



## ALERT

### **Situation around the National Energy and Utilities Regulatory Commission (NEURC) jeopardizes the independence and sustainable operation of the Regulator**

#### **What has happened?**

- 1. On November 4, 2020, the Constitutional Court of Ukraine received the submission from 50 members of the parliament on inconsistency of a number of decrees of the President and some laws of Ukraine with the Constitution<sup>1</sup>.** *First*, they challenged the decrees by the President Petro Poroshenko on appointment of the NEURC members Olena Antonova, Dmytro Kovalenko, Oksana Kryvenko (based on the results of an open competitive selection) and by the President Volodymyr Zelenskyi on appointment of the NEURC members Ruslan Kaidash, Olha Babii, Valeriy Tarasiuk and Oleksiy Mahda (as temporary ones pursuant to paragraph 3-1 of the final and transitional provisions of the Law “On the NEURC”, applicable at that time). *Second*, as for the NEURC members appointed by the President Zelenskyi, in addition, their right to perform functions of the NEURC members for 6 years (full tenure) was challenged, as they had been appointed on a temporary basis, without passing of the open competitive selection. *Third*, the principle of rotation of the NEURC members and the President’s right to determine, at own discretion, the name list for rotation was challenged. According to the Members of the Parliament, who signed the submission, those actions went beyond the powers of the President, and, therefore, were unconstitutional.
- 2. On July 1, 2020, under the signature of the NEURC chief of staff, in accordance with the President Decree No. 258/2020 of June 30, 2020, on rotation of the NEURC members, Olena Antonova was dismissed.** She had won the open competitive selection and had been appointed to this position by the President Petro Poroshenko on May 29, 2018, for the period of 6 years. As it stands today, Olena Antonova has been challenging these actions in court<sup>2</sup>.

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<sup>1</sup> [http://www.ccu.gov.ua/sites/default/files/3\\_525\\_2020.pdf](http://www.ccu.gov.ua/sites/default/files/3_525_2020.pdf)

<sup>2</sup> <https://www.facebook.com/elena.antonova.9026/posts/3167726640016123>

To note, **those are the expected consequences given the inconsistency in terms of the rotation and the term of office of the NEURC members, who were appointed under different procedures**, in the adopted version of the Law “On the NEURC” (of December 29, 2019). DiXi Group experts have indicated this risk in the respective alert<sup>3</sup>. The paragraph on rotation of the NEURC members was taken out of the Law, with the initial rotation only determined in the final and transitional provisions. Besides, the status of the NEURC members, appointed both based on an open competition and under the temporary procedure, was equalized, which can be considered as discrimination. In addition, legitimization of the members, appointed as temporary ones, for almost the full term of office contradicts with the Law requirements on the competitive selection of the Regulator members.

3. In compliance with the President Decree No. 258/2020 of June 30, 2020, on rotation of the NEURC members<sup>4</sup>, the government **initiated the process of competitive selection for a vacant position of the NEURC member**: on June 25, 2020, the respective Competition Commission was established<sup>5</sup>, and on October 12, 2020, two candidates (Ruslan Mashliakivskyi and Kostiantyn Ushchapovskyi) were announced, with the information forwarded by the Competition Commission, as required by the Law, for consideration by the Cabinet of Ministers<sup>6</sup>. However, **the government turned down both candidates** with its protocol resolution of October 28, 2020<sup>7</sup>.

To note, as per the current version of the Law “On the NEURC” (Article 8), the Cabinet of Ministers “shall adopt the resolution on appointment to the position of member (members) of the Regulator based on the list of candidates, proposed by the Competition Commission, within 10 working days from the date of respective submission by the Competition Commission”, which does not provide for the possibility to turn down the proposed candidates.

4. **On October 9, 2020, the current NEURC composition addressed the State Bureau of Investigations with a complaint on illegal influence by a group of MPs on the Regulator activities** in order to prevent performance of their duties and to induce them to make illegal decisions<sup>8</sup>. The NEURC members assume those actions by the MP could be aimed at lobbying of the interests of DTEK energy holding, owned by Rinat Akhmetov.

That is not the first notification by the Regulator representatives on illegal influence: in September 2020, according to the mass media, the NEURC chairman addressed the Energy Community Secretariat on the matter of illegal influence in terms of transition to the

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<sup>3</sup> [https://dixigroup.org/storage/files/2019-12-24/dixi\\_alert\\_eng.pdf](https://dixigroup.org/storage/files/2019-12-24/dixi_alert_eng.pdf)

<sup>4</sup> <https://www.president.gov.ua/documents/2582020-34293>

<sup>5</sup> <https://www.kmu.gov.ua/npas/pro-utvorennya-konkursnoyi-komisiyi-z-doboru-kandidativ-na-posadi-chleniv-nacionalnoyi-komisiyi-shcho-zdijsnyuye-derzhavne-regulyuvannya-u-sferah-energetiki-ta-komunalnih-poslug-773-250620>

<sup>6</sup> In accordance with the Law “On the National Energy and Utilities Regulatory Commission”, the Competition Commission shall select two candidates for one position in the composition of the NEURC, and the government shall select one to be appointed.

<sup>7</sup> <https://www.facebook.com/svetlana.golikova.16/posts/3504689756277049>

<sup>8</sup> <http://www.nerc.gov.ua/?news=10610>

*incentive-based (RAB) tariffs in electricity distribution*<sup>9</sup>. In September 2019, the NEURC noted facts of pressure by employees of the ferroalloy plants, which were picketing the Regulator building for two months in the way of protest rallies<sup>10</sup>.

## **DiXi Group recommendations**

DiXi Group think tank continues to consistently defend the position on creating an independent regulatory authority in the fields of energy and public utilities, to ensure high-quality and sustainable operation of the energy markets as required by the EU legislation (specifically, provisions of the Third Energy Package).

In our opinion, **in case of the Constitutional Court consideration of the MPs submission and recognition of all the regulations as unconstitutional, the Regulator activity will be totally blocked due to the absence of quorum** for an unpredictable period. In view of the functions and powers of the Regulator, that jeopardizes operation of the entire energy sector.

Besides, we are sure that **settlement of the issues by means of specific temporary solutions, even if they allow for achievement of short-term results, will – quite the opposite – deteriorate the situation in long-term perspective**. The bright example of appointment of ‘temporary’ members of the NEURC to the respective positions (for the period up to completion of competitive selection) demonstrates the adverse effects of this approach.

We emphasize that **the lack of political will of MPs and the President in the matter of settlement of the constitutional status of independent regulatory authorities jeopardizes the implementation of the Association Agreement**, which provides for independent and effective governance of the energy markets, and this is impossible in case of blocking of the NEURC activity.

Besides, **uncertainty of the status and ineffective activities of the energy regulatory authority serve for the interests of pro-Russian forces** in the circumstances of a hybrid war, as they create the environment for violation of the rules, manipulations and conflicts on the Ukrainian energy markets, instead of their further development and integration with the European ones.

We believe that **the law enforcement authorities have to ensure priority of the investigation as to exerting of any illegal influence on the NEURC activities**. The notifications of attempts to exert illegal influence (pressure) on the Regulator by politicians and/or market players have to be thoroughly investigated and brought to the stage of court trials in order to set a significant precedent and, therefore, to prevent any further attempts.

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<sup>9</sup> <https://www.epravda.com.ua/news/2020/10/15/666292/>

<sup>10</sup> <https://www.nerc.gov.ua/?news=9443>

Given this, DiXi Group think tank recommends the following:

### **STEP 1. Amendments to the Constitution**

- Return to settlement of the issue on **determination of the constitutional status of the Regulator**. The current condition emphasizes the importance of settlement of the basic issue – fixing of the status of all regulatory collegial institutions<sup>11</sup> in the Constitution of Ukraine, specifically the provisions on their establishment and reporting/subordination.
- **Preserve and fix the mandatory selection of the Regulator members on a competitive basis**. Appointment of members of all independent regulatory institutions, specifically the NEURC, has to take place based on an open competitive selection only, which would be reasonable to fix in the Constitution. The procedure for conducting competitions, the respective powers on forming the competition commissions have to be clarified at the level of laws.
- Among the powers of the President and the Verkhovna Rada, allow for **participation in the procedure for competitive selection of the Regulator members**, in order to ensure balance of interests of the various branches of power and the centers of political influence in the selection process.

### **STEP 2. Amendments to the Law (if necessary) and partial ‘reset’ of the Regulator’s composition**

- Depending on the status of independent regulatory institutions in the system of public authorities, to be determined in the Constitution, there could be a need for **development and adoption of amendments to the Law “On the National Energy and Utilities Regulatory Commission”**.
- Upon entering of the respective amendments to the Constitution, it is necessary to ensure conducting an **open competitive selection for the positions of the NEURC members, who were appointed temporarily** (with due regard to the updated rotation scheme).

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<sup>11</sup> Not only the National Energy and Utilities Regulatory Commission, but also the National Commission for the State Regulation of Communications and Informatization, the National Securities and Stock Market Commission.