Energy Community

UKRAINE ENERGY MARKET OBSERVATORY

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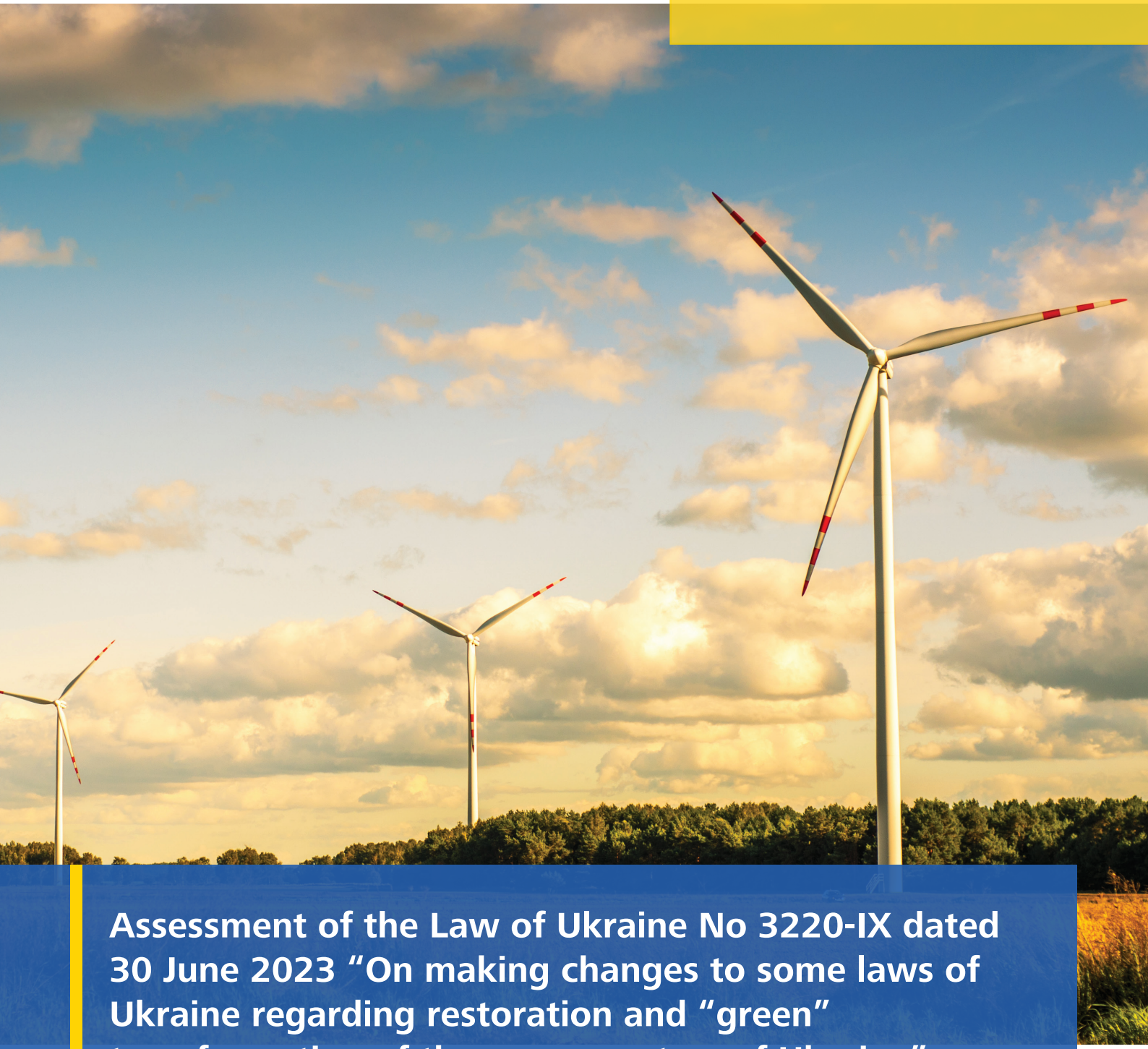

Assessment of the Law of Ukraine No 3220-IX dated 30 June 2023 "On making changes to some laws of Ukraine regarding restoration and "green" transformation of the power system of Ukraine"

by the Energy Community Secretariat

June, 2024

PURPOSE STATEMENT

Assessment of compliance of the Law of Ukraine No 3220-IX dated 30 June 2023 "On making changes to some laws of Ukraine regarding restoration and "green" transformation of the power system of Ukraine" with the Energy Community acquis.

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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 08/24

Assessment of the Law of Ukraine No 3220-IX dated 30 June 2023 "On making changes to some laws of Ukraine regarding restoration and "green" transformation of the power system of Ukraine"

Introduction

The present assessment of compliance with the Energy Community acquis is a follow-up to the assessment provided by the Energy Community Secretariat of the draft Law of Ukraine No.9011-d dated 8 April 2023 "On Amendments to Certain Laws of Ukraine Regarding the Restoration and "Green" Transformation of the Energy System of Ukraine" (hereinafter, the draft Law) in response to the request from the members of the Committee on Energy, Housing, and Utilities Services of the Verkhovna Rada of Ukraine, published by the Secretariat on 2 June 2023 (hereinafter, the Assessment Note 08/2023).[1]

On 30 June 2023, the Verkhovna Rada of Ukraine, during its second reading, adopted the Law of Ukraine "On Amendments to certain Laws of Ukraine regarding the restoration and "green" transformation of the power system of Ukraine" (No.3220-IX) (hereinafter, the Law No. 3220"). The President officially endorsed the Law on 24 July 2023. The Law was subsequently published on 26 July 2023 and became effective on 27 July 2023.

This assessment aims at reviewing the Law's compliance with the Energy Community acquis, taking into account, in particular, the amendments introduced to the draft Law which followed the first reading.

Background

a) Energy Community acquis

On 30 November 2021 the Energy Community Ministerial Council, by Decision 2021/14/MC-EnC, incorporated Directive (EU) 2018/2001 of 11 December 2018 on the promotion of the use of energy from renewable sources (hereinafter, REDII) into the Energy Community acquis. Simultaneously, by Decision 2021/13/MC-EnC, the incorporation of the Directive (EU) 2019/944 of 5 June 2019 on common rules for the internal market for electricity (hereinafter, the Electricity Directive) took place. In 2022, the Ministerial Council amended the adopted RED II and Electricity Directive by its Decisions 2022/02/MC-EnC and 2022/03/MC-EnC accordingly.

The deadline for the transposition and implementation by Ukraine for RED II expired by 31 December 2022. By 31 December 2023 the deadline for the Electricity Directive expired.

[1] https://www.energy-community.org/dam/jcr:f58f9b75-dc4a-4ee6-b34e-b1d4cc367173/Note08.pdf

b) The Law No. 3220

The Law No. 3220 introduces amendments to several laws in Ukraine (most importantly the Law "On Alternative Energy Sources"[2] and the Law "On the Electricity Market",[3] (hereinafter, the Electricity Market Law)), partially transposing provisions of the REDII (in particular, regarding guarantees of origin, self-consumption and support schemes for electricity from renewable sources) and the Electricity Directive (in particular, regarding aggregation, citizen energy communities, and active customers). In addition to the changes proposed by the draft Law, which was assessed by the Secretariat, the Law No. 3220 also contains provisions on small distribution systems, direct lines, some aspects of suppliers' switching, and aggregation.

Compliance assessment

The following assessment comes to the conclusion that while Law No.3220 took on board a limited number of recommendations of the Secretariat which were voiced in Assessment Note 08/2023, there were also further amendments introduced which raise doubts as to their compliance with the Energy Community acquis, as it will be described further below.

Guarantees of origin for energy from renewable[4] sources

Law No.3220 establishes a sound legal basis for implementing a Guarantees of Origin (hereinafter, GOs) system that complies with RED II and European standards.

Nonetheless, it does not clearly define the exact validity duration of GOs, which according to the law can range between 12 and 18 months. The Law No.3220 suggests that a GO is valid for 12 months, yet the producer could potentially repay it within 18 months, thus leading to a degree of uncertainty.

Moreover, Law No.3220 specifies that the Guaranteed Buyer possesses the authority to conduct the sale of GOs for electricity, provided that such GOs were not already transferred during the sale of electricity via bilateral or export agreements. However, GOs granted to renewable energy producers cannot be alienated or sold without obtaining their consent. Furthermore, this could potentially lead to double counting and hence violate REDII provisions.

Renewables self-consumption

Introducing a new feature, Law No.3220 permits renewable energy producers to provide electricity for self-consumption to electrical systems of entities which are situated on the same land parcel or neighboring land parcels sharing common boundaries. This is conditional upon the establishment of commercial metering and the absence of power-generating units installed on the premises of these parties. Nonetheless, it is prohibited to simultaneously supply electricity to such affiliated entities' electrical systems along with the networks operated by the transmission system operator or distribution system operator. This contradicts the notion of self-consumption.

[2] Law No. 555-IV dated 20.02.2023, https://zakon.rada.gov.ua/laws/show/555-15#Text
[3] Law No.2019-VIII dated 13.04.2017, https://zakon.rada.gov.ua/laws/show/2019-19#Text
[4] The Secretariat highlights that the terms "alternative" and "renewable" sources, which essentially convey the same meaning, are used in various laws. It is important to harmonize this terminology. According to the REDII, the term "renewable" should be used consistently

Support schemes

Law No.3220 incorporates the right of the Guaranteed Buyer to sell electricity through export-import contracts and stipulates that the income from such sales shall be used by the Guaranteed Buyer to cover the costs of performing special duties. This shall ensure an increase in the share of electricity generated from renewable sources, which ultimately shall decrease the cost of such service for the TSO. Decreasing the Guaranteed Buyer's costs for such service in the amount of "*expenses that related to obtaining the access to the capacity of interstate crossings, taxes, fees and other mandatory payments related to the sale of electric energy under electric energy export-import contracts*" confers an advantage to the Guaranteed Buyer on cross-border capacity allocation that is discriminatory in respect to other market participants. The reasonable expenses of the Guaranteed Buyer for cross-border capacity rights (if any) shall be recognized in the Guaranteed Buyer's budget and covered by income generated through its performance of special duties.

Energy cooperatives

The concept of "energy cooperatives" remains unclear in Law No.3220 and must be aligned with the Electricity Directive: the definition of "energy cooperative" contained in the Law "On Alternative Energy Sources" of 2019 remains unchanged. It defines an energy cooperative *as "a legal entity established in accordance with the Law on Cooperation or the Law on Consumer Cooperation to carry out economic activities in the production, procurement or transportation of fuel and energy resources, as well as to provide other services to meet the needs of its members or territorial community, as well as for the purpose of obtaining profit, in accordance with the requirements of the law*". However, the Electricity Directive stipulates that a citizen energy community (hereinafter, CEC)[5] is a legal entity with the primary purpose of providing environmental, economic, or social community benefits to its members or shareholders or to the local areas where it operates, rather than generating financial profits and it may engage in generation, including from renewable sources, distribution, supply, consumption, aggregation, energy storage, energy efficiency services or by charging services for electric vehicles or provide other energy services to its members or shareholders. Meanwhile, RED II stipulates that the renewable energy community (hereinafter, REC)[6] is a legal entity with the primary purpose of providing environmental, economic or social community benefits for its shareholders or members or for the local areas where it operates rather than financial profits. Despite sharing similar definitions, CECs and RECs display significant distinct features[7]. However, taking into account that the definition is part of the Law "On Alternative Energy Sources", it would be recommended to adjust this definition with the definition of REC from RED II.

Moreover, it is unclear what the term "*fuel and energy resources*" means, i.e. whether it encompasses heat energy as well.

Aggregation

Provisions related to aggregation in Law No.3220 were amended by defining "aggregation unit" and "aggregated group". Following the usage of these two definitions in Article 30-2 of the Electricity Market Law, it creates uncertainties on what is aggregated (group or unit) by the aggregator. Law No.3220 lacks non-discriminatory and proportionate rules clearly assigning roles and responsibilities to the electricity undertakings and customers (existing licensees, independent aggregators), including their balancing status, data exchange requirements, and

[5] Article 2(11) of the Electricity Directive
[6] Article 2(16) of the RED II
[7] Policy Guidelines on the concepts of energy communities, Energy Community Secretariat, March 2024

conflict resolution mechanism. Furthermore, other rights and obligations for this new type of market participants as defined by the Electricity Directive and emphasized by the Secretariat in Assessment Note 08/2023, are being left out.

Switching of market participants engaged in aggregation

Article 9-6 of the Law "On Alternative Energy Sources" stipulates that "*active consumers under the self-production mechanism have the right to change the electricity supplier under the conditions defined by the Law of Ukraine "On the Electricity Market" and the retail electricity market rules*". It also foresees that "*the switching shall be carried out from the first day of the calendar month*".

This approach differs from the existing provisions of Article 30-2(11) of the Electricity Market Law that defines that the "*exit from the aggregated group must be carried out in the shortest possible time in compliance with the terms of the contract, but such a time cannot exceed 21 (twenty-one) calendar days"* and from Article 59(2) of the Electricity Market Law, which envisages that the "*switching shall be done within the period of no more than three weeks from the moment of notification by the consumer about their intent to change the electricity supplier*." Moreover, it contradicts Article 12 of the Electricity Directive, which foresees that switching of supplier or market participant engaged in aggregation shall be carried out within the shortest possible time and that customers are entitled to such a switch within a maximum of three weeks from the date of request.

Active customers

The concept of obtaining and canceling the status of the active customer is not clearly defined in Article 58-1(1) of Law No.3220.

As it was already highlighted in the Secretariat's Assessment Note 08/2023, still now the limitations to certain types of installations of self-generated electricity (such as from alternative energy sources only) as well as provisions related to uncertainties regarding the limits of installed capacity for self-consumers, remain unchanged in Law No.3220.

Small distribution systems

The Law contains amendments to Article 49(4) of the Electricity Market Law and classifies the network as a small distribution system in case the following conditions are simultaneously met: (1) distribution by such networks is carried out for users whose electrical installations are located on a limited territory of objects and/or land plots; (2) distribution of electricity by such networks is not carried out to household consumers; (3) electricity is not transited through its territory outside the small distribution system; (4) the electrical networks are owned by the operator of the small distribution system and are located on the territory of objects and/or land plots on which the electrical installations of the users of the small distribution system are located (except for the connection lines of the small distribution system to the networks of the distribution system operator or the transmission system operator that may be located outside the territory of such facilities and/or land plots); (5) the connected capacity of a small distribution system is at least 1,000 kW, which was acquired as a result of receiving the connection service completed after the entry into force of this Law.

The classification and criteria for the definition of small distribution systems are determined by Law No.3220 and the Distribution Grid Code which is based, in particular, on the number and category of users of the small distribution system, the amount of electricity distributed by the small distribution system, the connection capacity to the transmission system and/or the distribution system itself. These criteria are not in line with Article 38 of the Electricity Directive.

The Law No.3220 does not provide the right for the Regulator to define exemptions for the operators of the small distribution system, as it is defined by Article 38(2) of the Electricity Directive. At the same time, the operators of small distribution systems (hereinafter, small DSOs) are exempted from unbundling requirements directly by Law No.3220 and are neither prohibited from owning and operating storages and recharging points for electric vehicles.

The Law No.3220 also provides that the distribution and connection charges of small DSOs are determined by the operator itself, and such charges may not be higher than the distribution tariff (for the relevant voltage class)/connection charge of the distribution system operator, which is the owner of the largest distribution system in the territory of the relevant region. At the same time, Law No. 3220 misses the right of the user of small distribution systems to request the Regulator to review and approve tariffs or the methodologies underlying their calculation, as defined by Article 38(3) of the Electricity Directive. The provisions on small distribution systems of the industrial parks are also not in line with the Electricity Directive, as the Electricity Directive does not define any specific types of small distribution systems.

Conclusions and recommendations

Law No.3220 constitutes an important step towards the transposition of the REDII and some provisions of the Electricity Directive. At the same time, to ensure its compliance with the Energy Community acquis, certain provisions must be brought in line with the REDII and the Electricity Directive. Taking into account the above-mentioned, the Secretariat invites Ukrainian authorities to clarify and align provisions of Law No.3220 within the transposition of the Electricity Integration Package into the national legislation of Ukraine.