**From: EUEA, UWEA, UARE**

**To:**

Minister of Energy of Ukraine,

**Herman Halushchenko**

**Date:** 30 December, 2021

**Copy to:**
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**Artur Lorkowski**

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**Pier Francesco Zazo**

**Subject:** *Regarding the draft Law of Ukraine "On Making Amendments to the Law of Ukraine "On the Electricity Market" on the introduction of an interim administration in the event of threat of violation of security of electricity supply"*

***Dear Mr. Halushchenko,***

On behalf of the European-Ukrainian Energy Agency (EUEA), the Ukrainian Wind Energy Association (UWEA) and the Ukrainian Association of Renewable Energy (UARE), which together unite more than 80% of Ukraine's renewable electricity market and represent international and Ukrainian investors, with deep respect we address to you with the following.

National and international investors in RES express concern over the draft Law of Ukraine "On Making Amendments to the Law of Ukraine "On the Electricity Market" on the introduction of an interim administration in the event of threat of violation of security of electricity supply" (hereinafter referred to as "**Draft Law**") published on the website of the Ministry of Energy of Ukraine (hereinafter referred to as "**Ministry**") on 1 December 2021 as a draft of regulatory act for providing comments and suggestions.

As noted, the purpose of the Draft Law is to determine an effective mechanism to ensure the possibility of introducing an interim administration

1) to business entities operating in the energy sector, in the event of threat of violation of security of electricity supply, criteria/types of which are defined by the Rules on security of electricity supply and/or

2) violation by market participants who are subjects of natural monopolies of licensing requirements for economic activity.[1]

The Draft Law is designed to implement the Plan for organizing the implementation of the decision of National Security and Defense Council of Ukraine dated 30 July 2021 " On measures to neutralize the threat in the energy sector", enacted by the Decree of the President of Ukraine dated 28 August 2021 No. 452, approved at a meeting of the Cabinet of Ministers on 1 September 2021 (minute No. 104), (subparagraph "б" of subparagraph 2 of paragraph 1 of the decision of National Security and Defense Council of Ukraine).[2]

Experts of leading RES associations of Ukraine, after analysing the Draft Law text, came to the conclusion that it will have a negative impact on the energy sector, given the following.

## 1. The Draft Law carries significant risks of violating the rights of energy facilities owners

### 1.1. The Draft Law contradicts to the fundamental principles of Ukrainian and international law

In spite of the fact that the mechanism proposed by the Draft Law does not contain such wording as "alienation", "compulsory alienation", "expropriation", "confiscation", the Draft Law proposes to establish a mechanism for introducing of interim administration by transferring management assets of market participants and/or their corporate rights, shares to the management of the enterprise, institution, organization which belongs under the management sphere of the ministry, other central executive body, or business entity, 50 and more percent of shares of which are in the authorized capital of companies, the state share in which is 100 percent, which carry out similar economic activities (hereinafter referred to as – "**Interim administrator**").

Such transferring of management over the assets of market participants and/or their corporate rights, shares effectively eliminates energy facilities owners from managing their property indefinitely and contravene the article 41 of the Constitution of Ukraine, which declares that everyone has the right to own, use and dispose of their property, no one may be unlawfully deprived of ownership rights, private ownership rights are inviolable and that the compulsory alienation of objects of private property can be used only as an exception for reasons of public necessity, on the basis and in the manner prescribed by law, with full reimbursement of their value.

The cases in which the procedure of introduction of the interim administration may be applied are specified in the Draft Law rather vaguely:

1 http://mpe.kmu.gov.ua/minugol/control/uk/publish/article?art_id=245607124&cat_id=35109
2 http://mpe.kmu.gov.ua/minugol/control/uk/publish/article?art_id=245607053&cat_id=167475

1) It is not very clear what the "threat of violation by market participants of security of electricity supply " is, how it should be manifested, how long it should last, and so on.

2) It is unclear what licensing requirements should be violated by market participants who are subjects of natural monopolies in order for the above procedure to apply to them.

3) It is not specified for what maximum period the interim administration can be introduced, what will be consultations on determining the interim administrator (with whom and what they are consulted about, what decisions can be made based on the results of consultations, etc.), and so on.

All the above is contrary to the principle of legal certainty, which is one of the elements of the rule of law. The principle of legal certainty states that, restrictions on fundamental human and civil rights and the implementation of these restrictions are permissible in practice only if the application of the legal norms established by such restrictions is foreseeable; the restriction of any right should be based on criteria that will allow a person to distinguish lawful behaviour from unlawful, to predict the legal consequences of their behaviour. (Decision of the Constitutional Court of Ukraine N 17-рп/2010 dated 29 June 2010)[3].

The mechanism of the interim administration proposed by the Draft Law contradicts the principles and norms of the Law of Ukraine “On the Electricity Market” and the Law of Ukraine “On the National Energy and Utilities Regulatory Commission”, in particular:

1) introduction of excessive measures of regulatory influence in cases when the purpose of the Draft Law can be ensured through the mechanisms provided by the current version of the Law of Ukraine “On the Electricity Market”, in particular, the functioning of the market in a state of emergency in accordance with the Law of Ukraine "On the Legal Regime of the State of Emergency"; introduction of a special period in accordance with the Law of Ukraine “On Mobilization training and Mobilization; imposition of special responsibilities on the market participants by the Cabinet of Ministers of Ukraine to ensure security of electricity supply.

However, analytical materials, including an explanatory note to the Draft Law, published by the Ministry, ignore the existence of alternative mechanisms to ensure energy security and security of electricity supply and do not justify the need for a more stringent regulatory measure.

This can also be considered as a violation of the principle of legality. According to the case law of the European Court of Human Rights, the principle of legality also stipulates that the applicable provisions of national law must be sufficiently accessible, precise and predictable in their application (for example, the case of *Beyeler v. Italy*, § 109[4]).

The Draft Law also does not clarify in a clear and consistent manner the purpose of introduction of interim administration mechanism. Therefore, it is impossible to determine the proportionality of such a significant restriction the rights of energy facilities owners. The Decision of the Constitutional Court of Ukraine in the case of 25 January 2012 No. 3- rp/2012 noted that one of the elements of the rule of law is the principle of proportionality, which"...means, in particular, that the measures provided for in the regulations must be aimed at achieving a legitimate goal and must be commensurate with it".

Additionally, the application of the procedure of introduction of interim administration may be considered as a violation of the right to entrepreneurial activity provided for in Article 42 of the Constitution of Ukraine.

Thus, summarizing, in accordance with the case law of the European Court of Human Rights, such introduction of interim administration cannot be considered a proper and permissible interference with the right to peaceful possession of one's property, because such

3 https://zakon.rada.gov.ua/laws/show/v017p710-10#Text
4 https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58832%22]}

interference must comply with the principle of legality and pursue a legitimate goal by means which are sufficiently proportionate to the goal sought to be achieved. ((for example, the case of *Beyeler v. Italy*, § 108-114[5]).)

In addition, the Constitution of Ukraine does not give either the Cabinet of Ministers of Ukraine (hereinafter referred to as - "**CMU**") or certain executive bodies the authority to make decisions on deprivation of property rights or removal of the owners from disposal of its property.

Therefore, the provisions of the Draft Law contradict the principles of the rule of law, legal certainty, legality, proportionality, free possession, use and disposal of property, freedom of entrepreneurial activity, give the CMU and Ministry abnormal authority to decide on deprivation of property.

### 1.2. The Draft Law contradicts the Association Agreement with the European Union, Energy Charter and the European Union's acquis

According to paragraph 1 of article 277 of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their member States, on the other hand (hereinafter referred to as - "**Association Agreement**"), in Ukraine, the regulatory body for electricity and gas (National Energy and Utilities Regulatory Commission (hereinafter referred to as - "**NEURC**" or "**Regulator**")), inter alia, must be empowered enough to guarantee effective competition and the efficient market functioning.

By empowering the CMU to decide on the transfer of management of market participants' assets and / or their corporate rights, shares, to Interim administrator, the state hereby recognizes that the Ukrainian electricity and gas regulatory authority (NEURC) is not able to guarantee the efficient functioning of Ukraine's energy market. In this case, a more appropriate step for the state would be improving the status and powers of the NEURC for its functional and institutional capacity to ensure effective competition and efficient market functioning.

According to paragraph 2 of article 277 of the Association Agreement, the decisions and procedures used by the regulatory body must be objective for all market participants. However, as mentioned above, cases in which the procedure of introduction of the interim administration can be applied, are specified in the Draft Law rather vaguely. This means that decisions made in the presence of such legislative vagueness cannot a priori be objective.

In accordance with Annex XXVII-B to the Association Agreement, Ukraine undertook to implement the provisions of Directive 2009/72 / EC of the European Parliament and of the Council of 13 July 2009 on common rules for the internal market in electricity and repealing Directive 2003/54 / EC (hereinafter referred to as – "**Directive 2009/72 / EC**"). According to Article 35 of Directive 2009/72 / EC, in the event of a sudden crisis in the energy market, the state may temporarily take the necessary protective measures. Such measures shall cause the least possible distortion of the functioning of the internal market and shall not be more extensive than is strictly necessary to remedy sudden difficulties which have arisen.

The measures proposed in the Draft Law do not comply with the provisions of Directive 2009/72 / EC, therefore the adoption of the Draft Law may lead to a violation of the provisions of the Association Agreement by Ukraine.

Similarly, the Draft Law also does not comply with Directive 2019/944 of the European Parliament and the Council of 5 June 2019 on general rules for the internal electricity market and amending Directive 2012/27 / EC, which is already in force in the European Union and according to Article 57 of which market regulation is to be carried out by an independent regulatory body.

5 https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58832%22]}

Given the irreversibility of Ukraine's European course enshrined in the Constitution of our country, the inconsistency of the Draft Law with the above European Union directives, in case of adoption of the Draft Law by Parliament and its entry into force, may be a ground for declaring the Draft Law as unconstitutional.

Also, the Draft Law does not comply with the provisions of the Energy Charter Treaty and its Final Act, ratified by the Law of Ukraine No. 89/98-BP dated 06 February, 1998 (hereinafter referred to as – "**Energy Charter Treaty**"). According to Article 13 of the Energy Charter Treaty, investors' investments must not be nationalized, expropriated or subjected to measures having similar nationalization or expropriation consequences (hereinafter referred to as "expropriation"), except where such expropriation is carried out:

a) for a purpose in the public interest;
b) without discrimination;
c) in accordance with due legal procedure; and
d) together with the payment of prompt, adequate and effective compensation.

As noted above, the purpose of introduction of interim administration mechanism remains vague. In addition, the Draft Law leaves considerable area for discriminatory application of its provisions and does not provide for compensation to investors.

### 1.3. Violation of Agreements on mutual protection of investments and threat of arbitration against the state of Ukraine

The Laws of Ukraine "On Investment Activity" and "On the Regime of Foreign Investment" establish guarantees for the preservation of foreign investments in Ukraine and their protection against expropriation by the state.

In addition, Ukraine has concluded investment promotion and mutual protection agreements with 57 countries around the world, such as Ukraine's investment donor countries:

a) Agreement between Ukraine and the United States of America on promotion and mutual protection of investments, entered into force on 16 November 1996;
b) Agreement between Ukraine and the Federal Republic of Germany on promotion and mutual protection of investments, entered into force on 29 June 1996;
c) Agreement between Ukraine and the French Republic on promotion and mutual protection of investments, entered into force on 26 January 1996;
d) Agreement between Ukraine and the United Kingdom of Great Britain and Northern Ireland on promotion and mutual protection of investments, entered into force on 10 February 1993;
e) Agreement between Ukraine and the Kingdom of the Netherlands on promotion and mutual protection of investments, entered into force on 01 June1997; etc.

All agreements on promotion and mutual protection of investments include, among their provisions, the obligation of Ukraine as a Contracting Party not to take measures that directly or indirectly deprive the citizens of the other Contracting Party of their investments, without fair compensation.

In particular, Ukraine has ensured that foreign investment will not be expropriated or nationalized directly or indirectly through applying of measures equivalent to expropriation or nationalization ("expropriation"), except when such expropriation or nationalization is carried out for public purposes, in a non-discriminatory manner, with payment of prompt, adequate and effective compensation and in accordance with the proper procedure established by law and general principles.

Compensation should be equal to the fair market value of the expropriated investment immediately before the expropriation action was taken or when it became known, whichever is

earlier; to be calculated in freely used currency on the basis of the market exchange rate prevailing at that time; to be paid without delay; include interest at a commercially motivated rate from the date of expropriation; be fully realized and freely transferable.

In turn, the introduction of interim administrations on the basis of the provisions of the Draft Law can be considered as expropriation (actual mechanism of transfer of electricity facilities from private to state ownership without any compensation of producers or investors), which contradicts the principles of competitive electricity market, the Law of Ukraine "On investment activities","On the regime of foreign investment" and international agreements of Ukraine on investment protection, in particular the Energy Charter.

Since:

1) the term of the interim administration may de facto be extended indefinitely (until the circumstances for the introduction of the interim administration are eliminated),
2) the introduction of an interim administration may become a de facto compulsory alienation of assets of market participants without appropriate compensation,
3) The powers of the Interim administrator are not limited by the Draft Law, and its activities may cause damage to the enterprise, which is imposed by the interim administration, and the Draft Law does not provide for the liability of such Interim administrator,
4) during the period of operation of the interim administration, the governing bodies will not be able to perform their functions, including resolving issues related to the distribution of profits (payment of dividends),
5) the Interim administrator will have access to trade secrets of enterprises, which he may illegally use, acting in a conflict of interest,

then such violations of the rights of investors (shareholders, participants of enterprises) will inevitably lead to the filing of claims by the relevant investors to recover damages against state bodies of Ukraine and the state of Ukraine to both Ukrainian courts and international arbitration bodies. In particular, the possibility of protecting the violated rights of foreign investors is provided by both the European Energy Charter and the Agreements on mutual protection of investments, which Ukraine has concluded with the majority of world developed countries.

### 1.4. Deterioration of the investment climate and investment attractiveness of Ukraine

The threat of indirect expropriation of energy companies will negatively affect the investment attractiveness of Ukraine and lead to a decrease in foreign direct investment in the energy sector of Ukraine. Moreover, the introduction of the institution of interim administrations and violation of the principle of control over the electricity market by an independent regulator, increasing corruption in the energy market will call into question Ukraine's successful integration into the European Union.

It should also be noted that the introduction of interim administrations will send a negative signal to Ukrainian and foreign creditors in the energy sector, as such a sanction calls into question the ability of the enterprise to meet its debt obligations in a timely and appropriate manner. This, in turn, will lead to higher interest rates on loans, difficulties in obtaining financing, and, as a consequence, reduce the competitiveness of Ukrainian business.

## 2. The Draft Law violates the independence of the Regulator

### 2.1.The Draft Law gives the Ministry control functions in the energy sector

The Draft Law empowers the Ministry with abnormal functions to implement measures of influence on electricity market participants by introducing interim administrations in case of

threat of violation of security of electricity supply by market participants and violation of licensing conditions by market participants.

### 2.1.1. The Draft Law envisages the Ministry to control the compliance of licensees with the licensing conditions for conducting economic activities in the energy sector

The powers of the NEURC include licensing of economic activity in the field of electric power and control over observance by licensees of licensing conditions of carrying out economic activity, including imposition of sanctions for non-compliance with license conditions - up to revocation of the license[6].

At the same time, the legislation of Ukraine on the implementation of Ukraine's international obligations[7][8] ensures the independence of the regulator, namely: state and municipal authorities, local governments, their officials, business entities, political parties, public associations, trade unions and their bodies are prohibited from illegally influencing the processes of state regulation in the fields of energy and utilities[9]; persons who illegally influence the process of performance of their functions and powers by the members of the NEURC and its officials shall bear administrative and criminal liability in accordance with the law.

In addition, there is another body of state control over the energy market - The State Inspectorate of Ukraine for Energy Supervision (hereinafter referred to as "**Inspectorate**") which carries out state energy supervision of electrical installations and networks of market participants (except consumers), compliance with the rules, regulatory instruments and regulatory documents on technical operation of power plants and networks, technical condition of electric installations and networks by market participants (except consumers).

The Inspectorate has the right to issue to the participants of the electricity market mandatory administrative documents to eliminate violations of regulations, norms and rules on technical operation of power plants and networks, technical condition of electrical, heat, heat-energized installations and networks, operation, design, construction, confirmation of readiness for operation of heat, heat-energized installations and networks, use of energy in the field of heat supply.

For its part, the Ministry has the power only to formulate and implement state policy[10]: such powers do not include powers to conduct state regulation, monitor and control the activities of business entities in the energy sector, which belong to the NEURC[11], and powers in the field of state energy supervision[12], which belong to the Inspectorate[13].

Therefore, the Draft Law, giving the Ministry abnormal functions:

1) violates the constitutional principle according to which state and municipal authorities, their officials are obliged to act only on the basis, within the powers and in the manner prescribed by the Constitution and laws of Ukraine.[14]
2) allows interference in the activities of the NERC and violation of the principle of independence of the regulator, which contradicts Directive 2009/72 / EC and does not comply with Directive 2003/54 / EC, as market regulation should only be carried out

6 Article 6 of the Law of Ukraine "On the Electricity Market"
7 Article 277 of Association Agreement
8 Article 35 of Directive 2009/72 / EC
9 Part 2 of Article 5 of the Law of Ukraine "On National Energy and Utilities Regulatory Commission"
10 Part 4 of Article 5 of the Law of Ukraine "On the Electricity Market"
11 Part 1 of Article 2 of the Law of Ukraine "On National Energy and Utilities Regulatory Commission"
12 Article 9 of the Law of Ukraine "On the Electricity Market"
13 Regulation on The State Inspectorate of Ukraine for Energy Supervision, approved by the resolution of the Cabinet of Ministers of Ukraine dated 14 February, 2018 № 77
14 Part 2 of Article 19 of the Constitution of Ukraine

by an independent regulatory body[15], that is – NEURC.

### 2.1.2. The Draft Law envisages the exercise by the Ministry of its abnormal powers in the field of security of electricity supply

The powers of the Ministry include the development and approval of rules for the security of electricity supply and monitoring of security of electricity supply[16]. In particular, in accordance with the Order of the Ministry dated 27 August, 2018 No. 448 "On approval of the Rules on security of electricity supply" (hereinafter referred to as the "**Electricity Supply Security Rules**") the Ministry is empowered to assess the risks of breach of security of electricity supply and is obliged to provide the NEURC with the results of risk assessment for the next calendar year and the formed conclusions on preventive measures to reduce the likelihood of risks that could lead to critical and significant consequences. The market participants and the NEURC, in their turn, cooperate with the Ministry and, upon its request, provide the necessary information for risk assessment.

The roles of the NEURC and the Inspectorate, specified in the Electricity Supply Security Rules, correspond to the legislative powers of these bodies.

Inter alia, the Regulator provides proposals to revise and supplement the list of criteria for security of electricity supply, receives from the Ministry the results of risk assessment for the next calendar year and formed conclusions on preventive measures to reduce the likelihood of risks that could lead to critical and significant consequences.

The Inspectorate, in its turn, carries out state energy supervision in the field of electricity to ensure that market participants comply with the rules, regulations and regulatory documents on technical operation of power plants and networks, technical condition and maintenance of electrical installations and networks, supervision over the availability and condition of backup autonomous power sources at the facilities of electricity consumers of the first category and special group of the first category on security of electricity supply, etc.

Moreover, the legislation explicitly stipulates that only the NEURC and the Inspectorate can hold market participants accountable for violating the legislation governing the functioning of the electricity market[17]. That is why the Electricity Supply Security Rules do not mention the powers of the Ministry to impose any sanctions on energy market participants.

The Draft Law violates the relevant legal rule and ipso facto gives the Ministry the right to impose sanctions on market participants.

## 3. The Draft Law imposes double jeopardy for the same offence.

The Draft Law de facto introduces double jeopardy for violating licensing conditions.

Thus, a market participant can be held responsible by:

1) Regulator or Inspectorate: a sanction may be applied to a market participant in the form of a warning about the need to eliminate violations; fine; license suspension; license revocation.;[18] and
2) Ministry: introduction of an interim administration[19].

However, according to Article 61 of the Constitution of Ukraine, no one can be twice held responsible for the same offence.

15 Article 35 of Directive 2009/72 / EU
16 Part 4 of Article 5 of the Law of Ukraine "On the Electricity Market"
17 Article77 of the Law of Ukraine "On the Electricity Market"
18 Aticle77 of the Law of Ukraine "On the Electricity Market"
19 Draft Law

## 4. The draft Law contains corruptogenic factors

The current edition of Draft Law consists of provisions that contain potential corruption-causing factors and create risks of committing corruption offenses regarding the grounds and procedure for imposing interim administrations.

### 4.1.1. There are no clear criteria for the introduction of an interim administration

That is:

1) the Draft Law does not provide for a list of threats of violations of electricity supply security by market participants;
2) there is no specific range of violations of licensing conditions, which in accordance with current legislation may contain personnel, organizational, technological and special requirements[20], and violations of which could not endanger the energy supply and functioning of the electricity market at all;
3) there is no specific procedure for selection of an Interim administrator.

With such uncertainty of criteria, the Ministry will be endowed with wide discretionary powers that can be used based on its own value judgment, arbitrarily and biased.

Since the Draft Law provides that only state-owned companies that already have a significant number of companies operating in the electricity market can be Interim administrators, in the first place, it increases the risks of biased and arbitrary interpretation of criteria for the introduction of interim administrations by market participants – private companies.

### 4.1.2. There is no mechanism for determining the amount of the Interim administrator's remuneration for asset management and the amount of expenses incurred by it in connection with asset management.

It is not clear from the text of the Draft Law, how the remuneration will be calculated, at whose expense it will be paid and who will develop such a mechanism.

This legal uncertainty also creates risks of establishing of unreasonable and excessive remuneration for the work of an Interim administrator by private companies, even if its work will lead to a deterioration in the efficiency and financial results of a company's activity.

Potential deterioration of the company's financial position combined with the need to reimburse the costs and losses of the Interim administrator may distort competition in the electricity market and lead to the company's bankruptcy.

At the same time, the Draft Law does not contain provisions on the liability of the Interim administrator for the consequences that could potentially occur as a result of its activities. Statistically, business activity of state-owned electricity companies is less efficient than that of private companies; therefore, the national and international RES investors are concerned about the absence of liability for the actions of the Interim administrator and the rights of private companies to recover their losses.

### 4.1.3. There are no criteria for selection an Interim administrator.

The Draft Law just stipulates that only state companies can be Interim administrators, but there are no requirements for their qualifications and competence in addressing issues of

20 Article 9 of the Law of Ukraine "On Licensing of Types of Economic Activity"

electricity supply security (this is a purpose of introduction of an Interim administrator).

In its turn, absence of such criteria additionally increases the discretion of the Ministry as a body that will determine the candidatures of Interim administrators.

In view of the above, the RES Associations consider that the Draft Law cannot be adopted in its current form and must be subjected to a comprehensive anti-corruption review.

## 5. Draft Law will distort and eliminate market competition and reverse all achievements in the liberalization of the electricity market.

According to Article 42 of the Constitution of Ukraine, everyone has the right to entrepreneurial activity, which is not prohibited by law. The state provides protection of competition in entrepreneurial activity. Abuse of a monopoly position in the market, unlawful restriction of competition and unfair competition are not allowed. Types and boundaries of a monopoly are determined by law.

By the decision of the Constitutional Court of Ukraine No. 4-r (II) / 2019 as of 5 June 2019 in case No. 3-234 / 2018 (3058/18) on the constitutional complaint of the Joint Stock Company "Zaporozhsky ferroalloy plant" regarding the constitutionality of the provisions of Paragraph 13 of Part 1 of Article 17 of the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine" the Court came to the following conclusion. The Constitution of Ukraine stipulates that everyone has the right to entrepreneurial activity, which is not prohibited by law; legal grounds and guarantees of entrepreneurship are determined exclusively by the laws of Ukraine (part one of Article 42, paragraph 8 of part one of Article 92 of the Constitution of Ukraine).

Part 1 of Article 42 of the Constitution of Ukraine envisages that it guarantees freedom of entrepreneurship and market self-regulation of economic relations of business entities, the restriction of which is permissible only by law in order to fulfil by state of constitutional obligations to human and society. The limits of such freedom must be determined primarily by constitutional rights and human freedoms, the rights and legitimate interests of participants in economic relations, and more generally - the interests of society and the state.

Furthermore, Article 254 of the Association Agreement stipulates that the Parties recognize the importance of free and undistorted competition in trade relations. The Parties recognize that anti-competitive economic actions and operations have the potential to distort the proper functioning of markets and generally reduce the positive effects of trade liberalization. Similarly, Article 6 of the Energy Charter Treaty provides that each Contracting Party shall act to reduce market distortions and obstacles to competition in economic activities in the energy sector.

Currently, the government, represented by CMU, the Ministry and the Ministry of Economy, manages a numerous large companies operating in the electricity market: OJSC "Ternopiloblenergo", PJSC "Zaporizhoblenergo", JSC "Kharkivoblenergo", JSC "Mykolaivoblenergo", JSC "Khmelnytskoblenergo", PJSC "Cherkasyoblenergo", JSC "Sumyoblenergo", NPC "Ukrenergo", PrJSC "Ukrhydroenergo", SFTC "Ukrinterenergo", SE "NNEGC "Energoatom "etc. Thus, a significant number of enterprises operating in the electricity market are concentrated in the state management, represented by the Ministry.

The Draft Law provides for the transfer of management over the assets of private energy companies to other companies directly related to the state.

This will lead to the actual concentration of market power by gaining control and management of assets of private energy companies in the hands of one player - the state. In particular, this situation will allow the state to coordinate the activities of private energy companies in the interests of state-owned companies in order to strengthen their market power (particularly in the segment of electricity generation, where state-owned generating companies

already dominate), provide the state with access to confidential inside information of private players in the state market, their pricing methodologies and competitive strategy in the market, etc. - which will ultimately have negative and catastrophic long-term consequences for market competition.

At the same time, we draw attention to the fact that according Directive 2009/72 / EC, to counteract the abuse of monopoly position of individual energy market participants, as well as to establish independence of decision-making by energy company management legislation should provide for managerial and functional separation of some market participants from others in order.

Therefore, the proposed mechanism for the introduction of an interim administration will grossly violate the rights and interests of market participants in competition, to which such a mechanism will be applied.

It has already been mentioned above that the proposed Draft Law is actually aimed at delegating the exclusive powers of Regulator to the so-called Interim administrators, regarding the possibility of applying sanctions and other emergency measures to market participants who violates licensing and other conditions of their activities.

Instead, Article 16 of the Law of Ukraine "On Protection of Economic Competition" stipulates that state and municipal authorities are prohibited from delegating certain powers to associations, enterprises **and other economic entities**, if it leads or could lead to the prevention, elimination, restriction or distortion of competition.

We would like to draw your attention to the fact that the acquisition of control over assets, in cases provided by the legislation on protection of competition, is prohibited until obtaining the appropriate merger clearance permission from Antimonopoly Committee of Ukraine. It is not seen that the Draft Law takes into account this legal requirement in the proposed procedure for the transfer of assets of energy companies to the management and control of interim administrations controlled by the state.

Thus, in our point of view, the proposed Draft Law contradicts the Constitution of Ukraine, international legal agreements involving Ukraine and national legislation on competition protection, as it could lead to manual state intervention in the market economy and strengthen market power of state energy companies by gaining state control over private energy companies and state interference in the operational activity of such private companies, which will also lead to undue competitive advantages for state-owned companies due to the activities of interim administrations and, respectively, could lead to the complete elimination of private market players and total market monopolization by the state.

Based on the above, in our opinion, the proposed Draft Law is also subject to coordination with the Antimonopoly Committee of Ukraine.

Thus, considering that the Draft Law:

1) contradicts the fundamental principles of Ukrainian and international law (in particular, the Association Agreement, the Energy Charter and the EU acquis),
2) violates the Agreement on Mutual Protection of Investments and threatens arbitration against the state of Ukraine,
3) deteriorates the investment climate and investment attractiveness of Ukraine,
4) breaks the independence of the Regulator,
5) introduces double jeopardy for the same offence,
6) contains corruption-causing factors,
7) distort and eliminate market competition and reverse all achievements of electricity market liberalization, etc.,

We believe that the Draft Law cannot be passed by the Verkhovna Rada.

In our opinion, laws of this nature should not be adopted in a market economy state governed by the rule of law. Instead, it would be appropriate and effective to strengthen the powers of regulators (NEURC and the Antimonopoly Committee of Ukraine) and improve Ukraine's energy and antitrust laws in line with the European Union law.

**Sincerely,**

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