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	Up/026/VG/DK MMag. Verena Gartner	3451	15.7.2016

Response to the ACER consultation document (PC_2016_E_02) on the definition of capacity calculation regions

Dear Madam or Sir,

The Austrian Federal Economic Chamber (WKÖ), a corporation under public law, is a statutory body representing the interests of about 450,000 member businesses. As a strong voice for business, we advocate future-oriented and economy-friendly policies which are balanced with energy and environmental interests. In order to achieve this, there is also a need for framework conditions which maintain the attractiveness of Austria and Europe as a business location, and in this context, inter alia, to maintain the German/Luxembourgian-Austrian electricity price zone which is indispensable for this purpose.

Therefore we take the possibility to reply to question 4 of the consultation on the definition of capacity calculation regions as follows:

4. Should the CEE region (or a merged region) include a bidding zone border between Germany/Luxembourg and Austria?

For the purpose of realizing the internal electricity market, bidding zones play a crucial role. Their configuration also determines prices in the various zones. Their primary function, however, is a technical one. They are intended to resolve capacity bottlenecks in an economically-efficient manner. The general fundamentals of congestion management include competitive principles of non-discriminatory market access. Accordingly, network congestion must, pursuant to Article 16 (1) of the Electricity Regulation, be countered by way of non-discriminatory market-based solutions, which give efficient economic signals to market participants. A review or change of existing bidding zone configurations is subject to a mandatory basis to the procedure set out in Article 32 et seqq. of the Capacity Allocation and Congestion Management Regulation (Regulation 2015/1222 "CACM Guideline"). In this context, with regard to definition of the bidding zones, as set out in Article 33 of the Regulation, a detailed examination of several substantive criteria is required. These comprise, in any event, network security, market efficiency and the stability and robustness of the bidding zones.

According to a detailed legal review, the CEE region (or a merged region) <u>should not include a bidding zone border</u> between Germany/Luxembourg and Austria, justified by following aspects:

I. Definition of new bidding zone borders is not within the scope of the process to define capacity calculation regions (CCR) pursuant to Article 15 of the CACM Guideline

We want to stress that this question 4 relates to the introduction (and attribution) of a so far non-existing bidding zone border. The definition of new bidding zone borders is however not within the scope of the process to define CCRs pursuant to Article 15 of the CACM Guideline, but exclusively regulated by the bidding zone process as laid down in Article 32 et seq. of the CACM Guideline. The subject matter of question 4 thus exceeds the scope of the CCR definition process already from the outset:

Pursuant to Article 15 para 2 of the CACM Guideline, the common proposal regarding the determination of CCR shall be based upon existing bidding zone borders, which shall be assigned to a respective CCR. In other words, under Article 15 of the CACM Guideline the CCR Proposal is only intended to propose CCRs based on existing bidding zone borders, but not to suggest the reconfiguration of bidding zones by the introduction of new bidding borders.

The review of existing bidding zones configurations is explicitly governed by Articles 32 et seq. of the CACM Guideline. Pursuant thereto, the bidding zone review is based on a thorough and detailed review of the existing bidding zone configuration which is an absolute prerequisite for the introduction of new bidding zone borders. Based on such empiric data, the bidding zone review is conducted in two steps, whereas in the first step, the TSOs participating develop a methodology and assumptions for the process. At the end of the second step, the TSOs shall submit a joint proposal to maintain or amend the bidding zone configuration. On the basis thereof, the participating Members States or National Regulatory Authorities (NRAs) shall within six month reach an (unanimous) agreement on this proposal. This procedural set-up underscores the legal inadmissibility to introduce new bidding zone borders by the CCR process, which does not provide for any thorough review of an efficient bidding zone configuration at all.

Hence, the inclusion of a non-existing bidding zone border between Germany/Luxembourg and Austria in a CCR Decision would clearly exceed the competences by the decision making body in violation of the CACM Guideline and undermine the bidding zone review as provided for in Article 32 thereof. This would clearly violate and (unlawfully) anticipate the results of the bidding zone review under Article 32 of the CACM Guideline, the only procedure under which any new bidding zone borders might be established under the current regulatory framework. A respective CCR Decision based on the current CCR Proposal would therefore be unlawful in this respect.

Moreover, it must be stressed that essential procedural requirements have been violated in the current adoption process of the CCR Proposal. According to Article 9 para 6 lit b) of the CACM Guideline, the adoption of the CCR Proposal is subject to the approval of all NRAs, such unanimous approval shall be achieved within a period of six months pursuant to Article 9 para 10 of the CACM Guideline. In the event that such an agreement between the NRAs cannot be reached within the period of six months, competence to adopt the CCR Proposal is transferred to ACER pursuant to Article 9 para 11 of the CACM Guideline.

This transfer of competence, however, only occurs according to the explicit procedural rules as laid down in Article 9 of the CACM Guideline in case that neither one nor several NRAs request an amendment to the CCR Proposal pursuant to Article 9 para 12 of the CACM Guideline. In such an event the CCR Proposal shall be resubmitted to the Transmission System Operators (TSOs) in terms of ENTSO-E, which shall decide on the requested amendments within a two months period. After this the CCR Proposal shall be submitted again to the NRAs, which can adopt it within a period of two months. Only after this procedure as laid down in Article 9 para 12 of the CACM Guidelines, ACER would be competent to adopt a decision regarding the CCR Proposal.

According to our knowledge, E-Control (the Austrian NRA) requested an amendment of the CCR Proposal pursuant to Article 9 para 12 of the CACM Guideline in due time (before 17 May 2016). This request for an amendment, however, has not been dealt with in line with the procedure as laid down in Article 9 para 12 of the CACM Guideline. According to our opinion, this constitutes a flagrant violation of the procedural rules. In light of legal certainty of the future design of the European electricity markets, we are of the strong opinion that the procedure as laid down in the CACM Guideline ought to be upheld to avoid potential judicial declaration of nullity of the terms and conditions or methodologies adopted under the CACM Guidelines.

In the light of the above and to sum-up, we therefore strongly recommend and request that any CCR Decision should exclusively refer to already existing bidding zone borders and consequently not introduce a new bidding zone border between Germany/Luxembourg and Austria. Only in such way, the unlawful interference of the CCR process with the separate bidding zone review process (as laid down in Articles 32 et seq. of the CACM Guideline) can be avoided. As consequence, Article 8 para 1 lit n) as well as Article 8 paras 2 and 3 of the CCR Proposal (and the recitals related thereto) must not be reflected in a final CCR Decision.

II. No structural congestion on the German/Luxembourgian-Austrian border

Firstly the Guidelines on the management and allocation of available transfer capacity of interconnections between national systems (Regulation (EC) No. 714/2009) state that the implementation of congestion management between TSOs is only possible in the event of structural congestion between transmission networks. As a general rule TSOs shall accept all commercial transactions, including those involving cross border trade. When there is no congestion, there shall be no restriction of access to the interconnection. As shown below, in the case of the German/Luxembourgian-Austrian border no structural congestion is present, making the proposed measures unlawful:

According to Article 2 (2) Regulation (EC) No. 714/2009 congestion means *a situation in which an interconnection linking national transmission networks cannot accommodate all physical flows resulting from international trade requested by market participants, because of a lack of capacity of the interconnectors and/or the national transmission systems concerned.*

The term structural congestion is not defined in Regulation (EC) No. 714/2009 but a definition can be found in the CACM Guideline, where it is stated in Article 2 (19) *leg cit* that structural congestion means a *congestion in the transmission system that can be unambiguously defined, is predictable, is geographically stable over time and is frequently reoccurring under normal power systems conditions.*

The situation on the German/Luxembourgian-Austrian interconnection is not a situation of structural congestion due to the fact that the interconnection on the border usually is in a position to accommodate all physical flows between Austria and Germany. Thus there is no predictable and stable congestion at the border between Austria and Germany and therefore no structural congestion. For interconnections which are not usually congested, no permanent general allocation procedure is required or indeed allowed.

With regard to the loop-flows at the Polish and Czech border to Germany addressed in the ACER Opinion, the latest development clearly shows that in the very short-term there will be no (or only very limited) loop-flows due to the following reasons:

- Within this year there will be no loop-flows at the German-Polish border as there will be one phase shifter in the Mikulowa substation (German-Polish Southern interconnector) in operation and the other interconnector Krajnik-Vierraden (German-Polish Northern interconnector) will be opened.
- Also the operation of the phase shifters at the Czech border to Germany as well as the special switching Hradec-Röhrsdorf to TenneT (CZ-DE) will control and limit the loop-flows.
- The North/South transmission capacity within Germany is increased this year by the "Thüringer Strombrücke" with an additional capacity of +3.000 MW. This will further drastically reduce the occurrence of potential loop-flows.

In conclusion that structural congestion does not exist on the German/Luxembourgian-Austrian border and that in the very short-term there will be no (or only very limited) loop-flows, the CEE region (or a merged region) should not include a bidding zone border between Germany/Luxembourg and Austria. An artificial separation of the German-Austrian bidding zone would not be justifiable on the basis of the principles as laid down in Regulation 714/2009 as well as Regulation 2015/1222 ("CACM Guideline")

III. No proof of structural congestion on the German/Luxembourgian-Austrian border

Leaving aside the fact that there exists no structural congestion at the German/Luxembourgian-Austrian border, furthermore no proof for its assumption of the existence of structural congestion is provided. However in order to establish a bidding zone border the existence and location of structural congestion must be proven.

In a first step the relevant interconnectors must be identified. Due to the meshed high-voltage situation in Central-Europe it is reasonable to include not only the Austrian-German interconnector, but also those of neighboring countries and country-internal transactions, which are physically affected by the situation. In all cases a clear definition which interconnectors are considered relevant for the determination of structural congestion is necessary.

Concerning discussions about including a bidding zone border between Germany/Luxembourg and Austria in the CEE region (or a merged region), an assessment must be undertaken whether the presumed congestion at the German/Luxembourgian-Austrian border indeed meets the above-mentioned criteria of a structural congestion in the sense of the CACM guidelines.

Furthermore an analysis of the extent of structural congestion within Germany as a cause for the unscheduled flows in the CEE region would be needed. Problems within the German network are known.

To conclude the proof necessary for establishing that structural congestion is present at the German/Luxembourgian-Austrian border does not exist.

IV. Infringement of Competition Rules of the TFEU

In order for bidding zone borders and capacity bottleneck management to be defined, competition rules must also be set. An artificial capacity curtailment at the border of the Member States without justification based on congestion breaches Competition Rules pursuant to the TFEU. Following submissions contradict a bidding zone border between Germany/Luxembourg and Austria:

- The terms of the fundamental freedoms lead to the conclusion that capacity curtailment between Member States is only admissible if it is justified for compelling reasons in the public interest. It is stated at Article 34 and Article 35 TFEU that quantitative restrictions on imports and exports as well as all measures having equivalent effects are prohibited between the Member States. These prohibitions are addressed to the Member States, which means all institutions of the Member States. Thus, the prohibition in any event also applies to the national regulatory authorities.

If a bidding zone border between Germany/Luxembourg and Austria is introduced, the electricity market territory would be separated and cross-border electricity flows would be very clearly limited. A direct capacity curtailment in respect of cross-border trade constitutes a quantitative restriction. The fact that an action taken by a Member State may accord with a provision of EU law is irrelevant as regards qualification as a government measure. The European Union and its institutions are bound by implementation of the fundamental freedoms.

Thus, the provisions of the fundamental freedoms mean that capacity curtailment between the Member States is only admissible if it is justified for compelling reasons in the public interest, such as network security and supply security. The introduction of capacity management and bidding zone borders must be subject to scrutiny in order to ascertain whether milder measures might not be available in order to achieve the objective of network security and supply security. Possible measures entering into consideration include in any event the technical expansion of line capacity and further remedial measures such as countertrading and redispatching. Splitting the markets moreover only appears proportionate if the capacity curtailment is essential in order to overcome actual physical congestion at a zone border in compliance with competition rules.

- Pursuant to Articles 101 and 102 TFEU, all agreements between undertakings, as well as decisions by associations of undertakings, are incompatible with the internal market if they impair trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the internal market. This concerns inter alia the splitting of markets or supply sources. Neither the national regulatory authorities nor ACER are entitled to introduce measures which contradict Articles 101 and 102 TFEU.

  Furthermore, a bidding zone border between Germany/Luxembourg and Austria serves to impede the reduction in market concentration, leading to additional costs. According to the principles at issue, a market split would bring about a restriction in itself, unless objective reasons were given. In this connection, it must be stated that there are no substantive reasons for including a bidding zone border between Germany/Luxembourg and Austria within the CEE region (or a merged region) and is thus breaching EU law.

The objective of European regulation in energy law must be to open the markets and strengthen cross-border competition. The Austrian Federal Economic Chamber urges ACER to take a clear stand at against introducing a bidding zone border between Germany/Luxembourg and Austria within the CEE region (or a merged region).

Yours sincerely

Christoph Leitl
President

Anna Maria Hochhauser
Secretary General