</sup>.

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<sup>3</sup> <https://www.energy-community.org/events/2023/04/ECRB.html>, <https://remit.in.ua/>

<sup>4</sup> According to Transitory Provisions, within twelve months from the date of entry into force of provisions on penalties for violation on wholesale energy markets the halved level of penalties applies (up to ~EUR 5 730 000)

Penalties for Insider Trading/Market Manipulation					
Albania	Georgia	Moldova	Montenegro	Serbia	Kosovo
Determined by NRA decision (no determined size)	Not exceed 6% of the annual turnover of the previous year	From 3% to 10% of the annual turnover of the company	From 5% to 10% of the total annual income in the previous financial year	From EUR 12 773 to EUR 25 546	From EUR 5 000 to 10% of revenues that the enterprise accumulated in the previous fiscal year
Ukraine	Poland	Germany/Slovakia	Hungary	Spain	Austria
Up to of EUR 11 500 000 the penalty may not exceed 10 % of annual revenue in relevant market (electricity or gas)	Up to EUR 2 120 000	Up to EUR 10 000 000	Up to EUR 4 800 000	EUR 6 000 000 - 60 000 000, but up to 10% of annual turnover	EUR 150 000

New roles are assigned to the market operators and the transmission system operators (hereinafter, TSOs) in the gas and electricity markets. The gas TSO has the roles of a person professionally arranging transactions with wholesale energy products, data transmission administrator and administrator of insider information platform. The electricity TSO and the Market Operator are operators of insider information platforms and the TSO is a person professionally arranging transactions with wholesale energy products as well as data transmission administrator.

## Compliance assessment

By adoption of the REMIT Law, Ukraine complies with the Ministerial Council Decision 2021/07/MC-EnC of 30 November 2021 in Case ECS-04/21.

The adopted REMIT Law fully reflects the requirements of the REMIT Regulation as adapted for the Energy Community. In particular, it governs the prohibition of insider trading (Article 3) and market manipulation (Article 5), obligation to publish inside information (Article 4), market monitoring by the NRA and creation of national central registry of market participants entering into transactions with wholesale energy products (Article 7 and 9) by the NRA information from which shall be transmitted to ECRB. According to the REMIT Law, NEURC shall ensure the functioning of the register of wholesale energy market participants within six months from the date of entry into force of the REMIT Law. The timeline is compatible with the transposition and implementation deadline of the new Electricity Integration Package (by the end of 2023) that is of importance while Ukraine energy market integration to the EU energy market.

The adopted REMIT Law goes a step beyond the requirements of the Energy Community REMIT Regulation as it contains requirements on reporting on transactions with wholesale energy products and data collection (based on Article 8 of the EU REMIT Regulation, without requiring submission of the data to ACER) and Commission Implementing Regulation (EU) No 1348/2014 of 17 December 2014 on data reporting implementing Article 8(2) and Article 8(6) of the EU REMIT Regulation as regards application of provisions of Article 6 on reporting channels for transactions to relevant Ukrainian stakeholder (e.g. TSOs, MO, power exchanges, other organised market places, detailing the Regulators role in setting the technical and organisational requirements for reporting data (Article 11), etc.

The REMIT Law requires that penalties introduced to be effective, dissuasive and proportionate, reflecting the nature, duration and seriousness of the infringement, the damage caused to consumers and the potential gains from trading on the basis of inside information

and market manipulation in accordance with Article 18 of the REMIT Regulation. As explained above, the maximum penalties introduced by the REMIT Law for market abuse are much higher compared to the previously applied penalties for violations on the energy markets. The maximum levels of penalties are not only comparable to those applied in the Energy Community and the EU, but are by far higher than in some countries of comparable or larger market size. Nonetheless, maximum penalty not exceeding 10% of annual revenue might be a limiting factor for full application of the principles of Article 18 of the REMIT Regulation, as such approach might fail to address the seriousness of violation. Thus, such provisions are not fully compliant with the REMIT Regulation and respective view noted by the Secretariat in communication of 9 January, 2023 has not been addressed.

REMIT Law does not address inconsistency with provisions of Regulation (EU) No. 1227/2011 and Regulation (EU) No 1348/2014 pointed out by the Secretariat.

While the latter regulations are not the part of Energy Community acquis, but Ukraine chose to implement respective provisions beyond the of the Energy Community acquis requirements, the Secretariat still pointed out some inconsistencies. In particular, on reporting obligation according to Article 8 (1) of (EU) Regulation 1227/2011, the overall reporting responsibility lies with market participants, but once the required information is received from a person or authority listed in points (b) to (f) of paragraph 4 of Article 8, the reporting obligation on the market participant in question shall be considered to be fulfilled. The REMIT Law transpose this provision in a different way stipulating that reporting obligation of the wholesale energy market participant shall be deemed fulfilled in case of providing such information to the data transmission administrator and/or trade repository. While Regulation (EU) No 1348/2014 further stipulate that where person reports data through a third party the person shall not be responsible for failures in the completeness, accuracy or timely submission of the data which are attributable to the third party and the third party shall be responsible for those failures, the market participant is responsible that relevant data reach the Regulator in any case.

The REMIT Law does not have clear provision ensuring that reporting obligations on market participants shall be minimized by collecting the required information or parts thereof from existing sources where possible (Article 8 (5) of the Regulation (EU) 1227/2011).

As was noted by the Secretariat previously, according to the Energy Community acquis (Regulation 715/2009 for gas market and Regulation 543/2013 for electricity market) TSOs submit data in gas and electricity markets to the ENTSO-G and ENTSO-E transparency platforms (with respective obligation on primary owners of the data to submit relevant information to the TSOs where relevant). In this regards Regulation (EU) No 1348/2014 also makes reference to above mention platforms as one of the sources of fundamental data on gas and electricity. The Secretariat believes that this may be aligned in requirements for information submission that shall be developed by the NEURC according to the REMIT Law to avoid duplication of information and excessive reporting requirements on market participants.

Article 17 of the REMIT Regulation is transposed but Article 12 on operational reliability is missing in the adopted REMIT Law. While the adopted REMIT Law contains provision requiring cooperation of NEURC with the other NRAs, ECRB and the Secretariat, the provision is quite general and fails to include the details of such cooperation. It is not very clear whether such cooperation includes all tasks of the NRA to participate to investigatory groups coordinated by the ECRB, to submit the required information or to commence investigations upon ECRB's request and to limit refusal to act upon ECRB's request as required by Article

16 of the REMIT Regulation. The adopted REMIT law also does not include an obligation of NEURC to submit annual report to the Secretariat on its monitoring activities as required by Article 7(3) of the REMIT Regulation. Finally, the adopted REMIT Law envisages that both TSOs and market operators act as so-called data inside information platform administrators. NEURC shall also maintain registers of data transmission administrators and administrators of inside information platforms, making these activities competitive. It is not clear from the adopted law whether anyone else in addition to the TSOs could act as a data transmission administrator, whether market participants would have a choice of using one or another platform for submitting the inside information and whether the market participants are expected to submit to those platforms the information required to be made public by other acts (such as the Electricity and Gas Regulations).

## Conclusions and recommendations

- The Energy Community Secretariat welcomes the significant reform towards transparency of energy markets operation in Ukraine by adoption of the REMIT Law and thus Ukraine's compliance with the requirements of the Energy Community acquis.
- The REMIT Law reflects the basic requirements of the REMIT Regulation adapted for the Energy Community and goes even beyond on certain aspects.
- Adoption of the REMIT Law contributes to further alignment of the country's energy markets with that of the European Union's standards and Ukraine's commitments undertaken in this respect. In combination with transposition of the Electricity Package due in the by the end of 2023, the actual electricity market coupling between Ukraine and the EU and Energy Community will be in place.
- The legislative change is only a first step towards availability of a fully functioning REMIT toolbox. Timely implementation of legislative requirements by stakeholders will be key in order to launch practical application. In particular this goes for:
  - Development of a set of regulations by NEURC within the next 3 to 18 months as of the entry into force of the REMIT Law as summarized in Annex 1 in order to ensure that NEURC can exercise its new competences in practice,
  - Timely establishment of relevant processes, inter alia of reporting and monitoring, information exchange and investigation. It is recommended that reporting obligations on market participants shall be minimized by collecting the required information or parts thereof from existing sources where possible to avoid duplication of information and excessive reporting. Moreover, the lack of clarity on the functioning of the platforms should be addressed in the secondary legislation;
  - Establishment of a relevant IT system by NEURC (for market monitoring, reported data analysis, central registry) and by market participants who have special functionality – TSOs and MO (inside information platforms);
  - Establishment of an efficient and practical coordination between regulators – NEURC, the Antimonopoly Committee AMCU and the Financial Regulator NSSMC to ensure that reporting requirements and penalties application are not duplicated via respective memorandums of understanding. The latter shall be based on the authorities as designated to each agency by national law and take into account best EU practices of such cooperation, inter alia, on information exchange and data protection;
  - A process should be established by NEURC in compliance with the requirements of the ECRB Procedural Act No 01/2020 of 7 August 2020 on



- cooperation and coordination of Contracting Parties' NRAs under REMIT Regulation;
- Efficient cooperation with the Secretariat shall be established whereby NEURC consults the Secretariat when applying fines for violations on the wholesale energy market;
  - Independence of the Regulator of any other public or private interests in its decision making, including in the context of the REMIT Law, is key to efficient REMIT implementation. The Secretariat invites the NEURC to submit annual report to the Secretariat on its monitoring activities as required by Article 7(3) of the REMIT Regulation.
- The Secretariat remains committed to continuously supporting the process of implementation of the requirements of the REMIT Law in Ukraine and cooperation with ECRB, ACER and NRAs of Contracting Parties with regard to the integrity and transparency of wholesale energy market.

## Annex 1 Timeline for REMIT Regulations Development & Next Steps

