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Response to: **PC_2016_E_02**
Consultation on the definition of capacity calculation regions

Dear Ladies and Gentleman

The Federation of Austrian Industries thank you for the opportunity to response to the consultation concerning questions on the elements of the CCRs Proposal, which were introduced after the public consultation held by ENTSO-E from 24 August to 25 September 2015.

Due to the potential massive impact on the structure of the German Austrian power common bidding zone we have focused on answering the question 4.

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

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 Art 15 of the CACM Guideline, but exclusively regulated by the bidding zone process as laid down in Art 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 Art 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 Art 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 Art 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 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 border 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 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 Art 32 thereof. This would clearly violate and (unlawfully) anticipate the results of the bidding zone review under Art 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 requirement has been violated in the current adoption process of the CCR Proposal. According to Art 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 Art 9 para 10 of the CACM Guideline. In the event that such an agreement between the NRAs cannot not be reached within the period of six months, competence to adopt the CCR Proposal is transferred to ACER pursuant to Art 9 para 11 of the CACM Guideline.

This transfer of competence, however, only occurs according to the explicit procedural rules as laid down in Art 9 of the CACM Guideline in case that neither one nor several NRAs request an amendment to the CCR Proposal pursuant to Art 9 para 12 of the CACM Guideline. In such an event the CCR Proposal shall be resubmitted to the TSOs (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 Art 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 Art 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 Art 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 and Austria. Only in such way, the unlawful interference of the CCR process with the separate bidding zone review process (as laid down in Art 32 *et seq.* of the CACM Guideline) can be avoided. As consequence, Art 8 para 1 lit n) as well as Art 8 paras 2 and 3 of the CCR Proposal (and the recitals related thereto) must not be reflected in a final CCR Decision.

For the sake of completeness, we want to add that the introduction of a new bidding zone border between Austria and Germany would also be in violation of the substantive legal framework, in particular Regulation (EC) 714/2009, the competition rules of the TFEU (Art 101, Art 102 and Art 106 TFEU) and the provisions on the free movement of goods in the TFEU (Art 34 and Art 35 TFEU). Reference is made to Federation of Austrian Industries Statement in Intervention in case Case-A-001-2015 before ACER's Board of Appeal ("**BoA**"), which is known to ACER.

We thank you again for the opportunity to take position in this consultation and ask for consideration of our arguments.

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Federation of Austrian Industries

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