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NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee

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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
- 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.
3. The European Council on 23 March 2023 invited the co-legislators to take work forward without delay on the proposed revision of the EU’s internal electricity market design with a view to ensuring its adoption by the end of 2023.

II. STATE OF PLAY

1. On 19 June, the TTE (Energy) Council discussed the 5th revision (REV5) 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 Regulation, Member States highlighted a few issues which needed further consultations and redrafting. On 30 June, Coreper examined a new compromise proposal. While some progress was made, Member States underlined the need for further discussions.
3. The Spanish Presidency has continued the work of the previous Presidency, and held a first discussion in the Energy Working Party on 6 July based on the Presidency note as set out in document WK 9131/23. The Presidency identified two remaining issues in the EMD Regulation, namely contracts for difference (CfDs), and the possible derogation from CO2 emission limits when applying capacity mechanisms, and has listened to all Member States’ perspectives on how best to proceed in order to reach an agreement.

4. On 26 July the Presidency asked Member States to focus on two-way contracts for difference in Article 19b, in particular in the case of those CfDs for new investments for the generation of electricity aimed at lifetime extensions, where there is a clear and urgent need to find the right balance regarding the distribution of revenues and the design principle of these CfDs. The Presidency requested delegations to share their written proposals in relation to article 19b in the EMD Regulation by 1 September. During the Energy Working Party meeting on 5 September the Presidency gathered the contributions of all Member States.
5. Based on the comments and contributions received from the Member States, the Presidency circulated a new wording proposal on Article 19b (Contracts for Differences), in order to strike a balance between the different positions. This text was discussed in the Energy Working Party meeting on 14 and 19 September.
6. The agenda of the TTE (Energy) Council taking place on 17 October 2023 includes the Regulation to improve the Union's electricity market design (EMD Regulation), with the aim to reach a General Approach.
7. On the basis of the discussions held so far and the different approaches maintained by Member States, the Presidency considers that there is a need to resolve essential issues on Article 19b as a first step to prepare the ground, with a view to reaching a General Approach at the TTE Council meeting on 17 October.

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 Parliament adopted its reports in Plenary on the EMD on 14 September and on the REMIT Regulation on 13 September 2023.
2. The European Economic and Social Committee adopted its opinion on EMD on 14 June, while the European Committee of the Regions adopted its opinion on EMD on 6 July 2023.

IV. COMPROMISE SOLUTIONS PROPOSED BY THE PRESIDENCY ON ARTICLE 19b

1. In order to bridge the gap between different approaches by the Member States, the Presidency considers that there are three possible options to solve the differences in Article 19b. The main elements of each of the options compared to document ST 10606/23 (REV5) are the following:
 - a) **Option A:**
 - Paragraph 1a on design criteria for CfDs is reinforced.
 - Addition of a new paragraph 1b in relation to the case of CfDs for new investments for the generation of electricity aimed at lifetime extensions (point c) in art. 19b(1)) where remuneration is not determined through a competitive bidding process. In such cases, CfDs should fullfill either of two conditions: a) apply a ratio to the electricity produced under a CfD (*proportionality*) calculated based on the amount of investments, or b) to apply a limitation to the revenues from CfDs that are to be distributed to undertakings.
 - Distribution of revenues from CfDs according to article 19b(3) remains as in REV5 (no changes).
 - Addition of a new paragraph 3a reinforcing the monitoring and transparency provisions in relation to the application of this article by Member States and the European Commission. This option tasks the Commission to issue appropriate recommendations to address distortions to the level playing field in the internal market.

b) **Option B:**

- Option B contains same text as option A in paragraphs 1,2 and 3 of Article 19b. It contains differences in paragraph 1a, 1b and 3a.
- Paragraph 1a on design criteria for CfDs is reinforced.
- Addition of a new paragraph 1b in relation to the case of CfDs for new investments for the generation of electricity aimed at lifetime extensions (point c) in art. 19b(1)) where remuneration is not determined through a competitive bidding process. MS should fullfill either of two conditions: a) apply a ratio to the electricity produced under a CfD (*proportionality*) calculated based on the amount of investments, or b) the revenues from CfDs are to be distributed to undertakings as per the general rules in article 19b(3) in a manner allowing for traceability of the corresponding financial flows.
- Addition of a new paragraph 3a that further reinforces the monitoring and transparency provisions for Member States and the Commission, including to strengthen the role of the European Commission as regards enforcement in relation to the application of this article. This option includes a provision in which the Commission may impose, by means of an implementing act, a limit to the share of revenues to final customers which are undertakings.

c) **Option C:** Removal of whole Article 19b from the text.

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

V. CONCLUSIONS

1. In light of the above, the Permanent Representatives Committee is invited to examine the texts as set out in Annex to this note and give political guidance on which of the three options is the solution to the outstanding issues on article 19b of the Electricity Regulation 2019/943 as amended by the EMD Regulation.
2. The input from the debate will feed the preparation of a draft compromise text (REV 6) on the EMD Regulation with the view of reaching a general approach at the TTE (Energy) Council on 17 October.

ANNEX

a) **OPTION A:**

Article 19b

Direct price support schemes for new investments in generation

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 contracts~~ 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.

The first subparagraph 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].

The participation in such schemes shall be voluntary for the market participants.

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) Prevent 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 aligned with 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, notably by determining remuneration amounts through a competitive bidding process that it is open, clear, transparent and non-discriminatory.

1b. Notwithstanding the design criteria of paragraph 1a, direct price support schemes in the form of two-way contracts for difference to investments referred to in point (c) of paragraph 1 where remuneration is not determined through a competitive bidding process shall fulfil either of the following two conditions:

(a) The share of the electricity under the contract for difference in relation to the total volume of electricity produced by the existing power generating facility does not exceed the ratio between the new investment and the initial gross investment value of the asset, adjusted for inflation. When information on the gross investment value of the asset is not available, a reference value of the investment cost of building a similar asset of the same technology shall be used.

(b) The revenues, or the equivalent in financial value of those revenues, arising from direct price support schemes in the form of two-way contracts for difference related to such investments, may be distributed to final costumers which are undertakings, but limited in total to the financial volume that would have been distributed to undertakings under condition (a) of this paragraph. The remaining revenues shall be used for the purposes referred to in paragraph 3 of this article, with the exception of any distribution to final customers which are undertakings, in a manner allowing for traceability, at any time, of the corresponding financial flows.

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 direct 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~~ **Revenues is distributed to final customers which are undertakings, this distribution shall** covers all undertakings in proportion to their share of consumption (same refund per MWh consumed). 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;**

~~(c) ensure that~~ **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 the level playing field 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 TO BE ADAPTED]

b) OPTION B

Option B remains the same as Option A, with the exception of the modification in paragraph 1b and paragraph 3a.

Article 19b

Direct price support schemes for new investments in generation

2. ~~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 contracts~~ 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.

The first subparagraph 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].

The participation in such schemes shall be voluntary for the market participants.

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) Prevent 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 aligned with the cost of the new investment, the market revenues, and guarantee the long-term economic viability of the power generating facility while avoiding under- and overcompensation;

(d) avoid undue distortions to competition and trade in the internal market, notably by determining remuneration amounts through a competitive bidding process that it is open, clear, transparent and non-discriminatory.

(e) Avoid distortions to competition and trade in the internal market resulting from the distribution of revenues to undertakings.

1b. Notwithstanding the design criteria of point (d) in paragraph 1a and without prejudice to Articles 107 and 108 TFEU, direct price support schemes in the form of two-way contracts for difference for investments referred to in point (c) of paragraph 1 where remuneration is not determined through a competitive bidding process shall fulfil either of the following two conditions:

(a) The share of the electricity under the contract for difference in relation to the total volume of electricity produced by the existing power generating facility does not exceed the ratio between the new investment and the initial gross investment value of the asset, adjusted for inflation. When information on the gross investment value of the asset is not available, a reference value of the investment cost of building a similar asset of the same technology shall be used.

(b) The revenues or the equivalent in financial value of those revenues, arising from direct price support schemes in the form of two-way contracts for difference related to such investments are used for the purposes referred to in paragraph 3 of this article in a manner allowing for traceability, at any time, of the corresponding financial flows, in particular those benefitting final customers which are undertakings.

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~~direct 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~~ **Revenues is distributed to final customers which are undertakings, this distribution shall covers all undertakings in proportion to their share of consumption (same refund per MWh consumed). 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;**

~~(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 any redistribution of the revenues to undertakings on the level playing field in the internal market.

Without prejudice to Articles 107 and 108 TFEU, if the Commission, when carrying out these monitoring tasks, considers in a specific case that the redistribution of revenues as applied by a Member State gives rise to distortions in the internal market threatening the level playing field, the Commission may impose, by means of an implementing decision, a limit to the share of revenues to final customers which are undertakings in the Member State concerned. The Commission shall determine the limit by reference to what is necessary and proportionate to address the distortion resulting from the redistribution of the revenues concerned, and shall ensure that any legitimate expectations are protected.

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.

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 TO BE ADAPTED]

c) OPTION C

Article 19b

Direct price support schemes for new investments in generation

~~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 contracts 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.~~

~~Direct price support schemes in the form of two-way contracts for difference shall be designed to 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.~~

~~The first subparagraph 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 direct 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 revenues is distributed to final customers which are undertakings, this distribution shall covers all undertakings in proportion to their share of consumption (same refund per MWh consumed). The sharepart 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;~~

~~(c) — ensure that the distribution of the revenues to final electricity customers shall beis 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.;~~

~~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.~~