

DECISION
OF THE BOARD OF APPEAL OF THE EUROPEAN UNION AGENCY FOR THE
COOPERATION OF ENERGY REGULATORS
of 7 July 2023

- Case number:** A-003-2019_R
- Language of the case:** English
- Appellant:** *Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen* (“BNetzA” or “the Appellant”)

Represented by: K. MÜLLER, J. GEWEHR, N. SADIGHI, R. LINBE and D. ALLMANN
- Defendant:** *European Union Agency for the Cooperation of Energy Regulators* (“ACER” or “the Defendant”)

Represented by: C. ZINGLERSEN
- Interveners:** *Commission de Régulation de l'Énergie* (‘CRE’)
On behalf of the Defendant
Commission for Electricity and Gas Regulation (‘CREG’)
On behalf of the Defendant
- Application for:** Annulment of the following provisions of Decision No 02/2019 of the Agency for the Cooperation of Energy Regulators of 2 February 2019 on the Core CCR TSOs’ proposals for the regional design of the day-ahead and intraday common capacity calculation methodologies (‘ACER Decision No 02/2019’):
- (a) Article 5(5) to (9) of its Annex I,
 - (b) Article 10(4) second half sentence, and Article 10(5) of its Annex I,
 - (c) Article 16(2), second sentence, and Article 16(3)(d)(vii) of its Annex I,
 - (d) Article 5(5) to (9) of its Annex II,
 - (e) Article 17(3)(d)(vii) of its Annex II,
 - (f) all parts and clauses of its Annexes I and II which make explicit reference to the paragraphs and provisions mentioned in points (a) to (e),
- or
- in the event that the Board of Appeal does not annul the above mentioned provisions of ACER Decision No 02/2019, the annulment of ACER Decision No 02/2019 entirely.

- Relaunched procedure upon:** Judgment of the General Court of 7 September 2022, *BNetzA v ACER* (T-631/19, EU:T:2022:509) - annulment of the Board of Appeal Decision A-003-2019 of 11 July 2019 dismissing the appeal against ACER Decision No 02/2019 (“Decision A-003-2019”).
- Board composition:** K. WIDEGREN (Technical Rapporteur), P. EECKHOUT, K. SARDI, A. BIONDI, M. SUPPONEN and M. PREK (Chair)

**THE BOARD OF APPEAL OF THE EUROPEAN UNION AGENCY FOR THE
COOPERATION OF ENERGY REGULATORS**

HAS ADOPTED THIS DECISION:

I. Facts giving rise to the present decision

1. On 21 February 2019, ACER adopted Decision No 02/2019 on the Core CCR TSOs’ proposals for the regional design of the day-ahead and intraday common capacity calculation methodologies¹ (hereinafter “ACER Decision No 02/2019” or “the Contested Decision”).
2. On 23 April 2019, the Appellant filed an appeal against ACER Decision No 02/2019 before the Board of Appeal (hereinafter “BoA”).
3. On 11 July 2019, the BoA adopted Decision A-003-2019, which dismissed the appeal against ACER Decision No 02/2019 as unfounded.
4. By applications lodged on 21 September 2019, the Appellant applied for the annulment of Decision A-003-2019 before the General Court of the European Union (hereinafter “GCEU”).
5. On 7 September 2022, the GCEU delivered its judgment in *BNetzA v ACER* (T-631/19, EU:T:2022:509) (hereinafter “the GCEU judgment”) annulling Decision A-003-2019 (hereinafter also referred to as the “Annulled Decision”).
6. The GCEU judgment was not appealed before the Court of Justice of the European Union.

II. Procedural steps leading to the relaunched Appeal

7. On 24 January 2023, the BoA relaunched appeal case A-003-2019 under reference number A-003-2019_R.
8. To this end, on 24 January 2023, the BoA invited the Appellant and the Defendant to submit their observations, if any, on the conclusions to be drawn from the GCEU judgment, which annuls Decision A-003-2019, by 24 February 2023.
9. On 24 February 2023, the Appellant and the Defendant submitted their observations.

¹ Decision No 02/2019 of the Agency for the Cooperation of Energy Regulators of 21 February 2019 on the Core CCR TSOs’ proposals for the regional design of the day-ahead and intraday common capacity calculation methodologies.

III. Legal background of the resumption of the procedure before the BoA

10. Article 266 of the Treaty on the Functioning of the European Union² (hereinafter “TFEU”) provides that “[T]he institution, body, office or entity whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union”.
11. Article 29 of Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators³ (hereinafter the “ACER Regulation”) provides that “(...) ACER shall take the necessary measures to comply with the judgments of the Court of Justice.”
12. Based on the above-mentioned provisions, the BoA shall take the necessary measures to comply with the GCEU judgement.

IV. Forms of order sought by the Parties

13. In its observations from 24 February 2023, the Appellant observes that the BoA should apply the legal findings of the GCEU judgment when reassessing the relaunched Appeal, in particular the GCEU’s finding that the BoA erred in law in its decision by failing to consider whether the day-ahead and intraday capacity calculation methodology (DA and ID CCM) of the Core capacity calculation region (Core CCR), approved by ACER Decision No 02/2019, comply with the requirements of Articles 14 to 16 of Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast)⁴ (hereinafter “the Electricity Regulation”).
14. The Appellant observes that the disputed provisions on the DA and ID CCM of ACER Decision No 02/2019 are, on the one hand, Article 5(5) to (9) of Annex I to ACER Decision No 2/2019 and Article 5(5) to (9) of Annex II to ACER Decision No 2/2019 relating to the selection of critical network elements and contingencies (CNEC) and, on the other hand, Article 10(4) second half sentence and Article 10(5) of Annex I to ACER Decision No 2/2019, Article 16(2), second sentence, and Article 16(3)(d)(vii) of Annex I to ACER Decision No 2/2019, and Article 17(3)(d)(vii) of Annex II to ACER Decision No 2/2019 relating to the early consideration of non-costly remedial actions (RA).
15. The Appellant seeks the following form of order: its main request is that the BoA annuls and deletes the disputed provisions of the DA and ID CCM of ACER Decision No 02/2019 if it concludes that they do not comply with the requirements of Articles 14 to 16 of the Electricity Regulation. Alternatively, should the BoA not agree with this interpretation, the Appellant requests that the BoA annuls ACER Decision No 02/2019 entirely and remits it to the competent body of ACER, instructing the latter to issue a new decision which does not contain the disputed provisions of the DA and ID CCM of ACER Decision No 02/2019.
16. The Defendant observes that the BoA should apply the legal findings of the GCEU judgment when reassessing the relaunched Appeal, in particular the GCEU’s finding that the BoA erred in law in its decision by failing to consider whether the DA and ID CCM of the Core CCR, approved by ACER in Decision No 02/2019, complied with the

² OJ C 326, 26.10.2012, p. 47.

³ OJ L 158, 14.6.2019, p. 22.

⁴ OJ L 158, 14.6.2019, p. 54.

requirements of Articles 14 to 16 of the Electricity Regulation.

17. The Defendant also observes that the disputed provisions on the DA and ID CCM of ACER Decision No 02/2019 are, on the one hand, Article 5(5) to (9) of Annex I to ACER Decision No 02/2019 and Article 5(5) to (9) of Annex II to ACER Decision No 02/2019 relating to the selection of critical network elements and contingencies (CNEC) and, on the other hand, Article 10(4) second half sentence and (5) of Annex I to ACER Decision No 02/2019, Article 16(2), second sentence, and Article 16(3)(d)(vii) of Annex I to ACER Decision No 02/2019, and Article 17(3)(d)(vii) of Annex II to ACER Decision No 2/2019 relating to the early consideration of non-costly remedial actions (RA).
18. The Defendant maintains that the GCEU judgment: (i) does not contain any statement declaring ACER Decision No 02/2019 unlawful, (ii) confirms that ACER did not err in law to the extent that ACER Decision No 02/2019 did not consider Articles 14 to 16 of the Electricity Regulation, (iii) finds an error in law that does not affect the merits and legality of ACER Decision No 02/2019, (iv) does not indicate any incompliance of the DA and ID CCM with Articles 14 to 16 of the Electricity Regulation, and (v) justifies the review of ACER Decision No 02/2019 only with regard to those pleas and arguments of the initial appeal relating to Articles 14 to 16 of the Electricity Regulation.
19. According to the Defendant, the GCEU judgment annuls Decision A-003-2019 because the BoA failed to apply Articles 14 to 16 of the Electricity Regulation, applicable at the time of the adoption of Decision A-003-2019. The Defendant considers, however, that the GCEU judgment does not annul the underlying ACER Decision No 02/2019, because Articles 14 to 16 of the Electricity Regulation were neither in force nor applicable at the time of the adoption of ACER Decision No 02/2019. In the Defendant's opinion, this implies that Decision A-003-2019 is vitiated by an error of law due to the failure to apply Articles 14 to 16 of the Electricity Regulation, whereas ACER Decision No 02/2019 is not vitiated by any error of law.
20. Furthermore, the Defendant puts forward that the DA and ID CCM and ACER Decision No 02/2019 comply with the requirements of Articles 14 to 16 of the Electricity Regulation, referring to its Defence of 16 May 2019 in case A-003-2019.
21. The Defendant seeks the following form of order: its main request is that the BoA confirms that the disputed DA and ID CCM and ACER Decision No 02/2019 approving these DA and ID CCM are lawful, in particular also under Articles 14 and 16 of the Electricity Regulation, and that the BoA dismisses the appeal in its entirety. Alternatively, should the BoA not agree with this interpretation, the Defendant requests that the BoA remits ACER Decision No 02/2019 to the competent body of ACER, instructing the latter that ACER Decision No 02/2019 remains in place until a new decision on the DA and ID CCM for the Core CCR has been adopted. In the Defendant's opinion, this instruction is critical for the sake of legal certainty as it avoids a legal gap that could seriously endanger the implementation of the CACM Regulation⁵ in the Core CCR, the continuity of the market integration processes and the secure operation of the system.

⁵ Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, OJ L 197, 25.7.2015, p. 24.

V. Merits of the relaunched Appeal

GCEU judgment

22. The GCEU judgment ruled upon the admissibility and the merits of the Appellant's action.
23. With respect to the admissibility of the Appellant's action, in the GCEU judgment the Court admitted the action against Decision A-003-2019 and expressly rejected the action against the underlying ACER Decision No 02/2019 as inadmissible (paragraphs 16 to 20).
24. With respect to the merits of the Appellant's action, in the GCEU judgment the Court ruled on two of the six pleas put forward by the Appellant (paragraphs 29 and 89) aimed at annulling the following provisions of Decision No 02/2019: (a) Article 5(5) to (9) of its Annex I; (b) Article 10(4) second half sentence, and Article 10(5) of its Annex I; (c) Article 16(2), second sentence, and Article 16(3)(d)(vii) of its Annex I; (d) Article 5(5) to (9) of its Annex II; (e) Article 17(3)(d)(vii) of its Annex II; and (f) all parts and clauses of its Annexes I and II which make explicit reference to the paragraphs and provisions mentioned at points (a) to (e).
25. The GCEU dismissed the first plea of the Appellant's action, alleging an infringement of Article 9(7) and (12) of the CACM Regulation and contending that ACER exceeded the limits of its competence (paragraphs 30 to 62).
26. The GCEU also ruled that the second plea of the Appellant's action was founded. In this second plea, the Appellant alleged that the BoA committed an error of law as regards the determination of the applicable law and should have reviewed the legality of ACER Decision No 02/2019 in light of Articles 14 to 16 of the Electricity Regulation. The GCEU annulled Decision A-003-2019 on the basis of this second plea and considered that it was not necessary to examine the four remaining pleas of the Appellant's application.
27. As stated at paragraph 77 of the GCEU judgment, Articles 14 to 16 of the Electricity Regulation regulate the capacity allocation on the day-ahead and intraday markets for cross-border electricity trade and set out the requirements to be considered when adopting the DA and ID CCM. This statement clarifies that Articles 14 to 16 of the Electricity Regulation are applicable and should be included in the assessment of the Contested Decision.

BoA observations

28. To fulfil its obligation under Article 266 of the TFEU and in order to adopt any measure necessary to comply with the GCEU judgment, the BoA will reassess the Contested Decision in light of Articles 14 to 16 of the Electricity Regulation and the pleas and arguments of the parties as submitted to it in the procedure leading to the adoption of the Annulled Decision.
29. The BoA observes that there is no disagreement between the parties that the GCEU judgment annulled Decision A-003-2019 on the sole ground that the BoA failed to examine whether the DA and ID CCM of the Core CCR, as approved by ACER Decision No 02/2019, complied with the requirements of Articles 14 to 16 of the Electricity Regulation, which was the Regulation in force at the time of the BoA's adoption of

Decision A-003-2019, even though it was not the Regulation in force at the time of ACER's adoption of ACER Decision No 02/2019 (paragraphs 79 and 87 of the GCEU judgment, paragraph 2 of the Appellant's observations and paragraphs 7, 8 and 19 of the Defendant's observations).

30. There is also no disagreement between the parties that the disputed provisions on the DA and ID CCM of ACER Decision No 02/2019 are, on the one hand, Article 5(5) to (9) of Annex I to ACER Decision No 02/2019 and Article 5(5) to (9) of Annex II of ACER Decision No 2/2019 relating to the selection of CNEC and, on the other hand, Article 10(4) second half sentence and (5) of Annex I to ACER Decision No 02/2019, Article 16(2), second sentence, and Article 16(3)(d)(vii) of Annex I to ACER Decision No 2/2019, and Article 17(3)(d)(vii) of Annex II to ACER Decision No 2/2019 relating to the early consideration of non-costly RA (hereinafter "the disputed provisions of ACER Decision No 02/2019").
31. Although the GCEU judgement clarifies that Articles 14 to 16 of the Electricity Regulation are applicable and should be included in the assessment of the Contested Decision, the BoA notes that the GCEU judgment does not include any indication as to how or to which extent the Electricity Regulation is to be taken into account in assessing the Contested Decision.
32. The BoA notes that the disputed provisions of ACER Decision No 02/2019 have been directly appealed by the Appellant before the GCEU in Case T-283/19, *Germany v ACER*, and that the GCEU has decided to stay its proceedings until the BoA adopts the present Decision A-003-2019_R.
33. The BoA also notes that the Appellant's first plea which alleged the infringement of Article 9(7) and (12) of the CACM Regulation, contending that ACER exceeded the limits of its jurisdiction, was rejected by the Court in the GCEU judgment.

VI. Legal Context

34. The Electricity Regulation is part of the Clean Energy Package, which includes 8 different legislative acts, among those the Electricity Regulation and the Electricity Directive⁶. These legislative acts were formally adopted on 22 May 2019, entered into force on the 20th day following the day of their publication in the Official Journal, i.e. on 4 July 2019, and were amended by Regulation (EU) 2022/869⁷.
35. The above-mentioned legal acts introduced stricter and harmonised rules for capacity mechanisms (reconciling the EU objectives of security of supply and emission reduction) and enhanced regional coordination, in order to improve market functioning and competitiveness and foster the internal electricity market. In particular, they strengthened the provisions that allow electricity to move freely to where it is most needed, provided that necessity arises from undistorted price signals and, in so doing, allow consumers to benefit from cross-border competition. They are expected to drive the investments necessary to provide security of supply, whilst decarbonising the European energy

⁶ Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast), OJ L 158, 14.6.2019, p. 125.

⁷ Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022 on guidelines for trans-European energy infrastructure, amending Regulations (EC) No 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) No 347/2013, OJ L 152, 3.6.2022, p.45.

system.

36. The Electricity Regulation, in line with its Recital 4, aims to lay down rules to ensure the functioning of the internal market for electricity; its objectives include the provision of a harmonised framework for cross-border exchanges of electricity and are specified in Article 14 ‘Bidding zone review’, Article 15 ‘Action plans’ and Article 16 ‘General principles on capacity allocation and congestion management’ of Section 1 "Capacity Allocation", Chapter III "Network Access and Congestion Management". Thus, Articles 14 to 16 of the Electricity Regulation regulate the capacity allocation on the day-ahead and intraday markets for cross-border electricity trade and set out the necessary requirements to be considered when adopting the day-ahead capacity calculation methodology (DA) and the intraday capacity calculation methodology (ID CCM).
37. Besides Regulation 714/2009⁸, the CACM Regulation also constitutes an important legal basis for ACER Decision No 02/2019. The CACM Regulation represents an important step to strengthen the legal framework which provides binding rules for the implementation and operation of the EU-wide single market coupling in the day-ahead and intraday timeframes. One key part of the CACM Regulation is the implementation of capacity allocation methodologies, which describe the rules of each capacity calculation region on how to calculate the amount of capacity available for trading between bidding zones at day-ahead and intraday market time frames.

VII. Compliance of ACER Decision No 02/2019 with the Electricity Regulation

38. The BoA heard the parties in their observations on the consequences of the annulment of Decision A-003-2019 by the GCEU judgement.
39. The BoA will re-examine the Contested Decision in light of the pleas and arguments of the parties as submitted to it in the procedure leading to the adoption of the Annulled Decision, but applying the correct legal framework, i.e. the Electricity Regulation. In analysing the Contested Decision, the BoA takes into account the pleadings of the parties and the observations submitted last 27 February 2024.
40. In order to avoid repetitions and burdening the reasoning, the BoA makes reference to the Annulled Decision for indicative purposes only; the reference to the points of the Annulled Decision are to be construed as the BoA's own reasoning, except where expressly stated otherwise.

VIII. The Grounds of Appeal

41. The Appellant argues that the Electricity Regulation contains “procedural and substantive rules on the allocation of internal and cross border capacity for cross border trade, the application of which would be devoid of purpose and futile” due to Article 5 of Annex I and II to the Contested Decision. It argues, in essence, that the Electricity Regulation contains rules on capacity calculation that preclude the Agency from adopting Article 5 of Annex I and II to the Contested Decision which, according to the Appellant, conflict with the new regulation and specifically the new provisions of Articles 14 to 16

⁸ Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ L 211, 14.8.2009, p.15.

of the Electricity Regulation.

42. In more details, the Appellant claims that the Contested Decision infringes EU law in various aspects when establishing the definition of Critical Network Elements and Contingencies in Article 5 of its Annex I and Article 5 of its Annex II.
43. Article 5(8)(c)(i) of Annex I to the Contested Decision may de facto force a Member State to reconfigure its bidding zone, which means that the guiding principles for such reconfiguration under the Articles 14 to 16 of the Electricity Regulation are circumvented. Hence, Article 5 of Annex I to the Contested Decision is contrary to the possible derogations for internal network elements laid down in Article 16(9) of the Electricity Regulation. Also, the limitation of loop flows included in the Contested Decision is contrary to Articles 15(2) and 16(8) of the Electricity Regulation.
44. The Defendant stresses that the GCEU judgment lacks any statements on the compliance of the contested day-ahead and intraday capacity calculation methodologies with Articles 14 to 16 of the Electricity Regulation, and that the GCEU judgement does not lend itself to draw specific conclusions on this compliance, in addition to what has been submitted in case A-003-2019. Therefore, the Defendant confines itself to refer to its submissions on Articles 14 to 16 of the Electricity Regulation, respectively their draft versions available at that time. Essentially, the Defendant maintains that in its Defence of 16 May 2019 in case A-003-2019, ACER has already demonstrated that the contested day-ahead and intraday capacity calculation methodologies and ACER Decision No 02/2019 are effectively in line with the requirements of Articles 14 to 16 of the Electricity Regulation.
45. In particular, the Defendant highlights that in the above-mentioned Defence, it explained in detail (contrary to the Appellant's claims in its appeal) that:
 - (a) the contested provisions on the definition of critical network elements and contingencies under Article 5 of Annexes I and II to the Contested Decision are in line with Articles 14 to 16 of the Electricity Regulation;
 - (b) the contested provisions on the definition of critical network elements and contingencies under Article 5 of Annexes I and II to the Contested Decision are proportionate with respect to system security also under Article 16 of the Electricity Regulation; and
 - (c) the contested provisions on remedial actions in capacity calculation under Articles 10 and 16 of Annex I to the Contested Decision and Article 17 of Annex II to the Contested Decision are in line with Articles 15 and 16 of the Electricity Regulation.

IX. Objectives and general principles of the Electricity Regulation compared to Regulation 714/2009

46. In the Annulled Decision, several references are made to the general principles and goals of Regulation 714/2009 and specifically to point 1.7 of Annex I to Regulation 714/2009 as the legal grounds for the Contested Decision. As Regulation 714/2009 has been replaced by the Electricity Regulation, this legal basis is no longer valid. For this reason, an evaluation of the compliance of the Contested Decision and the Electricity Regulation should, as a first step, include an assessment of the coherence between the general principles of Regulation 714/2009 and the Electricity Regulation. In the next paragraphs, Articles 14 to 16 of the Electricity Regulation will be assessed in detail.

47. The general principles and goals of Regulation 714/2009 are specified in point 1.7 of its Annex I:

“When defining appropriate network areas in and between which congestion management is to apply, TSOs shall be guided by the principles of cost-effectiveness and minimisation of negative impacts on the internal market in electricity. Specifically, TSOs shall not limit interconnection capacity in order to solve congestion inside their own control area, save for the abovementioned reasons and reasons of operational security. If such a situation occurs, this shall be described and transparently presented by the TSOs to all the system users. Such a situation shall be tolerated only until a long-term solution is found. The methodology and projects for achieving the long-term solution shall be described and transparently presented by the TSOs to all the system users (BoA underlines).”

48. The general principles specified in point 1.7 of Annex I to Regulation 714/2009 are also guiding the Electricity Regulation, and this is clearly demonstrated in several recitals, as exemplified below.

Recital 21 of the Electricity Regulation: *“Transmission system operators should be able to deviate from coordinated capacity calculation where its implementation would result in a violation of the operational security limits of network elements in their control area. Those deviations should be carefully monitored and transparently reported to prevent abuse and ensure that the volume of interconnection capacity to be made available to market participants is not limited in order to solve congestion inside a bidding zone. Where an action plan is in place, the action plan should take account of deviations and address their cause.”*

Recital 27 of the Electricity Regulation: *“Uncoordinated curtailments of interconnector capacities increasingly limit the exchange of electricity between Member States and have become a serious obstacle to the development of a functioning internal market for electricity. The maximum level of capacity of interconnectors and the critical network elements should therefore be made available, complying with the safety standards of secure network operation including respecting the security standard for contingencies (N-1)...”*

Recital 29 of the Electricity Regulation: *“It is important to avoid distortion of competition resulting from the differing safety, operational and planning standards used by transmission system operators in Member States. Moreover, there should be transparency for market participants concerning available transfer capacities and the security, planning and operational standards that affect the available transfer capacities.”*

49. The importance of transparency and undistorted price formation are also stressed in Article 3 “Principles regarding the operations of electricity markets” of the Electricity Regulation, as mentioned below:

“(a) prices shall be formed based on demand and supply.

(b) market rules shall encourage free price formation and shall avoid actions which prevent price formation on the basis of demand and supply”.

50. Article 3 clarifies that actions leading to price distortions should be avoided as much as possible and, consequently, national, zonal preventive re-dispatching should be the rule to avoid curative re-dispatching which distorts the price signal.

51. The principle to minimize negative impacts on the internal market in electricity is further supported in Article 7 “Day-ahead and intraday markets” of the Electricity Regulation, as follows:

“2. Day-ahead and intraday markets shall:

(a) be organised in such a way as to be non-discriminatory;

(...)

(g) make no distinction between trades made within a bidding zone and across bidding zones;”.

52. Finally, Article 16(8) of the Electricity Regulation clearly states that TSOs are not allowed to limit the volume of interconnection capacity to be made available to market participants as a means of solving congestion inside their own bidding zone or as a means of managing flows resulting from transactions internal to bidding zones. Article 16(8) of the Electricity Regulation, therefore, preserves the main principle of point 1.7 of Annex I to Regulation 714/2009 and clarifies that this requirement applies also to loop and internal flows (i.e. flows resulting from transactions internal to bidding zones). Moreover, Article 3 clarifies that actions leading to price distortions should be avoided as much as possible and, consequently, national, zonal preventive re-dispatching should be the rule to avoid curative re-dispatching which distorts the price signal.
53. To conclude, the main goals to foster competition, transparency and cost-effectiveness are also prominent in the Electricity Regulation, even if cost-effectiveness is not explicitly mentioned. The ambition to make the maximum level of capacity of interconnectors and the critical network elements available to the market is also unchanged. As far as these main principles are concerned, the Contested Decision is fully in line with the Electricity Regulation. In this regard, the relevant parts of the Contested Decision can be confirmed.

X. Article 14 “Bidding zone review” of the Electricity Regulation

54. In Article 14 “Bidding zone review” of the Electricity Regulation, the main principles guiding the process of bidding zone review are laid down in paragraph (1):

“1. Member States shall take all appropriate measures to address congestions. Bidding zone borders shall be based on long-term, structural congestions in the transmission network. Bidding zones shall not contain such structural congestions unless they have no impact on neighbouring bidding zones, or, as a temporary exemption, their impact on neighbouring bidding zones is mitigated through the use of remedial actions and those structural congestions do not lead to reductions of cross-zonal trading capacity in accordance with the requirements of Article 16. The configuration of bidding zones in the Union shall be designed in such a way as to maximise economic efficiency and to maximise cross-zonal trading opportunities in accordance with Article 16, while maintaining security of supply.”

55. In the remaining paragraphs of Article 14 of the Electricity Regulation, the rules regulating the bidding zone review are specified in detail.
56. According to the Appellant, Article 5(8)(c)(i) of Annexes I to the Contested Decision states that internal network elements may only be taken into account in the capacity calculation, if it is demonstrated that such consideration is economically more efficient

than a reconfiguration of the bidding zone. The Appellant claims that a Member State may de facto be forced to reconfigure its bidding zone by virtue of this rule, which means that the guiding principles for the reconfiguration of the bidding zones under Articles 14 to 16 of the Electricity Regulation are circumvented. The Appellant also clarifies that as long as the minimum capacity of 70% and the annual increase leading to those 70% until 31 December 2025 is complied with by the TSOs of a bidding zone, a bidding zone cannot be reconfigured against the will of the Member State.

57. The Defendant emphasises that the objective and scope of the Contested Decision are not to ensure an optimal configuration of bidding zones. The bidding zone review according to Article 14(3) of the Electricity Regulation has a longer time horizon and a different purpose, which is to consider long-term structural congestion and whether the zones operate efficiently as market areas. Instead, the contested provisions aim to ensure optimal and economically efficient capacity calculation taking into consideration all other alternatives to address congestions on internal network elements. Without considering these alternatives, the Defendant claims that they cannot ensure that the Core capacity calculation will indeed be efficient as required by the CACM Regulation.

Assessment

58. The guiding principle of Article 14(1) of the Electricity Regulation clearly stipulates that the bidding zones shall not contain structural congestions, unless they have no impact on neighbouring bidding zones, or, as a temporary exemption, their impact on neighbouring bidding zones is mitigated through the use of remedial actions and those structural congestions do not lead to reductions of cross-zonal trading capacity in accordance with the requirements of Article 16 of the same Regulation (see paragraph 70 below). However, as the Defendant rightly points out, these provisions focus on long term structural congestion.
59. As stated by the BoA in the Annulled Decision (at paragraph 74), CCMs, depending on their design, constitute a short-term solution to remedy congestion (whilst avoiding that congestion unduly discriminates between internal and cross-border exchanges), whereas the reconfiguration of bidding zones is an alternative solution addressing the same problem in the longer run, similarly to investments in the network infrastructure.
60. It is correct that as long as the minimum capacity of 70% and the annual increase leading to those 70% until 31 December 2025 is complied with by the TSOs of a bidding zone, a bidding zone cannot be reconfigured against the will of the Member State. However, even if the proposed capacity calculation methodology entails disclosing of structural congestion, the claim that the Contested Decision will, in practice, force Member States to review their bidding zones is unproven. Instead, this will rather be the consequence of the Minimum Remaining Available Margin (minRAM) target and the expected costs for remedial action where structural congestion exists within the bidding zone.
61. In line with what the Defendant argues, an analysis whether a bidding zone review could be a more efficient alternative to address congestion in the long-term than considering certain design features of capacity calculation does not amount to a decision on whether and how to implement such a review. Consequently, the guiding principles for the reconfiguration of the bidding zones under Article 14 of the Electricity Regulation are fully respected in the Contested Decision.

XI. Article 15 “Action plans” and Article 16(9) of the Electricity Regulation

62. Article 15 “Action plans” stipulates that Member States might address congestion problems by adopting multinational or national action plans, and possibilities for derogation granted to TSOs by the relevant NRA are also specified in Article 16(9) of the Electricity Regulation. The minimum capacity provided for in Article 16(8) of the same Regulation, i.e. 70 %, shall be reached by 31 December 2025. The objectives of the action plan are summarized in Recital 31 of the Electricity Regulation, while the time frame to reach the minRAM target is laid down in Article 15(2) of the same Regulation, as reproduced below:

Recital 31: “...For Member States which adopt an action plan to address congestion, a phase-in period in the form of a linear trajectory for the opening of interconnectors should apply. At the end of the implementation of such an action plan, Member States should have a possibility to choose whether to opt for a reconfiguration of the bidding zone(s) or whether to opt for addressing remaining congestion through remedial actions for which they bear the costs. In the latter case their bidding zone should not be reconfigured against the will of that Member State, provided that the minimum capacity is reached...”

Article 15(2): “Irrespective of the concrete progress of the action plan, Member States shall ensure that without prejudice to derogations granted under Article 16(9) or deviations under Article 16(3), the cross-zonal trade capacity is increased on an annual basis until the minimum capacity provided for in Article 16(8) is reached. That minimum capacity shall be reached by 31 December 2025”

63. The Appellant claims that the limitation of loop flows included in the Contested Decision is contrary to Articles 15(2) and 16(8) of the Electricity Regulation, given that these provisions grant TSOs the possibility to allow loop flows exceeding 30% of the maximum permissible power in a transitional phase in which they allow for a gradual, linear reduction of loop flows.
64. Furthermore, the Appellant contends that the early consideration of congestion remedial actions of ACER Decision No 02/2019 results in grid-relieving loop flows being reduced to 30% by remedial actions, hindering additional electricity trading (contrary to considering RA at a later stage in the process) and contradicting the requirement that the maximum capacity of the interconnectors and the transmission networks concerning the cross-border flows of electricity be made available to market participants.
65. The Defendant stresses that the Contested Decision does not ignore the fact that Member States may apply the action plan in accordance with Article 15 of the Electricity Regulation or derogations pursuant to Article 16(9) of the same Regulation. In both cases, the threshold of 30% may effectively increase. In such a situation, the level of allowed loop flows may indeed increase on those critical network elements affected by the action plans or derogations. In this regard, Article 10(5) of Annex I to the Contested Decision takes this possibility fully into account as the minimum RAM (Remaining Available Margin) factor pursuant to Article 17(9) of Annex I to the Contested Decision may be decreased below 0.7 in case of derogations or action plans, the effective threshold for loop flows and reliability margin may thus be increased above 30%. This fact is therefore fully taken into account in Article 10(5) of Annex I to the Contested Decision.
66. Moreover, the Defendant points out that the possibility for derogation is not limited to the minimum thresholds established by Article 16(8) of the Electricity Regulation, but apply to the whole Article 16(8), including the first sentence of paragraph (8). As such, it would also include a derogation from the general principle that the “transmission

system operators shall not limit the volume of interconnection capacity to be made available to market participants as a means of solving congestion inside their own bidding zone or as a mean of managing flows resulting from transactions internal to bidding zones.” As this general principle is transposing and complementing the main principle to exclude internal network elements from capacity calculation, the derogations granted by NRAs would be able to allow TSOs temporally to include internal network elements into capacity calculation.

Assessment

67. As stated by the BoA in its Annulled Decision (paragraphs 116 to 118), the Agency’s methodology sets a cap on loop flows resulting from remedial actions to ensure that cross-zonal capacity is not reduced in an attempt to solve internal congestion. A minRAM threshold alone is not sufficient to avoid undue discrimination, because the optimisation of remedial actions without cost could shift internal congestion into cross-border congestion and put an undue burden on TSOs that are not responsible for the initial internal congestion by compelling them to take costly actions to remedy the shifted congestion. However, the Contested Decision only limits loop flows in the positive direction (i.e. burdening loop flows) and not in the negative direction (i.e. relieving loop flows) as claimed by the Appellant.
68. More specifically, Articles 10(5) and 17(9) of Annex I to the Contested Decision duly introduce a transitional phase which allows for a gradual, linear reduction of loop flows in cases of action plans or derogations.
69. It follows from the above that the proposed capacity allocation methodology is fully adaptable to the rules regulating the special provisions included in an action plan according to Article 15 of the Electricity Regulation or a derogation granted to TSOs by the relevant NRA specified in Article 16(9) of the Electricity Regulation. It is also worth noting that when complying with the minRAM of 70 %, the remaining 30 % should not only be allocated to loop flows but also be used for the reliability margins and internal flows on each critical network element. It follows that the Contested Decision is in line with Article 15 of the Electricity Regulation.

XII. Article 16 “General principles of capacity allocation and congestion management” of the Electricity Regulation

70. In Article 16 “General principles of capacity allocation and congestion management” of the Electricity Regulation, the general principles are specified at paragraphs (1) to (7), including the role of Regional Coordination Centres. In Article 16(8) of the same Regulation, the minimum levels of available capacity for cross-zonal trade (the 70% minRAM target) are thereby specified, as reported below:

“Transmission system operators shall not limit the volume of interconnection capacity to be made available to market participants as a means of solving congestion inside their own bidding zone or as a means of managing flows resulting from transactions internal to bidding zones. Without prejudice to the application of the derogations under paragraphs 3 and 9 of this Article and to the application of Article 15(2), this paragraph shall be considered to be complied with where the following minimum levels of available capacity for cross-zonal trade are reached:

- (a) for borders using a coordinated net transmission capacity approach, the minimum*

capacity shall be 70 % of the transmission capacity respecting operational security limits after deduction of contingencies, as determined in accordance with the capacity allocation and congestion management guideline adopted on the basis of Article 18(5) of Regulation (EC) No 714/2009;

(b) for borders using a flow-based approach, the minimum capacity shall be a margin set in the capacity calculation process as available for flows induced by cross-zonal exchange. The margin shall be 70 % of the capacity respecting operational security limits of internal and cross-zonal critical network elements, taking into account contingencies, as determined in accordance with the capacity allocation and congestion management guideline adopted on the basis of Article 18(5) of Regulation (EC) No 714/2009.

The total amount of 30 % can be used for the reliability margins, loop flows and internal flows on each critical network element.”.

71. The rules related to derogation are included in article 16(9) of the Electricity Regulation. The remaining part of Article 16 primarily regulates duties of market participants, financial consequences and cost allocations, which are rules that are not subject of this proceeding.
72. The Appellant claims that differentiating between internal and cross-border network elements infringes Article 16(8) of the Electricity Regulation, as both internal and cross-border critical network elements are to be determined according to Article 16(8) of the Electricity Regulation. Network element that is not taken into account in the capacity calculation is naturally treated in such a way that during capacity calculation, the TSOs must assume that this network element can be utilized without limitation. The correction of this "blind" capacity calculation in the interest of grid stability will have to be remedied with costly redispatch and countertrading. According to the Appellant it would be a blatant violation of the requirements laid down in Articles 16(8)(b) and Article 15(2) of the Electricity Regulation if instead of 70%, 100% and more must now be made available for cross-border trade.
73. According to the Appellant, the CNEC selection methodology based on an efficiency assessment using the power transfer distribution factor (PTDF) leaves many network elements out of the DA and ID CCM, implying that more than 70% of the TSOs' transmission capacity is made available for cross-border trade in the EU and therefore, torpedoing the compromise reached by the EU legislator in the Clean Energy Package.
74. The Appellant further argues that the minRAM of 70% will lead to a huge increase in cross-border trading capacities. This already poses massive challenges for all Member States in terms of grid expansion and redispatch. It also explains why most TSOs have chosen to request derogations under Article 16(9) of the Electricity Regulation or the Member States have opted for an action plan which allows the respective TSOs to annually increase the capacity instead of instantaneously provide 70 % minRAM. Barely any TSO is currently providing 70% minRAM for cross-border trade. The German TSOs currently provide 40,8 % of the capacity in the Core Region, in accordance with the annual increase via the linear trajectory under Article 15(2) of the Electricity Regulation and in accordance with Germany's Action Plan.
75. The Defendant stresses that the Electricity Regulation does not specify what critical network elements are and how they are defined or selected, and therefore, it leaves the competence of this selection to the CACM Regulation and the latter to the capacity

calculation methodologies adopted pursuant to the same Regulation. The intention of this selection process is not to exclude all internal critical network elements from capacity calculation, but to select the critical ones, based on transparent, non-discriminatory and efficiency considerations.

76. The Defendant further explains that internal network elements are not the same as the internal critical network elements. Critical network elements are a subset taken from all network elements, which are then taken into account in capacity calculation. The contested provisions do not set any conditions on internal critical network elements. Instead, the contested provisions set requirements on internal network elements before they are selected as critical. After the internal network elements are selected as critical, only then Article 16(8) of the Electricity Regulation applies to those critical network elements. In this sense, the Contested Decision does not in any way provide different rules for internal critical network elements in comparison with cross zonal critical network elements. In fact, Article 17 of Annex I to the Contested Decision, which provides a minimum RAM consistent with Article 16(8) of the Electricity Regulation, applies fully equally to cross-zonal and internal critical network elements.
77. According to the Defendant, the implementation of the methodologies is also fully in line with the main principles of the Electricity Regulation. It is expected to increase significantly the cross-zonal capacities between the relevant TSOs and Member States and to address the current problems with regard to discrimination between internal and cross-zonal electricity trading. The new methodologies will also significantly increase the transparency and understanding of how TSOs translate the technical capability of the electricity network infrastructure into cross-zonal capacities that market participants can use to trade electricity across Member States' borders.

Assessment

78. The creation of the 70% rule in Article 16(8) of the Electricity Regulation should be regarded as a reflexion of the need to establish an enforceable rule that would motivate a change in TSOs, NRAs and Member States' behaviour. Transmission System Operators are assumed to comply with the requirement in the regulation if at least 70 % of the capacity of critical transmission network infrastructure is made available to the market. The remaining 30% can, for example, be used for transferring power within a zone, handling loop flows and/or providing an operational safety margin. The intention behind the use of an explicit quantitative minimum for cross-zonal capacity availability in combination with the CACM Regulation is to give a clear legal framework, in order to guarantee coordinated measures and transparency. However, the legislation provides little detail on how compliance should be assessed.
79. The lack of details in the Electricity Regulation on how to achieve the 70% minRAM target is supporting the conclusion that the proposed methodology does not go beyond the requirements in the Electricity Regulation, but rather supports a coordinated and transparent implementation and monitoring of the compliance with the rule.
80. The Appellant's observation that most TSOs have chosen to request derogations under Article 16(9) of the Electricity Regulation or the Member States have opted for an action plan which allows the respective TSOs to annually increase the capacity instead of instantaneously provide 70% minRAM is actually supporting the position of the Defendant. BNetzA's concern that the Contested Decision is jeopardizing the compromise found with the Clean Energy Package (the 70 % minRAM) and that the

capacity allocation methodology will lead to a minRAM above 70 % is unproven and seems to be rather far from reality. It follows that the Contested Decision is in line with the Article 16 of the Electricity Regulation.

XIII. Conclusion

81. The legal bases for the Contested Decision are primarily Regulation 714/2009 and the CACM Regulation. However, as stressed by the BoA in its Annulled Decision, the Contested Decision contains references which highlight that the Contested Decision is not only in line with the applicable legal framework, but also with the Clean Energy Package's objectives to improve market functioning and competitiveness and to foster an internal electricity market. The Agency also logically tested the Contested Decision against the proposed recast of Regulation 714/2009.
82. The Contested Decision has to be interpreted in its context, i.e. an EU market consisting of different regions, and it will have a positive impact on the entire Core Region, which includes Germany. Also, the Contested Decision only deals with capacity calculation, which, as set out above, is a short-term solution to remedy internal congestion issues in Germany, irrespective of other solutions in the long term, e.g. a more efficient bidding zone configuration or faster investments in network infrastructure.
83. The general principles of capacity allocation and congestion management and the definition and selection of CNECs cannot be assessed outside of the wider regulatory context, which is aimed at gradually creating an internal electricity market, balancing the short-term advantages and disadvantages of some measures with the long-term advantages and disadvantages of other measures. As stressed in the Annulled Decision by the BoA, in the absence of Article 5 of Annex I and Article 5 of Annex II to the Contested Decision, the zonal model would imply that priority access to the scarce capacity of internal network elements (implied by the congestion on those elements) would be given to internal trade and cross-zonal trade would be limited. This would breach the overarching objectives of the Electricity Regulation to make the maximum level of capacity of interconnectors and the critical network elements available to the market, as provided in Recitals 21, 27 and 29 of the same Regulation.
84. Having re-assessed the pleas and arguments put forward again by the Appellant in light of the Electricity Regulation and having concluded that they are unable to demonstrate that the Contested Decision is vitiated by an error when assessed against the provisions of the Electricity Regulation, the Appeal must be dismissed as unfounded, and the Contested Decision must be confirmed.
85. For the above reasons, the Board of Appeal hereby confirms the Contested Decision.

Done at Ljubljana, 7 July 2023

For the Registry
The Registrar
S. VAONA

For the Board of Appeal
The Chairperson
M. PREK