

Attn. Mr. Yurii Vlasenko  
Chairman, National Commission for State Regulation of Energy and Public Utilities  
Ukraine

Vienna, 9 October 2024  
REG-UA/O/alo/23/09-10-2024

**Subject: Compliance by *Ukrenergo* with unbundling requirements**

Dear Mr. Vlasenko,

I am writing to you regarding the non-compliance of the Ukrainian electricity transmission system operator, *Ukrenergo*, with the unbundling requirements of Directive (EU) 2019/944 of 5 June 2019 on common rules for the internal market for electricity, as adapted and adopted (“the Electricity Directive”) and request NEURC to perform the duties imposed on it.

**1. Background**

On 17 December 2021, *Ukrenergo* was conditionally certified under the independent system operator (ISO) model by Decision No. 2589 issued by NEURC (“the Final Decision”). According to the Final Decision, both the Ministry of Energy (the Ministry) as sole shareholder of *Ukrenergo* and *Ukrenergo* had to fulfill several conditions by pre-determined deadlines spanning from 3 days to one year. However, in March 2023 the deadline for compliance with these conditions was postponed until after the end of martial law in Ukraine.<sup>1</sup>

In October 2023, the Secretariat published Ukraine Energy Market Observatory Compliance Note 18/23,<sup>2</sup> in which it identified five main areas in which action is still needed to ensure *Ukrenergo*’s compliance with the ISO model of unbundling, relating to core aspects of unbundling and requiring immediate attention and action to maintain *Ukrenergo*’s certification status.

In the last year, no progress has been made to ensure compliance with the certification conditions, and the situation worsened with regard to some aspects. The following aspects pertain to *Ukrenergo*’s corporate governance and are essential to ensure independence of the transmission system operator.

**1. Supervisory Board**

*Ukrenergo*’s Supervisory Board was designed to mitigate unfettered control by the Ministry. The main task of the Supervisory Board is to control and supervise the operation of the Management Board, including by appointing the chairperson and members of the Management Board, and the Compliance Officer. While the Supervisory Board’s seven members are formally appointed by the Ministry, four must be independent from the state administration and selected through a competitive procedure. The fact that the majority of the Supervisory Board’s members must be, at all times, independent from the state administration, is essential to ensure the independent operation and commercial activity of *Ukrenergo* and shelter it from interference from the Cabinet of Ministers or the

<sup>1</sup> NEURC Resolution No.337 of 3 March 2022 “On the extension of the deadlines for the implementation of the Final Decision on the certification of PJSC NEC UKRENERGO”.

<sup>2</sup> Certification and Unbundling of *Ukrenergo*, Status Report September 2023.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

Ministry. It is therefore imperative that all four independent members of the Supervisory Board be appointed.

Currently, the Supervisory Board consists of only four members: three state representatives and one independent member. The position of an independent member of the Supervisory Board has been vacant since April 2022, while two other independent members resigned in September 2024. The mandate of the fourth independent member expires on 9 December 2024.

The Secretariat is aware that the Ministry of Economy published the announcement of a competitive selection procedure for one independent member of the Supervisory Board in April 2024, but the selection procedure has not yet been completed.

At this stage, the Supervisory Board of *Ukrenergo* is operational only in terms of quorum requirements, and it will cease to be so on 9 December 2024, when the mandate of the remaining independent member expires. Due to its composition, the Supervisory Board is however already now not in a position to make independent decisions.

It is therefore vital that all four independent members be appointed without delay and by 9 December 2024 at the latest and a Chairman of the Management Board be appointed thereafter.

## 2. Amendments of the Charter

Following the adoption of the latest amendments (Law No. 3587 dated 22 February 2024) to the Law On Management of State Property and the Law On Joint Stock Companies, the following competences shall be attributed to the Supervisory Board: approval of the strategic development plan and performance indicators of the company, the annual financial plan and the implementation report, the annual investment plan and the medium-term investment plan; submission of proposals to the general meetings regarding short- and medium-term financial, operational and non-financial goals; approval of the report and conclusions of the internal auditor.

In order to ensure that an independent Supervisory Board can serve its aim of sheltering the operation and commercial activity of *Ukrenergo* from interference from the government, the Charter of *Ukrenergo* has to be revised with the aim of strengthening the role of an independent Supervisory Board in the company's decision-making.

## 3. Separation within the Ministry

In order to prevent any conflicts of interest due to the Ministry's double role as shareholder and policy setter in the field of energy, Order of the Ministry No 162<sup>3</sup> created a new separate structural unit for the coordination and interaction of fuel and energy operators, under the direct subordination of the designated Deputy Minister, tasked to perform the functions of the Ministry of Energy in relation to the management of the state's corporate rights in *Ukrenergo*, as well as the management of state property used by *Ukrenergo*.

The Final Decision required amendments to Order No 162 and its implementing regulations, in order to bring them in line with the requirements for TSO unbundling, the compliance programme of the Ministry and other internal regulations. At this stage, it is unclear who the designated Deputy Minister is, whether the new unit has been appointed and is functional, and how it performs its tasks in practice.

<sup>3</sup> Order of the Ministry of Energy No.162 of 29 July 2021.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

The implementation of Order No 162 in practice must therefore be assessed in order to ensure that it addresses the risk identified.

#### 4. Order 408/2022 of the Minister of Energy

Order 408/2022 of the Minister of Energy imposes a mechanism for the organization and functioning of internal control and risk management in the system of the Ministry, including enterprises in which the Ministry performs corporate rights management, such as *Ukrenergo*. Overall, Order 408/2022 *de facto* establishes a parallel control system which results in conflicting lines of accountability, in particular with regard to the accountability towards the (independent) supervisory boards. Order 408/2022 also entrusts the Minister with the power to institute control measures and make decisions beyond the scope of a system owner under the ISO model of unbundling.

Hence, Order 408/2022 has to be revised to ensure that the *Ukrenergo* can operate entirely independently from the interference of the Ministry and of the Minister of Energy.

#### 5. Necessary steps

According to Article 52(4) of the Electricity Directive, it is the duty of national regulatory authorities to monitor the continuing compliance of transmission system operators with the unbundling requirements. Regulators are also obliged to re-open a certification procedure to ensure such compliance by the transmission system operators.

Each of the aspects described above represents, by itself, a ground for the re-opening of the certification procedure, as each of them represents a serious obstacle to the independent functioning of *Ukrenergo* as transmission system operator. However and without prejudice to the position of the European Union, bearing in mind that the European Council granted candidate status to Ukraine and the decision was taken to open accession negotiations, we would not wish the status of the transmission system operator to revert to a status of non-compliance as observed before the certification.

We therefore kindly request NEURC to assess compliance of *Ukrenergo* with the unbundling requirements and to re-open the certification procedure if compliance with regard to the above aspects is not achieved by **9 December 2024**. In particular:

- (i) **All four independent members of the Supervisory Board be appointed without delay and by 9 December 2024 at the latest;**
- (ii) **The Charter be revised to strengthen the Supervisory Board's independence;**
- (iii) **Order No 162 must be implemented in practice to address potential conflicts of interest;**
- (iv) **Order 408/2022 has to be revised to ensure that the Ukrenergo can operate entirely independently from the interference of the Ministry and of the Minister of Energy.**

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	<a href="mailto:contact@energy-community.org">contact@energy-community.org</a>
<b>Web</b>	<a href="http://www.energy-community.org">www.energy-community.org</a>

The Secretariat is ready to engage with NEURC and all stakeholders to support these processes. However, in the event compliance is not achieved by 9 December 2024, NEURC is requested to re-open the certification procedure for *Ukrenergo*.

Yours sincerely,



Artur Lorkowski  
Director