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Subject: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulations (EU) No 1227/2011 and (EU) 2019/942 to improve the Union's protection against market manipulation in the wholesale energy market

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulations (EU) 2019/943 and (EU) 2019/942 as well as Directives (EU) 2018/2001 and (EU) 2019/944 to improve the Union's electricity market design

- General approach

I. INTRODUCTION

1. On 14 March 2023, the Commission presented a proposal for the Regulation to improve the Union's electricity market design (EMD), and the Regulation to improve the Union's protection against market manipulation in the wholesale energy market (REMIT).

2. These proposals follow the very high prices and volatility in the electricity markets observed in 2021 and 2022, and are based on three pillars – to protect consumers, to enhance stability and predictability of the costs of energy and thereby contribute to the competitiveness of the EU economy, and to boost new energy investment.

II. STATE OF PLAY

1. In the second part of March 2023, the Swedish Presidency has started negotiations on the proposals in the Energy Working Party. Based on the outcomes of these discussions, Presidency has submitted 5 revisions of both the EMD and REMIT.
2. Work on both proposals have been conducted in an accelerated manner in the last months, and were also discussed by Ministers at the TTE (Energy) Council on 28 March 2023 in Brussels, which served as a guidance for further work.
3. The proposals were also discussed in the Committee of Permanent Representatives on 31 May with the main focus on two-way contracts for differences, declaring a regional or Union-wide electricity price crisis and capacity mechanisms. The Committee provided the Presidency with political guidance and set a direction for further work.
4. The current 5th revision as set out in documents 10605/23 and 10606/23 should serve as the basis for the General Approach. New text is **bold underline** and deletions are ~~striketrough~~. Text from previous revisions is marked **bold** and deletions are ~~***striketrough bold italics***~~

III. WORK WITHIN THE EUROPEAN PARLIAMENT AND OTHER UNION BODIES

1. In the European Parliament, the Committee on Industry, Research and Energy (ITRE) is the leader for both files. The rapporteur appointed for the EMD is MEP Nicolás González Casares (S&D, Spain) and for REMIT it is MEP Maria da Graça Carvalho (EPP, Portugal). The Parliament should adopt both reports in September 2023.
2. Neither the European Economic and Social Committee nor the European Committee of the Regions have delivered their opinions yet.

IV. MAIN ELEMENTS OF THE PRESIDENCY COMPROMISE PROPOSAL

1. The Member States supported the manner in which the debate in the Committee of Permanent Representatives and discussions within the Energy Working Party were reflected in the course of work on the four revisions of the two proposals.
2. For reasons of legal certainty and clarity, Articles 2 and 3 of the proposed Electricity Market Regulation, which amend Directives (EU) 2018/2001 and (EU) 2019/944, will be split from that Regulation and become a self-standing Directive. This is a legal and technical adjustment which does not affect the substantial provisions of the proposals.
3. The most notable changes can be summarised as follows:

As regards EMD:

1. In Article 7a of the Regulation, the peak shaving product that may be procured and activated by Member States in order to achieve a reduction of electricity demand in peak hours, has been linked to Article 66a of the Directive that sets out the declaration of a regional or Union-wide electricity price crisis. The product shall be limited to the duration of a price crisis pursuant to Article 66a(2).

2. In Article 7b of the Regulation, the data from dedicated measurement devices may be used by the transmissions system operators (TSOs) and distribution system operators (DSOs) only upon consent of the final customer. Where a final customer does not have a smart meter installed, or where the smart meter of a final customer does not deliver the necessary data to provide demand response or flexibility services, TSOs and DSOs shall accept the data from a dedicated measurement device, where available.
3. In Article 8 of the Regulation, the intraday cross-zonal gate closure time shall be at the earliest 30 minutes ahead of real time by 1 January 2026. The regulatory authority (NRA) of a given Member States may, however, grant a derogation from this requirement at the request of the relevant TSO, until 1 January 2029 at the latest, subject to an impact assessment and an action-plan to shorten the intraday cross-zonal gate closure time to 30 minutes. This derogation may be further extended by a maximum of three years, subject to a revised action-plan and impact assessment. No later than 1 January 2032 the intraday cross-zonal gate closure time shall be at the earliest 30 minutes.
4. As regards Article 9 of the Regulation, the implementation of regional virtual hubs is now subject to an impact assessment. After such an assessment, the Commission shall adopt an implementing act that implements the design of the Union's forward market based on regional virtual hubs and supported by at least long-term transmission rights issued by the TSOs. This implementing act shall include inter alia a methodology for defining the geographical scope of the regional virtual hubs, and a methodology for the calculation of the reference prices for the regional virtual hubs.
5. Regarding Article 19 of the Regulation, it was clarified that compensation due to reduced capacity of the interconnectors for offshore renewable electricity generation plant operators in an offshore bidding zone concerns plant operators directly connected to two or more bidding zones. This compensation shall not exceed the total congestion income generated on interconnectors between the concerned offshore bidding zones on an annual basis.

6. According to Article 19a of the Regulation, Member States shall promote the uptake of Power Purchase Agreements (PPAs) by removing unjustified barriers and disproportionate or discriminatory procedures or charges. It was also clarified that instruments to promote the uptake of PPAs, may include, but are not be limited to, state-backed guarantee schemes at market prices, private guarantees, or facilitating pooling demand for PPAs.
7. As regards Article 19b in the Regulation, it was clarified that two-way contracts for difference shall apply to new investments aimed at substantially repowering, increasing the capacity or prolonging their lifetime of existing power-generating facilities. To accommodate the projects that are in the pipeline in Member States right now, the appropriate transitional period has been added, i.e. the provisions of this Article will only apply to contracts under direct price support schemes for new investments in generation concluded as of three years after the date of entry into force of this Regulation. The transitional period for offshore hybrid assets connected to two or more bidding zones is set to five years. Concerning the distribution of revenues arising from contracts for difference, the right balance between granting flexibility for Member States and returning revenues to final customers is delicate. The main rule that revenues shall be distributed to final customers is maintained, but Member States may also use them to finance the costs of the direct price support schemes or investments to reduce electricity costs for final customers. The share of the revenues distributed to final customers that are undertakings shall not exceed the combined share of electricity consumption of all undertakings. The redistribution shall also be without prejudice to state aid rules set out in Article 107 and 108 TFEU. Finally, an exemption for small-scale renewables installations and demonstration projects has been included.
8. As regards the flexibility provisions in the Regulation:
 - Overall, the linkages between the flexibility provisions in Articles 19c–19f were strengthened and further clarified.

- In Article 19c of the Regulation, the content of the report on the needs for system flexibility have been further specified and it is made clear that another authority or entity, designated by a Member State, than the NRA can adopt the report and that they may ask the TSOs and DSOs to provide input. It shall take into account the European Resource Adequacy Assessment and national adequacy assessments. The report shall further, at least, evaluate barriers for flexibility in the market and propose relevant mitigation measures.
 - In Article 19d of the Regulation the indicative national objective is now for non-fossil flexibility and shall be based on the report pursuant to Article 19c. Member States may also define provisional indicative objectives before the first submission of the report.
 - In Article 19e of the Regulation, Member States may apply non-fossil flexibility support schemes consisting of payments for the available capacity where investments in non-fossil flexibility are insufficient to achieve the indicative national objective identified in Article 19d. This shall not preclude Member States from addressing their indicative objectives by other means.
9. As regards to capacity mechanisms, Member States expressed the need of streamlining the approval procedure. To address Member States concerns a review clause was added, so that the Commission shall submit a detailed report, by no later than one month after entry into force of this Regulation, assessing possibilities of streamlining and simplifying the processes under Chapter IV. In that context, the Commission shall request the Agency to amend the methodology for the European resource adequacy assessment as appropriate. In addition, no later than three months after entry into force of this Regulation, the Commission shall come forward with proposals with a view to simplifying the process for assessing capacity mechanisms as appropriate.

10. Still concerning capacity mechanisms, Member States have throughout the negotiations asked to remove the temporary nature and the reference of capacity mechanisms as a last resort measure. Notwithstanding the necessity to limit distortions to competition and the internal market, the proposed texts acknowledges that capacity mechanisms can play an important role in ensuring resource adequacy, in particular during the transition towards a carbon-free system. In that context, the text introduces a possibility to request from the Commission a limited extension of derogations from the CO₂ emission limit in capacity mechanisms due to issues of security of supply.
11. In Articles 64 of the Regulation, Article 66 of the Directive and recital (53b), new derogations have been granted to Estonia, Latvia and Lithuania as regards their balancing markets. As they are dependent on the Russian synchronous area for frequency management, the Baltic countries have not been able to develop their own functioning balancing market. The Russian war of aggression has increased the risk of security of supply for the Baltic countries. Therefore, to allow for the development of their own balancing market, and connection to Continental Europe, the Baltic countries will, for a certain period of time, be exempted from certain requirements applying to existing balancing markets.
12. Article 66 and the corresponding recital 53g introduce derogations for Cyprus from Articles 40(4) and 54(2), until the transmission system in Cyprus is connected to other Member States' transmission systems via interconnection.
13. As regards the consumer provisions in the Directive:
 - Recital (46) clarifies that customers should be allowed to have more than one metering and billing point covered by the single connection point for their premises. Here, more flexibility has been given for Member States to determine these rules at national level. In addition, the possibility for using smart metering systems that may directly cover more than one metering point has been added.

- In Article 11a and recital (44), it has been added that Member States may exempt suppliers who only offer dynamic price contracts from the obligation to offer fixed price fixed term contracts, provided that this does not have a negative impact on competition and retains sufficient choice of fixed term fixed price contracts.
- In Article 15a and recital (51) on energy sharing, the balancing responsibilities between active customers were clarified. Moreover, all consumer rights and obligations set out applies to final customers involved in energy sharing schemes. Furthermore, it has been clarified that the concept of energy sharing is without prejudice to applicable national rules for the authorisation of suppliers.
- In Article 27a and recital (48), it has been clarified that this directive does not interfere with existing schemes of suppliers of last resort. In that vein, where a Member State has already appointed a supplier of last resort before the entry into force of this Directive, it is not necessary to run a new procedure for appointing the supplier of last resort. In addition, it is possible to appoint the supplier of last resort either before or at the moment of supplier failure.

- In Article 66a and recital (53), more procedural discretion was given to the Council to decide when an electricity price crisis occurs. The Council, acting on a proposal from the Commission, should determine by means of an implementing decision when a regional or Union-wide electricity price crisis exists and the decision should also specify its validity in time, which may be up to one year. With regards to the triggers, the wholesale market criteria have mainly been kept according to the Commission proposal, but a possibility to exclude times of abnormal prices in the calculation of very high prices is introduced. At the same time, the retail market criteria have been made more flexible, partly by introducing a range for the level of sharp increases in electricity retail prices, partly by decreasing the forward looking assessment for how long those prices are expected to hold from six months to three months. Finally, a mechanism for prolonging a regional or Union-wide price crisis is added, which will be subject to a Commission assessment and a Commission proposal.
- With regard to the transposition period of the directive, the general rule of six months is kept in accordance with the Commission proposal. However, a period of twenty four months has been introduced for Article 4 on free choice of supplier and Article 15a on energy sharing to facilitate Member States implementation processes.

As regards REMIT:

- a) In Article 2 (20a), and recital (10), a definition of 'order book' has been included at the request of several delegations to further specify the proposal.
- b) In Articles 4a and 9a, and recitals (11) and (12), concerning Inside Information Platforms (IIP) and Registered Reporting Mechanisms (RRM), it has been added that the Agency should have the power to withdraw an authorisation in certain cases. In addition, the Commission has been empowered to adopt implementing acts to further clarify the implementation of the provisions regarding RRM and IIPs. Subsequently, these articles will only apply when the Commission has adopted the relevant implementing acts.
- c) In Article 9 and recital (18a), the requirement of market participants in the Union that are resident or established in a third country have been changed. It now requires these market participants to designate a representative in that Member State where they are active in instead of declaring an office, to provide more clarity for Member States.
- d) Regarding Article 13, ACER may exercise its powers in Member States jurisdiction unless the NRA objects on the grounds that it has formally opened or is conducting an investigation on the same facts, or has conducted an investigation on the same facts and determined the existence or the absence of a breach. ACER shall inform the national regulatory authority and other concerned authorities before doing so. ACER may exercise its powers where the NRA does not take the necessary measures in order to comply with the request from ACER in cases having a cross-border impact. Upon completion of its investigation, ACER shall draw up an investigation report setting out their findings.

- e) Still in Article 13, it has been added that the Agency may exercise its powers, without prejudice to paragraph 3a, if the competent national regulatory authority requests it to exercise its powers with regards to acts that have a cross-border impact.
- f) In Article 13a, relating to on-site inspections by ACER, it has been clarified that the inspections shall be prepared and conducted in close cooperation and coordination with national authorities. The empowerment of ACER's on-site inspections has been further detailed to provide more clarity. It has also been added that on-site inspections on private premises may not be carried out without a prior authorisation by a judicial authority.
- g) Article 13c, regarding procedural guarantees of ACER's investigations has been strengthened by detailing the right for the persons subject to its investigation to comment on facts concerning them before ACER adopts the investigation report pursuant to Article 13.
- h) In Article 16b, it has been clarified that the Agency's guidelines and recommendations are non-binding, and that the Agency will not be able to publish information whether a national regulatory authority does not comply with the guidelines or recommendations.
- i) In Article 18 and recital (18), changes have been made to ensure a more consistent application of administrative fines across Member States. To achieve that, a list of criteria determining those administrative fines, and the level of them, have been included. In addition, more flexibility for Member States has been given by introducing a possibility to set lower fines to be determined on a case-by-case basis. The procedures in instances where the legal system of a Member State does not provide for administrative fines have also been added.

V. CONCLUSIONS

1. In light of the above, the Council is invited to examine the Presidency compromise texts as set out in documents: 10605/23 and 10606/23, solve any outstanding issues that may arise during the meeting and reach an agreement on the Council's general approach, with the view to the forthcoming negotiations with the European Parliament.
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