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UKRAINE



To:

Mr. Volodymyr Zelenskyy
President of Ukraine

Copy:

Mr. Oleksii Honcharuk
Prime Minister of Ukraine

Mr. Dmytro Razumkov
Speaker of Verkhovna Rada of Ukraine

Mr. Andriy Gerus
Head of the Parliamentary Committee on Energy, Housing and Utilities Services

Mr. Oleksii Orzhel
Minister of Energy and Environment

Ms. Oksana Kryvenko
Chair of the National Commission for State Regulation of Energy and Public Utilities

Mr. Olexandr Danilyuk
Secretary of the National Security and Defense Council

Mr. David Arahamiya
Secretary of the National Investment Council

From:

Mr. Mats Lundin
Chairman of the Board of the European-Ukrainian Energy Agency

Mr. Andy Hunder
President of the American Chamber of Commerce in Ukraine

Subject: Sustainability of investment climate in Ukraine's renewable energy sector

Date: 20 September 2019

Dear Mr. President,

On behalf of the Association "European-Ukrainian Energy Agency" (EUEA) and the American Chamber of Commerce in Ukraine (the Chamber) uniting national and well known foreign investors with a total investment in Ukraine of more than 1.5 billion Euros in construction of more than 1 GW of renewable energy generation capacities using sun, wind and biomass/biogas, we extend our sincere respect and appeal to you with the following.

During recent days we have received information from multiple sources that there is an initiative from the Members of the Parliament representing your political party «Servant of People» to introduce retroactive reduction of the feed-in tariffs guaranteed at the level of the law via respective amendments.



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If this information is correct, members of the Chamber and EUEA are deeply concerned about negative consequences from such step on all ongoing and future investment projects as well as on the general investment climate in Ukraine. Contractually guaranteed electricity off-take until 2030 at the “green” tariffs linked to EUR/UAH exchange rate has been the catalyst for the development of the renewable energy industry in Ukraine. Ukrainian and foreign companies have invested hundreds of millions of dollars in equity in renewables projects and IFIs and commercial banks have likewise provided debt finance, all in reliance on the stability of the legal regime in Ukraine. These projects, which are in line with the stated goals of Ukraine’s official Energy Strategy to 2035 program, have spawned an industry that provides clean energy and promotes the energy independence of Ukraine.

If any changes are introduced to legislation that will change for worse the Ukrainian regulatory framework for operational renewable power plants or projects under development and construction, this may trigger default of majority of 400+ renewable existing power plants in servicing their loans (with IFIs and Ukrainian state banks being the largest lenders) and a mass of lawsuits by foreign investors against Ukraine in international arbitration tribunals for amounts reaching billions of dollars. Experience of countries that undertook actions against renewable investors (for example, Spain) shows that investors whose contractual rights have been breached inevitably prevail in such actions.

Introducing retroactive changes to the legal framework may have severe negative consequences for Ukraine. Such a step may undermine the primacy of the rule of law and signal to prospective foreign investors across all sectors that commercial contractual rights are not respected in Ukraine. Our member companies have invested in the development of such projects with the good faith that the Government of Ukraine would honor its commitments that have been legislated and entered into law.

The impact of any such actions may extend beyond the renewable energy sector. There might be a chilling impact on large-scale foreign investment and the bankability of projects in the energy sector and other Ukrainian industries regulated by the state would be called into question. This may create further challenges for Ukrainian companies, including state-owned ones, to attract financing for much needed upgrade and modernization programs.

Such changes would go clearly against the often-stated priorities of the new Government regarding the commitment of Ukraine to attract foreign direct investments to fuel GDP growth and to fight climate change by focusing on energy efficiency and renewable energy. Protecting investor rights is an absolute requisite to attract investments from abroad. An unexpected change of rules of the game and abrogation of contractual rights would be received very poorly by international investors, and decisions damaging the renewable sector may be expected to have a domino effect felt by all capital-hungry industries in the national economy. International investors appreciated your stated commitment to growth-enhancing reforms and the rule of law which might be undermined by a unilateral, retroactive change to renewable energy tariffs.

The problem of retroactive changes as one of regulatory risks faced by investors is emphasized by the European Bank for Reconstruction and Development and the Energy Community Secretariat in Policy Guidelines on Competitive Selection and Support for Renewable Energy¹. According to this document implementation of the auction mechanism aims to avoid the problem of retroactive changes, including the retroactive reduce of “green” tariffs. Furthermore, under the EU legislation on renewable energy sources² introduction of retroactive changes to renewables support schemes is not welcome.

Under Ukrainian legislation, including the Law of Ukraine On Alternative Energy Sources, Law of Ukraine On Electricity Market, regulations of the National Commission for State Regulation of Energy and Public Utilities, the concluded Power Purchase Agreements are effective until 2030 and the State guarantees investors support under the “green” tariff for new renewables projects and payment of “green” tariff for produced electricity in full. Any retroactive changes of “green” tariff would be a gross violation of investors’ rights and state guarantee.

¹ https://www.energy-community.org/dam/jcr:4ab03f8c-de3d-4783-931d-4766f643fe7b/EBRD_EnCS_PC_RE_Auction_032018%20.PDF

² [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599278/EPRS_BRI\(2017\)599278_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599278/EPRS_BRI(2017)599278_EN.pdf)



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On 6 June 2019, the Ukrainian Parliament ratified the updated Annex XXVII Energy Cooperation including Nuclear Issues to the EU-Ukraine Association Agreement, which aims at increasing market integration and bringing energy sector regulations in line with key parts of the EU acquis or body of law. The Annex covers electricity, gas, oil, renewable energy and nuclear energy, and will radically impact the regulation and policies of the Ukrainian energy sector. Inter alia, the updated Annex provides that:

- i) whenever Ukraine is considering energy legislation, it must consult with the European Commission about the proposal's compatibility with EU law.
- ii) laws and regulations contradicting EU standards cannot be passed.
- iii) the final draft of each energy-sector law must be communicated to the European Commission.

Therefore, any such initiatives should be communicated and discussed with the European Commission before their adoption.

The successful implementation of renewable energy projects that are now under development with international financing would send a strong signal to the prospective foreign investors that Ukraine is "open for business". It would substantially improve the country risk profile for Ukraine, with the potential to result in substantial inflows of investment into all sectors of the economy, resulting in the achievement of targeted GDP growth. It would also help to drive down the price of electricity under the upcoming auction system, enabling the Government to expand its auction quotas for renewable energy and create a real track record of success for the Government.

We believe that dialogue between your team and international investment community is extremely important at this stage to find optimal solution in the best interests of Ukraine and investors. EUEA and the Chamber remain available to share with you, the Parliament and the Government relevant international experience and detailed information about our completed and ongoing projects as well as look forward to working with the Government to offer ways to address current problematic issues in electricity sector. We would appreciate opportunity to meet with the representatives of your Office, the Parliament and the Government to discuss situation in renewable energy sector.

In case of any issues arising out of this letter, please contact Oleksandra Gumeniuk, EUEA Director, oleksandra.gumeniuk@euea-energyagency.org, or Vladyslava Levakina, Chamber Policy Officer (Energy Issues), vlevakina@chamber.ua.

Yours sincerely,

Mats Lundin
Chairman of the Board
European-Ukrainian Energy Agency

Andy Hunder
President
American Chamber of Commerce in Ukraine

Copy also sent to:
EBRD
World Bank
IFC
EU Delegation to Ukraine
Energy Community Secretariat
Ukraine Invest