Council of the European Union

Brussels, 29 June 2023
(OR. en)

10873/23

Interinstitutional File:
2023/0077(COD)

LIMITE

ENER 379
ENV 722
CLIMA 317
COMPET 649
CONSOM 246
FISC 139
CODEC 1174

NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee
No. prev. doc.:	10606/23
No. Cion doc.:	7440/23 +ADD1
Subject:	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 - Mandate for negotiations with the European Parliament

1) On 19 June, the TTE (Energy) Council Permanent Representatives Committee discussed the 5th revision of 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), as set out in documents 10605/23 and 10606/23 with the aim to reach a General Approach on both files ahead of the negotiations with the European Parliament.

2) During the meeting, a General Approach was agreed on REMIT. However, regarding EMD, Member States highlighted a few issues which needed further consultations and redrafting. Consequently, the Presidency decided to propose amendments in the EMD taking into account the discussion in the Council, as set out in the Annex to this note and submit them to Coreper for its meeting planned on 30 June.

3) The modifications are as follows:

Only for the Electricity Market Design:

a) In Article 19b(1) and corresponding recitals, the new text amends the design principles of the two-way contracts for difference (CfDs). It now clarifies that life-time prolongation of an existing power generating facility shall only be considered substantial if the new investment covers at least 50% of the economic value of the asset after the investment, and the life-time of the facility is prolonged by at least 10 years.

b) In Article 19b(3) and corresponding recitals, the changes include that Member States may provide for a different distribution to take into account national specificities. In addition, with regard to the investments referred to in point (c) of paragraph 1, the amount of expected revenues distributed shall be proportionate to the investment made.

c) Still in Article 19b, a new paragraph 3a has been added. This paragraph introduces that the Commission shall monitor the application of this Article by the Member States including the effects of the redistribution of the revenues on competition and trade in the internal market. It also tasks the Member States to submit a report to the Commission on the measures adopted in application of Article 19b.

d) In Article 64 and corresponding recital 53f, it has been added that Member States applying such derogation shall assess the impact of that derogation on decarbonization targets. In addition, before conducting the first competitive bidding process, the Member State shall adopt a binding plan to transition from the participation of such power plants in capacity mechanisms.

e) In recital 40a, it has been added that capacity mechanisms can play an important role in ensuring resource adequacy for insufficiently interconnected energy systems.

f) In recital 53g, the new texts adds that capacity mechanisms shoud be open to the participation of all resources that are capable of providing the required technical performance, including gas-fired power plants, provided they satisfy the emission limit in 22(4).

g) In Article 66a and the corresponding recital, it has been added that Member States may, without prejudice to Articles 107 and 108 TFEU, apply a cap on market revenues from inframarginal generators subject to the same conditions as those set out in Articles 6 to 8 and Article 10 of Council Regulation (EU) 2022/1854. Such a revenue cap may be applied until 30 June 2024.

h) A new recital on Power Purchase Agreements has been added as well, highlighting that Member States should pay particular attention to cross-border PPAs and remove unjustified barriers specifically related to them, allowing consumers in Member States with limited capacity to access power generated in other regions without discrimination.

4) In the Annex, in respect to REV 5 (10606/23) changes are highlighted in yellow and new text is **bold underline** and deletions are ~~strikethrough.~~

5) In light of the above, the Permanent Representatives Committee is invited to examine the texts as set out in Annex to this note, solve any outstanding issues that may arise during the meeting and agree on the mandate for negotiations with the European Parliament as currently set out in document 10606/23 as complemented by the Annex to this document, to enable the Presidency to conduct those negotiations.

6) In accordance with the approach to legislative transparency endorsed by Coreper on 14 July 2020[1], and in full consistency with Regulation (EC) 1049/2001 and the Council's Rules of Procedure, the text of the mandate thus agreed will be made public unless the Permanent Representatives Committee objects.

---

[1] 9493/20.

ANNEX

I. Two-way contracts for difference (CfDs):

Article 19b

1. ~~*1.*~~ Direct price support schemes for new investments for the generation of electricity from the sources listed in paragraph 2 shall take the form of ~~a~~ two-way contract**s** for differences. New investments for the generation of electricity shall include investments in new power-generating facilities **or**~~,~~ investments aimed at **substantially:**

a) repowering existing power-generating facilities**;**~~,~~

b) increasing their capacity; or

c) ~~*investments aimed at extending existing power-generating facilities or at*~~ prolonging their lifetime.

For the purpose of point (c) of the first subparagraph, the life-time prolongation of an existing power generating facility shall only be considered substantial if it fulfils both of the following conditions:

(a) the new investment covers at least 50 % of the economic value of the asset after the investment; and

(b) the life-time of the facility is prolonged by at least 10 years.

1a. **Direct price support schemes in the form of two-way contracts for difference shall be designed to:**

(a) preserve incentives for the generating facility to operate and participate efficiently in the electricity markets, in particular to ~~adjust its production to~~ reflect market circumstances;

(b) limit any distortive effect of the support scheme on the operation, dispatch and maintenance decisions of the generating facility or on bidding behaviour in day-ahead, intraday, ancillary services and balancing markets;

(c) ensure that the level of the minimum remuneration protection and of the upward limit to excess remuneration are proportionate to the cost of the new investment and guarantee the long-term economic viability of the power generating facility while avoiding overcompensation;

(d) avoid undue distortions to competition and trade in the internal market.

~~The first subp~~Paragraph 1 shall apply to contracts under direct price support schemes for new investments in generation concluded as of three~~one~~ years after [the date of entry into force of this Regulation]. For offshore hybrid asset projects connected to two or more bidding zones, the transitional period shall be five years after [the date of entry into force of this Regulation].

2. Paragraph 1 shall apply to new investments in generation of electricity from the following sources:

(a) wind energy;

(b) solar energy;

(c) geothermal energy;

(d) hydropower without reservoir;

(e) nuclear energy;

3. **The revenues, or the equivalent in financial value of those revenues, arising from** ~~*D*~~**d**irect price support schemes in the form of two-way contracts for difference shall ~~***ensure that***~~:

~~*(a) the revenues collected are*~~ **be** distributed to final customers**.**~~;~~

Notwithstanding the requirement in the first subparagraph, the revenues, or the equivalent in financial value of those revenues, may also be used to finance the costs of the direct price support schemes or investments to reduce electricity costs for final customers ~~*be designed so that the revenues collected when the market price is above the strike price are distributed to all final electricity customers based on their share of consumption (same cost / refund per MWh consumed);*~~

~~*(b) to the extent that part of the r*~~**The redistribution of revenues to final customers which are undertakings shall be without prejudice to Articles 107 and 108 TFEU. Such redistribution shall avoid undue distortions to competition and trade in the internal market. To the extent r**evenues~~*is*~~ **are** distributed to **final customers which are** undertakings,~~*this distribution*~~ **this distribution shall** covers all undertakings in proportion to their share of consumption (same refund per MWh consumed). **Notwithstanding the first sentence, Member States may provide for a different distribution to take into account national specificities.** ~~**The share*part* of the revenues distributed to final customers that may be distributed to undertakings shall not exceed the combined share of electricity consumption of all undertakings. This shall be without prejudice to Article 107 and 108 TFEU**~~;

With regard to investments referred to in point (c) of paragraph 1, the amount of expected revenues distributed shall be proportionate to the investment made;

~~**(c)** *ensure that* **T**~~the distribution of ~~the~~ revenues to final ~~*electricity*~~ customers **shall be**~~*is*~~ designed ~~*so as not*~~ to **maintain** ~~*remove the*~~ incentives ~~*of consumers*~~ to reduce their consumption or shift it to periods when electricity prices are low and not to undermine competition between electricity suppliers**.**~~;~~

3a. The Commission shall monitor the application of this Article by the Member States including the effects of the redistribution of the revenues on competition and trade in the internal market.

No later than 1 January 2025 and every year thereafter, Member States shall submit a report to the Commission on the measures adopted in application of this Article. This report shall include information about the installed capacity and the amounts of electricity produced which are covered by two-way contracts for difference, the amount of revenues collected and the manner in which these revenues have been distributed.

Without prejudice to Articles 107 and 108 TFEU, where the Commission considers that the redistribution of revenues as applied by Member States distorts competition and trade in the internal market, it shall issue appropriate recommendations to address these distortions.

4. In line with the third subparagraph of Article 4(3) of Directive (EU) 2018/2001, Member States may exempt small-scale renewables installations and demonstration projects from the obligation under paragraph 1.

Recitals:

(30) Where Member States decide to support publicly financed new investments **by** ~~(~~"direct price support schemes"~~)~~ in low carbon, non-fossil fuel electricity generation to achieve the Union's decarbonisation objectives, those schemes should be structured by way of two-way contracts for difference such as to include, in addition to a revenue guarantee, an upward limitation of the market revenues of the generation assets concerned. **That obligation should apply to support for investments in new power generating facilities. For reasons of proportionality and to protect investment certainty, the obligation should only apply to support for investments in existing power generation facilities where such support relates to new investments, and where such new investments aim at substantially repowering existing power generation facilities or at substantially increasing their capacity or prolonging their lifetime. This should exclude at least any new investments in existing installations resulting in improvements which are not significant in comparison with the total value of the installation or, ~~as the case~~which may ~~be, a small prolongation of lifetime or~~entail a small increase in capacity as compared to the total capacity. In relation to investments prolonging the lifetime of power generating facilities, this should exclude those that effectively result in a small prolongation of its lifetime~~of the installation or as compared to the total capacity respectively~~. This should be assessed on a case-by-case basis, having regard ~~to the need~~ to the duration of the prolongation and the economic value of the asset (net present value as set out in the Guidelines on State aid for climate, environmental protection and energy 2022) after the investment. ~~ensure respect for the principle of proportionality when applying two-way in respect of existing power generation~~. ~~*To protect investment certainty, this obligation should apply to contracts under direct price support schemes for new investments in generation concluded as of one year after entry into force of this Regulation.* New investments for the generation of electricity should include investments in new power generating facilities, investments aimed at repowering existing power generating facilities, **and** investments aimed at **substantially repowering**extending existing power generating facilities**, increasing their capacity** or at prolonging their lifetime.~~

(30a) To ensure legal certainty and predictability, the obligation to structure direct support schemes by means of two-way contracts for difference should 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. That transitional period should be five years for offshore hybrid assets connected to two or more bidding zones due to the complexity of such projects."

(30b) With a view to ensuring stability and predictability of investments, and without prejudice to Articles 107 and 108 TFEU, the application of two-way contracts for difference~~CfDs~~ to new investments in existing generation should not lead to the revision of the level of support already granted or of the conditions attached thereto in a way that negatively affects the rights conferred and undermines the economic viability of projects already benefiting from support. The obligation to use two-way contracts for difference is without prejudice to Article 6(1) of Directive (EU) 2018/2001.

(31) ~~Such~~ Two-way contracts for difference would ensure that revenues of producers stemming from new investments in electricity generation which benefit from public support become more independent from the volatile prices of fossil fuels-based generation which typically sets the price in the day-ahead market. **The design of these two-way contract for differences should preserve the incentives for the generating facility to operate and participate efficiently in the electricity markets, in particular to ~~adjust its production to~~ reflect market circumstances. Furthermore, it should ensure that the level of the minimum remuneration protection and the upward limit to excess remuneration are proportionate to the new investment, that the long-term economic viability of power generating facilities subject to the support scheme is not affected and that it avoids overcompensation. Carrying out a competitive bidding process notably set out in such a way that it is open, clear, transparent and non-discriminatory and based on objective criteria that are defined ex ante and minimise the risk of strategic bidding and undersubscription will be a key factor for the compatibility of the design of two-way contracts for difference with Union law. The Commission is responsible, pursuant to Article 107 and 108 TFEU for assessing compliance of direct price support schemes with the internal market, ensuring the level playing field, in particular with the principle of proportionality. Two-way contracts for difference could vary in duration and could include inter alia injection-based contracts for difference with one or several strike prices, a floor price, or capability or yardstick contracts for differences. The obligation to use two-way contracts for difference does not apply to support schemes not directly linked to electricity generation, such as storage, and which do not use direct price support, such as investment aid in the form of upfront grants, tax measures or green certificates amongst others.**

(34) Thanks to the upward limitation of the market revenues direct price support schemes in the form of two-way contracts for difference should provide an additional source of revenues for Member States in periods of high energy prices. To further mitigate the impact of high electricity prices on the energy bills of consumers, Member States should ensure that the revenues collected from producers subject to direct price support schemes in the form of two-way contracts for difference, **or the equivalent in financial value of those revenues**, are passed on to all final ~~*electricity*~~ customers, including households, SMEs and industrial **customers**~~*consumers, based on their consumption*~~. **When distributing the revenues to households, Member States should in particular be able to favour vulnerable customers. In the light of the wider benefits for electricity customers resulting from investments in renewable energy and related system flexibility, energy efficiency, and low carbon energy deployment, it should also be possible for Member States to use the revenues from two-way contract for difference, or the equivalent in financial value of those revenues, to finance investments to reduce electricity costs for final customers and to use such revenues, or the equivalent in financial value of those revenues, to finance the costs of the direct price support schemes.** ~~***Where Member States decide to distribute***~~ **In order to minimise distortions to competition and trade in the internal market, revenues** ~~**to**~~ **distributed to final customers which are undertakings,** ~~**they**~~ **should cover all these undertakings in proportion to their share of consumption**~~***do so proportionally to the consumption of such undertakings***~~**. Where the new investments on existing generation prolong the lifetime of power-generating facilities, the amount of expected revenues to be distributed should be proportionate to the investment made. Proportionality can be demonstrated based on the relationship between the new investment and the economic asset value (net present value as set out in the Guidelines on State aid for climate, environmental protection and energy 2022) after the investment. To take account of national specificities, Member States may decide to deviate from the proportionate distribution key, for example by redistributing revenues only to some undertakings or by allocating to some undertakings a proportion of the revenues which is higher than their consumption.** ~~**To avoid overcompensation, tThe sharepart of the revenues that could be distributed to final customers that are undertakings should not exceed the combined share of electricity consumption of all those undertakings.**~~ **This is without prejudice to Article**

107 and 108 TFEU. The redistribution of revenues should be done in a way that ensures that c**ustomers**~~*onsumers*~~ are still to some extent exposed to the price signal, so that they reduce their consumption when the prices are high, or shift it to periods of lower prices (which are typically periods with a higher share of RES production). **In particular, Member States should be able to consider the consumption in off-peak hours to preserve incentives to flexibility.** Member States should ensure that the level playing-field and competition between the different suppliers is not affected by the redistribution of revenues to the final electricity consumers. **These principles should not be compulsory for revenues generated by contracts under direct price support schemes concluded before the date of application of the obligation to use two-way contracts for difference. It is possible for Member States to distribute revenues from two-way contracts for difference without that distribution constituting a retail price regulation pursuant to Article 5 of Directive (EU) 2019/944.**

(34bis) The Commission should monitor the application by Member States of the design principles for two-way contracts for difference set forth in this Regulation, including the principle of proportionality. For that purpose, Member States should report to the Commission regularly and transparently on all aspects of their application. Without prejudice to Articles 107 and 108 TFEU and with a view to preserve the level-playing field in the internal market, the Commission should issue appropriate recommendations where in the exercise of its monitoring duties it identifies significant potential risks.

II. Capacity mechanisms:

(13ac) In Article 64, the following paragraph is inserted.

2c. By way of derogation from Article 22(4)(b), generation capacity exceeding the limit per KWh ~~that started commercial production before 4 July 2019 and that emits more than 550 g of CO2 of fossil fuel origin per kWh of electricity may, subject to compliance with~~referred to therein may, upon a decision of the Commission pursuant to Articles 107 and 108 TFEU, exceptionally be committed or receive payments or commitments for future payments under a capacity mechanism approved by the Commission before the entry into force of this Regulation, provided that the following conditions are fulfilled:

(a) the Member State has carried out a competitive bidding process in line with the provisions of Article 22, which aims at maximising the participation of capacity providers which meet the requirements in Article 22(4);

(b) the amount of capacity offered in the competitive bidding process referred to in point (a) is not sufficient to address the adequacy concern as identified pursuant to Article 20 (1) for the contracting period covered by that bidding process;

(c) the generation capacity ~~that emits more than 550 g of CO2 of fossil fuel origin per kWh of electricity~~referred to in the first subparagraph is committed or receives payments or commitments for future payments for a period not exceeding one year and is procured through an additional procurement process which complies with all requirements in Article 22 except for those set out in point (b) of paragraph 4.

The derogation pursuant to this paragraph may be applied until 31 December 2028. Member States applying such derogation shall assess the impact of that derogation on decarbonization targets with a view to minimizing any detrimental impact. Before conducting the first competitive bidding process referred to in point (c) of the first subparagraph, the Member State shall adopt a binding plan with milestones to transition from the participation of generation capacity referred to in the first subparagraph in capacity mechanisms by 31 December 2028, including a plan to procure the necessary replacement capacity and an assessment of the investment barriers causing the lack of sufficient bids in the competitive bidding procedure referred to in point (a).

Recitals:

(53f) To support environmental protection objectives, Article 22(4) of Regulation (EU) 2019/943 of the European Parliament and of the Council sets out requirements regarding CO2 emission limits for capacity mechanisms. The Russian war of aggression against Ukraine caused a disruption of the supply of natural gas and required many Member States to establish new gas supply sources and routes. This may lead to investment uncertainties for new power generating installations and additional adequacy concerns. Therefore, where such adequacy concerns can be demonstrated, during their transition to a carbon-free system and in the aftermath to the energy crisis, Member States applying capacity mechanisms which were approved before the entry into force of this Regulation, can exceptionally and subject to strict conditions derogate from the CO2 emission limit per kWh for a limited period of time. Such derogation should however be limited to existing generation capacity that started commercial production before 4 July 2019, that is before the entry into force of the Clean Energy Package in order to protect investment certainty and to ensure that new generation projects do not benefit from the derogation to the emission limits. Member States should carry out a primary procurement process which is designed so as to maximise the participation of capacity that meets the CO2 emission limits, including by letting capacity prices rising high enough to incentivise investments in such capacity. In case that process has not brought about the necessary capacity to meet the identified adequacy concern, Member States should be allowed organise an additional procurement process which meets all the requirements in Chapter IV of Regulation (EU) 2019/943 of the European Parliament and of

the Council, except for those regarding CO2 emission limits. Generation capacity that does not meet the CO2 emission limits should not be procured for a period longer than one year. Such derogation ~~may~~ could be introduced only upon the adoption of a Commission's decision pursuant to Articles 107 and 108 TFEU. Furthermore, Member States applying such derogation should assess its impact on decarbonization targets with a view to minimizing any detrimental impact. Before applying the derogation, the Member State should adopt a binding plan with milestones to transition from the participation of generation capacity which does not meet the CO2 emission limits per kWh in capacity mechanisms by 31 December 2028. This should include a plan to procure the necessary replacement capacity and an assessment of the investment barriers in the technologies that could ensure the adequacy of the system and comply with the CO2 emission limits.

(40a) […] **Notwithstanding the necessity to limit distortions to competition and the internal market, together with an appropriate regulatory framework, capacity mechanisms can play an important role in ensuring resource adequacy, in particular during the transition towards a carbon-free system and for insufficiently interconnected energy systems. […]**

[…] After consultation with the Member States, ~~T~~the Commission should come forward with proposals with a view to streamlining and simplifying the process for assessing capacity mechanisms as appropriate at the latest 3 months after entry into force of this Regulation~~by end of 2024~~. In the meantime, the Commission should strive to take all possible measures to accelerate the approval process for capacity mechanisms in cases where Member States are exposed to exceptional adequacy concerns, notably resulting from low interconnection capacity or high shares of renewables.

New recital (53g)

Capacity mechanisms should be open to the participation of all resources that are capable of providing the required technical performance, including gas-fired power plants, provided they satisfy the emission limit in Article 22(4).

III. Possibility to extend crisis measures:

New paragraph in Art 66a:

8. Without prejudice to Articles 107 and 108 TFEU, Member States may apply a cap on revenues from inframarginal generators subject to the same conditions as those set out in Articles 6 to 8 and Article 10 of Council Regulation (EU) 2022/1854. Such revenue cap may be applied until 30 June 2024. By 15 May 2024, the Commission shall carry out a review of the application of the relevant schemes under this paragraph and issue a report on the main findings of this review to Parliament and the Council.

Recital:

The inframarginal revenue cap introduced in Articles 6 to 8 and Article 10 of Council Regulation (EU) 2022/1854 has in some cases provided a relevant source of income that Member States have used to soften the impact of the high electricity prices in the consumers bills. This Regulation provides tools that will also bring relief for consumers during times of high electricity prices; while Member States implement those tools, they should also be allowed to apply an inframarginal revenue cap until 30 June 2024. That revenue cap should be subject to conditions corresponding to those which were applicable under Council Regulation (EU) 2022/1854. In order to assess the application of any such revenue cap, the Commission shall issue a report to the Parliament and the Council.

New recital on PPAs:

Member States should pay particular attention to cross-border PPAs and remove unjustified barriers specifically related to them, allowing consumers in Member States with limited capacity to access power generated in other regions without discrimination.