



Council of the
European Union

Brussels, 26 May 2023
(OR. en)

9467/23

LIMITE

ENER 238
ENV 496
CLIMA 241
COMPET 442
CONSOM 175
FISC 90
CODEC 884

Interinstitutional Files:
2023/0077(COD)
2023/0076(COD)

NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee
No. Cion doc.:	7435/23 +ADD1 7440/23 +ADD1
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 - Guidance for further work

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). 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 the first revision of both the EMD and REMIT on 21 April 2023. The first revision addressed mainly consumer related provisions in the EMD, and overall technical changes in both proposals as set out in documents: ST 8106/23 and ST 8105/23.
2. Subsequently, the Presidency has submitted the second revision of both proposals on 5 May 2023. In the second revision, the main focus was on price stability instruments in the EMD, and all other articles except for on-site inspections by ACER in the REMIT as set out in documents: ST 8918/23 and ST 8932/23.
3. The third revision of the proposals were submitted by the Presidency on 12 May 2023, and focused on articles related to system operation, including flexibility in the EMD, transmission grid access for offshore renewables and on provisions relating to on-site inspections by ACER in the REMIT as set out in documents: ST 9201/23 and ST 9202/23.
4. Work in the Energy Working Party has proceeded swiftly, and several issues have already been resolved at technical level. However, a few remaining issues needs to be discussed in COREPER to find the right balance between the Member States.

III. ISSUES FOR POLITICAL GUIDANCE

1. Article 19b of Regulation – two-way Contracts for Difference (two-way CfDs)

Two-way contracts for difference (two-way CfDs) are at the core of the electricity market design proposal. Some Member States wish to see more flexibility on CfDs especially in terms of their bindingness (I.e., as regards limiting the types of direct price support schemes that Member States may implement to two-way CfDs) and redistribution of revenues, and other Member States strongly prefer to maintain the text as it was proposed by the Commission.

The purpose of two-way CfDs is to enhance stability and predictability of the energy prices, provide stable investment incentives to accelerate the energy transition, and to create a level playing field within the EU and ensure a certain level of harmonisation for tenders in renewable and fossil-free energy sources.

The Presidency identifies three significant elements in the Article 19b that need further considerations, namely: the length of a possible transitional period to accommodate the projects that are in the pipeline in MS right now under existing schemes, whether there is a need to define direct price support schemes, and how much flexibility for redistribution of revenues is required. In order to find the right balance in this article the Presidency would like to get guidance from the Delegations on one of the following options consisting of three elements:

Option 1:

- A longer transitional period or application at tenders rather than contracts to accommodate the projects that are in the pipeline in MS right now
- No additional clarifications on the concept of ‘direct price support schemes’
- No earmarking of revenues for consumers, but where revenues are redistributed to undertakings there are clear rules for such redistribution.

Option 2:

- A longer transitional period or application at tenders rather than contracts to accommodate the projects that are in the pipeline in MS right now.
- Inclusion of a clear definition of ‘direct price support scheme’ to further clarify the scope of Article 19b
- Keeping a general rule that all revenues should be earmarked for consumers – both undertakings and households; and more specific redistributions rules of revenues to undertakings (as in Rev 2)

Option 3:

- No transitional period or a short transitional period.
- Inclusion of a clear definition of ‘direct price support scheme’ to further clarify the scope of Article 19b
- Keeping a general rule that the revenues should be earmarked to consumers – both undertakings and households; more specific redistributions rules of revenues to undertakings; addition of a possibility for the Member States to use some of the revenues to finance the costs of the CfD-schemes.

2. Article 66a of the EMD – Access to affordable energy during an electricity price crisis

The purpose of Article 66a of the Directive is to extend the toolbox available to Member States to ensure that customers have access to affordable energy during a regional or Union-wide price crisis. It allows the introduction of below cost regulated prices for households and SMEs when a regional or Union wide electricity price crisis is declared

During the negotiations the Presidency has identified that some Member States would prefer to have more general rules for the declaration of the electricity price crisis allowing below cost regulated prices, while other Member States have expressed views supporting more restrictive criteria for the declaration of a crisis highlighting their concerns in terms of the impact of below cost regulated prices on the market.

There are two significant elements in the Article 66a that need further considerations, namely: on which conditions a price crisis should be declared and for how long should such a price crisis be valid. To find the right balance in this article the Presidency would like to get guidance from the Delegations on the following options:

Option 1:

- A regional or Union-wide price crisis is triggered pursuant to the criteria in the current REV3.
- The decision declaring a price crisis may be valid for a period up to 6 months (I.e. shorter than COM proposal).
- The Commission should assess if the triggering conditions are expected to hold after the validity of the decision expires and, if applicable, propose a new decision on prolongation to the Council.
- Member States may only do price interventions below cost in those bidding zones where the wholesale prices have reached the criteria in paragraph 1. This should be specified in the proposed decision.

Option 2:

- A regional or Union-wide price crisis is triggered pursuant to the criteria in the current REV3.
- The decision declaring a regional or Union-wide price crisis may be valid for a period up to 12 months (in line with REV3/COM proposal).
- The Commission should assess if the triggering conditions are expected to hold after the validity of the decision expires and, if applicable, propose a new decision on prolongation to the Council.

Option 3:

- The retail market criteria for triggering a regional or Union-wide price crisis in paragraph 1 is made more qualitative.
- The “expected length of crisis” criterion on the wholesale and retail markets are reduced to 3 months.
- The decision declaring a regional or Union-wide price crisis may be valid for a period up to 12 months (in line with REV3/COM proposal).
- The Commission should assess if the triggering conditions are expected to hold after the validity of the decision expires and, if applicable, propose a new decision on prolongation to the Council.

3. Capacity mechanisms

The articles covering the provisions of capacity mechanisms in the Electricity Regulation were not opened by the Commission in its proposal. The (non-fossil) flexibility support schemes in Article 19e and 19f were not aiming to address adequacy concerns on the Commission original proposal. However, several Member States have expressed the need to also address adequacy concerns and capacity mechanisms in the discussions of these articles. Member States have expressed the need of easing the procedures related to capacity mechanism since the approval process is considered cumbersome and lengthy. The Presidency believes that there might be a need to address certain concerns expressed by the Member States within the limitation of the Commission's proposal, and would thus like to seek the Delegations guidance on the following options:

Option 1:

Include a review clause on the capacity mechanism application process so that the Commission shall:

- request ACER to amend the capacity mechanism methodology pursuant to Article 23(3) as appropriate and
- submit a report assessing other possibilities of streamlining procedures in the current capacity mechanism framework so as to ensure that adequacy concerns can be addressed by Member States in a timely manner,
- come forward with proposals with a view to simplifying the process for assessing capacity mechanisms as appropriate at the latest by end of 2024.

Option 2:

Consider setting an additional and explicit deadline for the delivery of the proposal for a European resource adequacy assessment (ERAA) and add a clarification that ACER and national regulatory authorities are competent to enforce the timely delivery of the ERAA, in order to allow for the ERAA to be established quicker and thus simplify the evaluation process for new capacity mechanisms (e.g. in Article 23).

Option 3:

Remove the extra requirements for non-fossil flexibility support schemes on MS with existing capacity mechanisms introduced in Article 19e, so that existing capacity mechanisms don't need to be reviewed in light of this article.
