



SELADORE LEGAL

Seladore Legal Limited
24 Greville Street
London
EC1N 8SS
Tel: +44 (0)20 3008 4432

8 December 2021

By email

International Monetary Fund
700 19th Street, N.W.
Washington, D.C. 20431
USA

Our ref: SJB/KK/0058/192

Ms. Ivanna Vladkova Hollar
Mission Chief for Ukraine
ivladkovahollar@imf.org

Mr. Vlad Rashkovan
Alternate Executive Director
IMF Board Member
VRashkovan@imf.org

Mr. Vahram Stepanyan
Resident Representative in Ukraine
vstepanyan@imf.org

Copy to:
Mr. Ihor Shpak
Senior economist, Ukraine office
IShpak@imf.org

URGENT

Dear Sirs,

RE DTEK Renewables / Ukrenergo Bond

We are instructed by DTEK Renewables BV and its subsidiaries (together, "**DTEK Renewables**") and write to you in connection with the unlawful misuse of the proceeds of the bond in the amount of \$825 million which was issued by JSC NEC Ukrenergo ("**Ukrenergo**") in November 2021, listed on the London stock exchange (the "**Ukrenergo Bond**"), for the purpose of ensuring the repayment of debts owed by GarPok to suppliers of renewable energy in Ukraine, including our client.

It appears that Ukrenergo has - in concert with the Ukrainian state-owned guaranteed buyer of electricity SE "Garantovanyi Pokupets" ("**GarPok**") and potentially others - unlawfully conspired to harm the interests of our client in breach of English and Ukrainian law and of fundamental principles of the rule of law and good governance.

We regret that it has become necessary to trouble you with this matter but, for the reasons set out below, we think that it is appropriate to do so in the circumstances. We hope that you will appreciate these issues being drawn to your attention and recognise that you may indeed yourself wish to take action in relation to them.

We are therefore writing to you to request that you assist our client by taking such steps as may be available to you to procure that GarPok, UkrenergO and any and all other entities which have unlawfully conspired against our client rectify the situation as soon as possible.

Summary of relevant background

Our client is entitled, both contractually (pursuant to duly executed power purchase agreements) and (*inter alia*) according to Article 65 of the Law of Ukraine “On the Electricity Market”, to payment on time and in full for the renewable electricity it produces in Ukraine, based on an agreed feed-in tariff.

For some time up to and including June 2020, GarPok had fallen behind on the payments owed to our client and other providers of renewable energy to Ukraine. However, in June 2020, a Memorandum of Understanding of the Cabinet of Ministers of Ukraine and the Ministry of Energy and Environmental Protection of Ukraine was issued (the “**MoU**”) which provided that, by 31 December 2021, the State Authorities of Ukraine would ensure the repayment of GarPok’s existing indebtedness for electricity to all suppliers of renewable energy which had accrued since 1 January 2020. In October 2021, a further Ukrainian Cabinet resolution (number 1049) then provided that the Ministry of Energy, UkrenergO and GarPok “*shall ensure the application of the funds raised [by the UkrenergO Bond (as defined below)] to repay the indebtedness that has accrued under agreements for the sale and purchase of electricity at the feed-in tariff*”.

As mentioned above, in November 2021 UkrenergO issued the UkrenergO Bond for the purpose of ensuring the repayment of debts owed by GarPok to suppliers of renewable energy in Ukraine, including our client.

The EBRD subscribed to the UkrenergO Bond in the amount of \$75 million, and publicly stated on its website that its participation was “*conditional*” on a “*clear commitment*” by the Ukrainian authorities that the proceeds of the bond be used to pay the debts owed to renewable energy producers in full¹.

Further, in its board report of 25 November 2021 the EBRD made clear both that it had concluded a Framework Agreement with UkrenergO, and that the purpose of the UkrenergO Bond was to “*enable the Company to channel the [bond] proceeds to repay payment arrears accumulated during the years of 2020 and 2021 towards the renewable energy producers*” and that this was to be done “*on a pro-rata basis*” such that all of the relevant producers, including our client, would receive payments.

The EBRD’s subscription, as an “anchor investor”, will no doubt have strongly influenced others to invest in the UkrenergO Bond, and indeed the EBRD’s board report states that its subscription will have the effect of “*providing comfort to other potential investors in the instrument and further widening market participation*”.

However, despite using the proceeds from the UkrenergO Bond to pay all other renewable energy suppliers to whom debts were owed, GarPok has deliberately withheld the payment of the debts owed to our client. GarPok’s decision to withhold payment from our client appears to have been taken in conjunction with other state bodies and to be an act of blatant discrimination deliberately targeted at our client for ulterior political purposes that do not relate to the debts owed to our client.

It has been reported that the former director of GarPok, Kostiantyn Petrykovets, was put under pressure by the Ukrainian Government not to make payments to our client and that he was then subsequently dismissed from his position. He has reportedly alleged that the reason for this was because he refused to “*implement illegal instructions from government representatives on payments to [DTEK Renewables]*.”

This matter has become particularly urgent as we understand from news reports that it now appears that the Ukrainian entities and officials involved may be planning imminently to take further unlawful steps to divert the proceeds of the bond to make payments to other producers, including energy companies

¹ See <https://www.ebrd.com/work-with-us/projects/psd/53221.html>

outside the renewable energy sector or “green” producers other than DTEK Renewables (in breach of the listing documents for the Ukrenergobond and the commitments provided by the Ukrainian authorities).

We note that the IMF agreed, in June 2020, an 18 month Stand-By Arrangement (the “SBA”) with Ukraine for an amount of around \$5 billion, and that the IMF is currently carrying out reviews alongside the Ukrainian authorities which would enable the disbursement of funds pursuant to the SBA. We note in particular that on 18 October 2021 the IMF publicly stated that the focus of the SBA is on (*inter alia*):

- i. *reducing fiscal risks from quasi-fiscal operations, including in the energy sector;*
- ii. *ensuring banks’ financial health, including through good governance, with the goal of reviving sound bank lending to the private sector; and*
- iii. *reducing the role of the state, [... strengthening] corporate governance [and attracting] investment.* (quoted from <https://www.imf.org/en/News/Articles/2021/10/18/pr21301-ukraine-imf-team-and-ukraines-authorities-reach-staff-level-agreement-on-first-review-of-sba>)

We also note in particular that, as recently as 24 November 2021, the IMF published its First Review of the Stand-by Agreement, which states (at page 23) the following:

*32. The authorities propose to eliminate arrear accumulation to renewable energy producers (RES) by increasing transmission tariffs. The commitment will be monitored through a new quantitative performance criterion. Under the RES PSO, the state-owned Guaranteed Buyer is obliged to purchase wind and solar energy at feed-in tariffs that are significantly above market prices. The difference is only partially covered by the transmission tariffs, resulting in accumulation of arrears to RES of about UAH 25 billion in 2020 and another UAH 5 billion are expected in 2021 despite favorable conditions. **Ukrenergobond, the transmission system operator (TSO) borrowed UAH 10 billion from SOBs to finance some arrears reduction in January and is planning on issuing publicly guaranteed “green” bonds to eliminate the stock of arrears as of end-2021.** The transmission tariff is expected to increase to a level sufficient to fully eliminate arrear accumulation and service the debt issued to finance past accumulated arrears (MEFP ¶33). (emphasis added)*

Furthermore, recent developments in Ukraine, including significant falls in the price of the Ukrenergobond and of other Ukrainian sovereign bonds, starkly demonstrate the negative consequences of the failure to repay the debts owed to DTEK Renewables.

Next steps

Our client now wishes to pursue as a matter of urgency avenues of redress available to it in the English courts and/or under English law. We also believe that the criminal offences related to misleading the market set out in sections 89 and 90 of the Financial Services Act 2012 may have been committed by persons associated with GarPok and/or Ukrenergobond, including public officials.

We are aware that the IMF seeks to promote adherence to the rule of law, good governance and non-discrimination and that it “places great emphasis on promoting good governance when providing policy advice, financial support, and technical assistance to its member countries”²; while we of course appreciate that the IMF is not in any way involved in the above misconduct, we trust that given its ongoing role in providing credit to Ukraine and assisting Ukraine in the reform of its economy, it will take the view that it is able to use its position in order to help resolve the situation.

With all of the above in mind, it would be greatly appreciated if the IMF would take any and all steps which are available to it in order to investigate the situation which has arisen and ensure the fulfilment of the main initial aim of the Ukrenergobond, i.e. the full and non-discriminatory repayments of the debts owed to all green energy producers in Ukraine, including DTEK Renewables. In particular, we request that you reinforce to the Ukrainian Government the urgency of using the proceeds of the Ukrenergobond to “eliminate the stock of arrears as of end-2021”.

² <https://www.imf.org/en/About/Factsheets/The-IMF-and-Good-Governance>

Thank you in advance for your assistance with this matter. Please do not hesitate to contact Simon Bushell of this firm (simon.bushell@seladorelegal.com / Tel: 07785254891) should you have any questions in relation to any of the above.

Yours faithfully

Seladore Legal Ltd

Seladore Legal Limited