ACER
European Union Agency for the Cooperation of Energy Regulators

A-004-2022

DECISION

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

of 24 October 2023

Case number:	A-004-2022
Language of the case:	English
Appellant:	*Fingrid Oyj* ("Fingrid" or "the Appellant")
	Represented by: P. WILLIS (Bird & Bird LLP)
Defendant:	*European Union Agency for the Cooperation of Energy Regulators ("*ACER*"* or "the Defendant"*)*
	Represented by: C. ZINGLERSEN and its legal representatives P. GOFFINET and M. SHEHU (Strelia cvba/scrl)
Interveners:	*Energimarknadsinspektionen*
	Represented by: G. MORÉN and J. ROUPE
	Energiavirasto
	Represented by: S. NURMI and M. SALO
	Svenska Kraftnät
	Represented by: L. MEDELIUS-BREDHE
Application for:	Remittal to the competent body of ACER of Decision No 12/2022 of the European Union Agency for the Cooperation of Energy Regulators of 14 September 2022 concerning risk hedging opportunities on the bidding zone borders between Finland and Sweden.
Board composition:	P. EECKHOUT (Rapporteur), K. SARDI (Technical Rapporteur), K. WIDEGREN, 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. Procedural steps relevant for the present decision

1. On 14 September 2022, ACER adopted Decision No 12/2022 of the European Union Agency for the Cooperation of Energy Regulators of 14 September 2022 concerning risk hedging opportunities on the bidding zone borders between Finland and Sweden (hereinafter "the Contested Decision").

2. On 14 November 2022, the Appellant lodged an appeal with the Registry of the Board of Appeal (hereinafter "the Registry") against the Contested Decision, requesting the Board of Appeal to remit the case to the competent body of ACER for a new decision to be adopted.

3. On 25 November 2022, an announcement of appeal was published on ACER´s website[1] and the Notice of Appeal was served on the Defendant.

[1] https://www.acer.europa.eu/sites/default/files/documents/en/The_agency/Organisation/Board_of_Appeal/Annoucements%20of%20Appeal/A-004-2022_Fingrid_v_ACER_Announcement_of_Appeal.pdf

4. On 25 November 2022, the parties were notified of the composition of the Board of Appeal hearing the appeal case.

5. On 8 December 2022, Energimarknadsinspektionen applied for leave to intervene in support of the Defendant.

6. On 9 December 2022, Energiavirasto applied for leave to intervene in support of the Applicant, while Svenska Kraftnät applied for leave to intervene in support of the Defendant.

7. On 16 December 2022, the Defendant submitted a reasoned request for extension of the time limits for the submission of its Defence pursuant to Article 10(1) of the Rules of Organisation and Procedure of the Board of Appeal (hereinafter "the BoA´s Rules of Organisation and Procedure")[2].

8. On 21 December 2022, the Chair of the Board of Appeal granted the Defendant until 13 January 2023 to submit its Defence.

9. On 13 January 2023, ACER submitted its Defence requesting the Board of Appeal to dismiss the appeal.

10. On 24 January 2023, the Registry acknowledged receipt of the Appellant´s request of 20 January 2023 for leave to submit a reply to ACER´s Defence. The Registry communicated to the Appellant that the Chair, acting on behalf of the Board, did not foresee further exchanges of pleadings at this stage and noted that the Appellant had requested an oral hearing where the parties would have the opportunity to make their views known and that the Chair could prescribe procedural measures in accordance with Article 20 of the BoA´s Rules of Organization and Procedure at any point of the proceedings.

11. On 10 February 2023, Energimarknadsinspektionen, Energiavirasto and Svenska Kraftnät were granted leave to intervene (hereinafter "the Interveners").

12. On 20 February 2023, Energimarknadsinspektionen filed a supplementary intervention submission within the deadline set pursuant to the receipt of the copies of procedural documents. On 21 February 2023, Energiavirasto and Svenska Kraftnät filed their respective supplementary intervention submissions within the deadline set pursuant to the receipt of the copies of procedural documents.

13. On 12 April 2023, the parties and the Interveners were summoned to the oral hearing to be held on 5 May 2023 on-line.

14. On 13 April 2023, the Defendant requested the Board of Appeal to reschedule the oral hearing to a different date due to the unavailability of the legal representative leading the work on the Defence.

15. On 17 April 2023, the Registry informed the Appellant of the Defendant´s request to reschedule the oral hearing and proposed the date of 10 May 2023, with which the Appellant expressly agreed on 18 April 2023.

16. On 21 April 2023, the parties were summoned to attend the oral hearing, which had been rescheduled to 10 May 2023.

17. On 21 April 2023, the Interveners were invited to attend the oral hearing of 10 May 2023.

18. On 24 April 2023, the announcement of the hearing was published on ACER's website[3].

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[2] Decision BoA No1-2011 laying down the rules of organisation and procedure of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators, as amended last on 5 October 2019.

[3] Microsoft Word - A-004-2022 - Fingrid v ACER - Announcement on Public Hearing (europa.eu).

19. On 10 May 2023, the oral hearing took place. The oral hearing was conducted on-line.

20. On 22 June 2023, the Appellant filed an application for procedural measures, seeking authorisation to submit observations concerning relevant new facts related to the announcement on 20 June of an agreement between the European Energy Exchange (hereinafter "EEX") and Nasdaq to transfer Nasdaq's power trading and clearing business to EEX, resulting in the withdrawal of Electricity Price Area Differentials (hereinafter "EPAD") from the Nordic market.

21. On 24 July 2023, the Board of Appeal granted the Appellant and the Defendant the opportunity to submit their observations concerning the new facts reported by the Appellant on 22 June 2023.

22. On 31 July 2023, the Defendant filed its observations.

23. On 11 August 2023, the Appellant filed its observations.

24. On 21 August 2023, the Defendant filed an application for procedural measures, seeking authorisation to submit additional observations in reply to the Appellant's submission of 11 August 2023.

25. On 29 August 2023, the Defendant filed additional observations without being granted authorisation by the Chair of the Board of Appeal.

II. Forms of order sought by the Parties

26. In its Notice of Appeal, the Appellant requests the Board of Appeal to remit Article 1 of the Contested Decision to the competent body of ACER in accordance with Article 28(5) of Regulation (EU) 2019/942[4] (hereinafter the "ACER Regulation"), insofar as it rejects Long Term Transmission Rights (hereinafter "LTTRs") as the hedging solution for the Finnish-Swedish border (hereinafter "FI-SE border").

27. The Appellant also requests the Board of Appeal to provide to the competent body of ACER sufficient reasoning as to the correct interpretation of the relevant provisions of Commission Regulation (EU) 2016/1719[5] (hereinafter "the FCA Regulation") to enable it to make a new decision in accordance with Article 28(5) of the ACER Regulation and Article 21(2) of the BoA´s Rules of Organization and Procedure.

28. The Defendant requests the Board of Appeal to dismiss the appeal in its entirety as unfounded.

III. Pleas in law

29. The Appellant contests the Contested Decision insofar as it directs the Appellant, together with the other addressees of the Contested Decision, to make available other hedging products (i.e. products other than LTTRs) as the hedging solution for the FI-SE border, thereby rejecting LTTRs.

30. The Appellant sets out eight pleas on the basis of which it contests the relevant elements of the Contested Decision.

31. In its first plea, the Appellant alleges serious errors of assessment made by ACER in applying Articles 3 and 30(5) of the FCA Regulation, mischaracterising relevant elements of the

[4] 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 Regulators (recast), OJ L 158, 14.6.2019, p. 22.

[5] Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation, OJ L 259, 27.9.2016, p. 42.

Nordic market, incorrectly assessing the operation of LTTRs and EPAD coupling and their ability to satisfy the objectives of the FCA Regulation.

32. In its second plea, the Appellant alleges that ACER exceeded the powers given to it in Regulation (EU) 2019/943 [6] (hereinafter the "Electricity Regulation") and the ACER Regulation and infringed Article 5 of the Treaty on the Functioning of the European Union[7] (hereinafter "TFEU") in applying Articles 3 and 30(5) of the FCA Regulation.

33. In its third plea, the Appellant alleges that ACER infringed Article 9 of the Electricity Regulation and Article 30(5) of the FCA Regulation by dismissing LTTRs, the default option, without compelling reasons.

34. In its fourth plea, the Appellant alleges that ACER infringed Article 40 of Directive (EU) 2019/944[8] (hereinafter "Electricity Directive") and Article 9 of the Electricity Regulation by rejecting LTTRs in favour of a recommended solution (EPAD coupling).

35. In its fifth plea, the Appellant alleges that ACER infringed Article 18 of the TFEU, Article 21 of the Charter of Fundamental Rights of the European Union[9] (hereinafter "Charter of Fundamental Rights") and the principle of equal treatment.

36. In its sixth plea, the Appellant alleges that ACER infringed the principle of proportionality by rejecting LTTRs in favour of a recommended solution (EPAD coupling) which is neither appropriate nor necessary to achieve the goal of creating sufficient cross-zonal risk hedging opportunities in the Finnish bidding zone in the short term.

37. In its seventh plea, the Appellant alleges that ACER infringed Article 6(11) of the ACER Regulation by failing to conduct a proper consultation.

38. In its eighth plea, the Appellant alleges that ACER forced the addressees of the Contested Decision to do the impossible, which infringes EU law.

Additional, including non-solicited, submissions

39. On 22 June 2023, Fingrid filed an application for procedural measures, seeking authorisation to submit observations concerning relevant new facts related to the announcement on 20 June 2023 of an agreement between EEX and Nasdaq to transfer Nasdaq's power trading and clearing business to EEX, resulting in the withdrawal of EPADs from the Nordic market. In particular, Fingrid by relying on a press-release issued by EEX indicating that EPADs would no longer be available from the first half of the year 2024, indicated that there was additional evidence on the shortcomings of EPADs as hedging solution, and therefore, on the need to annul the Contested Decision in so far as ACER committed an error of assessment in rejecting the introduction of LTTRs.

40. On 24 July 2023, the Board of Appeal granted Fingrid and ACER the opportunity to submit their observations concerning the new facts reported by Fingrid on 22 June 2023.

41. On 31 July 2023, ACER filed its observations, remitting to the Board of Appeal the decision.

42. On 11 August 2023, Fingrid filed its observations, whereby it further built on its application for procedural measures indicating the relevance of the additional evidence brought in support of its first plea. The Appellant emphasised that LTTRs, contrary to ACER's

[6] Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast), OJ L 158, 14.6.2019, p. 54.
[7] OJ C 326, 26.10.2012, p. 47.
[8] 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.
[9] OJ C 326, 26.10.2012, p. 391.

assessment in the Contested Decision, are suitable and the preferred solution to increase the cross-zonal hedging opportunities if regulatory intervention is needed. According to the Appellant, the developments brought about in the announcement of 20 June 2023 (e.g. the alleged withdrawal of EPADs and the introduction of zonal futures) indicate that the Contested Decision should be annulled in so far as it rejects LTTRs as the hedging solution for the Finnish-Swedish bidding-zone borders. In fact, the alleged withdrawal of EPADs and the introduction of zonal futures would favour the adoption of LTTRs. In particular, the developments of 20 June 2023:

- would imply that ACER's assessment as regards the distinction between the Nordic and the Continental Europe electricity forward market designs – justifying the rejection of LTTRs – would not be justified. By replacing EPADs with zonal futures, the main product used in the Nordic electricity forward market will be the same as the one in Continental Europe. It would therefore reduce the relevance of distinguishing between the Nordic and the Continental Europe electricity forward markets;
- would show that, similarly to Continental Europe, LTTRs can work in tandem with zonal futures to allow market participants to hedge price risks across bidding zone borders, as foreseen in ACER's preliminary position.

43. On 21 August 2023, ACER filed an application for procedural measures, seeking authorisation to submit observations in response to Fingrid's submission of 11 August 2023, indicating that ACER was not enabled to submit observations on the new facts reported by Fingrid on 22 June 2023, but rather on the opportunity to grant procedural measures.

44. On 29 August 2023, ACER filed additional observations while its request of 21 August was still pending before the Chair of the Board of Appeal. In its additional observations, ACER indicated that:

- EEX was heard in the course of the public consultation held by ACER on 1st June 2022, in the course of the process that led to the adoption of the Contested Decision. In the consultation, EEX opposed EPADs or similar market coupling solution with contract for differences ('CfDs');
- there is empirical evidence (i.e. Report from the Swedish TSO, Svenska Kraftnat) that EPAD coupling delivers results in coupling different bidding zones (i.e. price convergence at the different EPADs contracts – SE2, SE3, SE4 – and increase in the volume of EPADs contracts exchanged – SE2, SE3, SE4);
- EPAD coupling represents a solution to the structural and systemic undervaluation of cross zonal capacity (hereinafter 'CZC') caused by the explicit auctions of LTTRs;
- EEX proposed launch of zonal futures products i) would take place from the fourth quarter of the year 2023 and ii) is subject to and conditional upon the approval of the acquisition of Nasdaq by the European Commission under the EU Merger Regulation[10]. During the European Commission's review, the announced replacement of EPADs contracts with zonal futures contracts by the first half of 2024 is likely to be subject to the review by the European Commission in light of its competitive effects;
- the fact that EEX will replace EPAD contracts by zonal future products is not an assumption that will be the most likely at the time of the adoption of the decision by the Board of Appeal;
- considering the new fact could violate the obligation of the Board of Appeal to safeguard fair and undistorted competition in the market;

[10] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1.

- the allegedly new developments would not invalidate ACER's assessment and conclusions in the Contested Decision.

ACER therefore maintained its request to dismiss the appeal and invited the Board of Appeal to dismiss as unfunded the legal consequences attached to the facts as raised by Fingrid in its application of 22 June 2023 and further developed in its observations of 11 August 2023.

45. On 13 September 2023, Fingrid submitted spontaneous observations requesting the Chair of the Board of Appeal to reject ACER's application for procedural measures of 21 August 2023 as a) it attempts to circumvent a prescribed time-limit; b) it intends to correct a defect in ACER's pleadings; and c) it would breach the principle of equality of arms. Fingrid also requested the possibility to submit observations on ACER's observations of 29 August 2023 in case of acceptance of ACER's application for procedural measures.

46. On 15 September 2023, ACER submitted a letter to the attention of the Chair of the Board of Appeal following Fingrid's observations of 13 September on ACER's application for procedural measures of 21 August 2023, replying to the submissions of 13 September 2023 by Fingrid, and eventually reiterating its request of 21 August 2023 to be granted the possibility to make written observations on the Appellant's observations of 11 August 2023 and, therefore, to accept ACER's written submissions of 29 August 2023.

IV. The first plea

Arguments of the Parties

47. The Appellant contends that the Contested Decision is fundamentally flawed by serious errors of assessment made by ACER in applying Articles 3 and 30(5) of the FCA Regulation, as follows:

- first, ACER mischaracterised (i) the Nordic electricity markets, (ii) the Nordic system price and (iii) the liquidity of the market, laying the ground for even more serious errors with respect to the effect of LTTRs and EPADs;
- second, ACER overstated significantly the adverse effect of LTTRs on the market, it overstated the positive effect of EPAD coupling and failed to present and assess correctly the many complexities, uncertainties and deficiencies of EPAD coupling, in particular as regards (i) solving supply/demand asymmetry; (ii) further reducing liquidity and (iii) increasing the complexity of hedging in the Nordic region;
- third, ACER has erroneously assessed possible EPAD-based solutions, in particular as regards (i) the risk of tipping, especially in view of the observations by two large associations (Finnish Energy and the Association of Energy Users in Finland); (ii) a market maker function; (iii) cross-zonal coupling of EPAD; and (iv) EPAD coupling; the Appellant argues also that ACER "failed to carry out a holistic and comprehensive review of all academic and empirical evidence presented, before making the decision against the introduction of LTTRs", as observed by the expert report of Oxera Consulting LLP (hereinafter "OXERA"), based on a review of the literature, consultation responses and experience in other markets;

  and

- fourth, the Contested Decision is based on a large number of manifest errors of assessment with respect to the assessment of the objectives set out in Article 3 of the FCA Regulation, in particular:
  - Article 3(a) of the FCA Regulation – Promoting effective long-term cross-zonal trade with long-term cross-zonal hedging opportunities for market participants;

- Article 3(b) of the FCA Regulation – Optimising the calculation and allocation of long-term cross-zonal capacity;
- Article 3(c) and (d) of the FCA Regulation – Providing non-discriminatory access to long-term cross-zonal capacity and ensuring fair and non-discriminatory treatment of TSOs, ACER, regulatory authorities and market participants;
- Article 3(e) of the FCA Regulation – Respecting the need for a fair and orderly forward capacity allocation and orderly price formation;
- Article 3(f) of the FCA Regulation – Ensuring and enhancing the transparency and reliability of information on forward capacity allocation; and
- Article 3(g) of the FCA Regulation – Contributing to the efficient long-term operation and development of the electricity transmission system and electricity sector in the Union.

48. Consequently, the Appellant considers that ACER´s comparison between LTTRs and EPAD coupling, on which it based the Contested Decision, is flawed when assessing (i) the asymmetry in supply and demand; (ii) the impact on liquidity of EPAD products; (iii) the liquidity of Nordic system price products; (iv) market transparency; (v) TSO costs and network tariffs; (vi) the level playing field for market participants; (vii) the implementation timeline; and (viii) the overall effects of the Contested Decision.

49. In its Defence, the Defendant considers that it did not commit errors of assessment in applying Articles 3 and 30(5) of the FCA Regulation:

- first, the Defendant claims that its description of the Nordic markets is correct and appropriate because (i) it correctly assessed the differences between the Nordic and Continental European markets; (ii) its conclusions on the Nordic system price are correct; and (iii) its assessment of liquidity is correct;
- second, according to the Defendant, the Defendant has correctly and appropriately assessed the impact of the different types of LTTRs on the markets of the SE-FI bidding zone borders, in particular as regards (i) increasing hedging opportunities; (ii) further reducing liquidity and (iii) increasing the complexity of hedging in the Nordic region;
- third, according to the Defendant, the Defendant has correctly and appropriately assessed the impact of EPAD coupling on the markets of the SE-FI bidding zone borders, in particular because (i) the Appellant´s claims on EPAD coupling related to the consultation are unfounded; and (ii) the Defendant did not commit errors when assessing EPAD coupling; and
- fourth, the Contested Decision fulfils the objectives of Article 3(a) to (g) of the FCA Regulation.

50. In the Defendant´s view, its comparison between LTTRs and EPAD coupling is correct and appropriate when assessing (i) the asymmetry in supply and demand; (ii) the impact on liquidity of EPAD products; (iii) the liquidity of Nordic system price products; (iv) market transparency; (v) TSO costs and network tariffs; (vi) the level playing field for market participants; (vii) the implementation timeline; and (viii) the overall effects of the Contested Decision.

51. Energiavirasto (also referred to as the 'Finnish NRA') states in its intervention that ACER has made multiple serious errors of assessment in applying Articles 3 and 30(5) of the FCA Regulation by mischaracterising relevant elements of the Nordic market, incorrectly assessing the operation of LTTRs and EPAD coupling and their ability to satisfy the objectives of the FCA Regulation. The Finnish NRA agrees with the Appellant that LTTRs are the default option in the applicable regulation. In addition, it considers ACER´s analysis

insufficient from a quantitative and qualitative perspective.

52. Energimarknadsinspektionen (also referred to as the 'Swedish NRA') and Swedish TSO Svenska Kraftnät, by contrast, consider in their respective interventions that the FCA Regulation contains two options and that none of the options prevails over the other.

ACER's assessment of the (i) the Nordic electricity markets, (ii) the Nordic system price and (iii) the liquidity of the market, laying the ground for even more serious errors in respect of the effect of LTTRs and EPADs

Arguments of the Parties and Assessment

53. The Nordic and Baltic areas are divided into several bidding zones (BZ) with Finland and Sweden comprising one and four bidding zones respectively. The Swedish bidding zones SE1 and SE3 are interconnected to Finland and Norway. SE2 is interconnected to Norway and SE4 is connected to Latvia and central Europe (Poland, Germany and Denmark). Bidding zones can have a balance, deficit or surplus of electricity. In Finland, there is often a demand/supply imbalance with electricity imported from SE1 and SE3. Price differences between SE bidding zones and Finland can be substantial.

54. Market participants (such as energy suppliers or industrial customers) use the Nordic system price products (hereinafter "SYS") and the EPAD products in the forward market to build a hedge against the fluctuations of their respective bidding zones day-ahead prices. The SYS is an index reflecting the Nordic day-ahead (DA) market for electricity and represents an unconstrained market clearing reference price for the Nordic region. This means that for the calculation of SYS, it is assumed that all Nordic countries comprise a single bidding zone and there are no capacity constraints. If the flow of power between bidding areas is within the capacity limits set by the transmission system operators, prices in these different bidding zones will be identical to SYS, but this is often not the case. A bidding zone-specific contract for difference, that is an EPAD product, is used to hedge against the basis price risk, i.e., the risk of a difference between the price in a particular bidding zone and the SYS. The Finnish EPAD is the so called SYHEL, while in Sweden there are SYLUL and SYSTO (for SE1 and SE3 respectively).

55. Section 6.2 of the Contested Decision sets out the Defendant's assessment of the Nordic markets. The Defendant recognises that the Nordic market is a multi-zone hub with the Nordic system price being a financial product used in the forward Nordic market. Participants use EPAD products to hedge the bidding zone price to SYS, the hub price. In Continental Europe, forward markets have been developed under a different logic, as single-zone hubs. They rely on a set of hedging contracts for each bidding zone, linked to the day-ahead bidding zone clearing price. Under this second market design, market participants in each bidding zone may hedge their exposure to risk by a hedging contract of a neighbouring bidding zone. This is sufficient if prices in the two zones are highly correlated. In the absence of a high correlation, LTTRs act as an additional hedging tool to cover the price difference between the two zones.

56. The Appellant argues that the Defendant incorrectly assesses differences between the Nordic and Continental European markets and that the Defendant's reference to hedging in Nordic markets being done on the basis of a hub is irrelevant and misleading. However, the Defendant's analysis of the functioning of the forward Nordic markets is neither irrelevant nor misleading. The Nordic market is indeed a multi-zone hub, and this is acknowledged besides the Defendant also by the Appellant and the Interveners (paragraph 82(b) of the Appeal). Further, the EU electricity forward market design is indeed not harmonised in terms of standard products used; with hub-based products in the Nordics and Italy and LTTRs in the remaining Continental Europe. As further recognised in Recital (71) of the Contested

Decision, but omitted by the Appellant in its Appeal, "*...specific characteristics of the Nordic forward electricity market must be appropriately considered when assessing the expected overall impact of any planned regulatory measures on hedging opportunities in the concerned bidding zones*." This is in line with one of the objectives laid down under Article 1(c) of the Electricity Regulation, which requires *"...taking into account the particular characteristics of national and regional markets*" as regulatory measures can have a different impact depending on the characteristics of the market. The Defendant's conclusion, at Recital (72) of the Contested Decision, is only that *"[T]o allow the consideration of regional specificities such as the Nordic electricity forward market, which is not well compatible with the zone-to-zone characteristics of LTTRs, the FCA Regulation explicitly allows to consider other solutions to address insufficient hedging opportunities, i.e. such as requesting the TSOs to 'make sure that long-term cross zonal hedging products are made available to support the functioning of the wholesale electricity markets', pursuant to Article 30(5)(b) of the FCA Regulation*".

57. The Appellant bases its arguments on the compatibility of LTTRs with the Nordic regional market design also on the fact that LTTRs are used in Denmark and are being introduced on the FI-EE bidding zone border. However, LTTRs of the Danish bidding zones concern connections with Continental European Markets (*i.e.*, the German and the Dutch bidding zones). Regarding the FI-EE border, as confirmed by the Finnish NRA[11], there is almost no liquidity at all in Estonia. Moreover, the consumption of electricity in the Estonian bidding zone (8,7 TWh in 2018) represents only10% of the consumption in the Finnish bidding zone (87,4 TWh)[12].

58. The Appellant also argues that by rejecting LTTRs, ACER is in essence limiting the opportunity for effective cross-border risk hedging in the long-term timeframe between the Finnish and Swedish bidding zones and presupposes that hedging in the Nordic markets should continue to be via a hub despite identified inefficiencies. The Board of Appeal agrees with ACER that the Agency does not limit opportunities for effective cross-border risk hedging in the long-term timeframe between the Finnish and Swedish bidding zones. One of the long-term cross-zonal hedging products (other than LTTRs) considered under Article 30(5)(b) of the FCA Regulation, namely the EPAD coupling, implies an implicit allocation of CZC between Finland and Sweden. Allocating CZC in EPAD auctions allows matching of bids and offers of different bidding zones addressing directly and more efficiently the demand/supply asymmetry among the participating bidding zones compared to a case with explicit allocation (i.e., LTTRs) for the following reasons: by using long term (LT) CZC, the prices of the EPAD products of the different bidding zones will converge depending on the direction of the asymmetry; and the more LT CZC is available, the more prices will converge (paragraph 40 of the Defence). The greater convergence of prices (and the better solving of the asymmetry) in case more CZC are available for EPAD (implicit) coupling is illustrated in the numerical example provided by the Defendant in paragraphs 34-43 of the Defence leading to a new, lower, clearing price. The asymmetry between the participating bidding zones of Finland and Sweden is only indirectly/less efficiently addressed by explicit allocation (i.e., LTTRs).

59. The Appellant further argues that Recital (70) of the Contested Decision manifests ACER's misunderstanding of the purpose of measures adopted by Article 30 of the FCA Regulation and specifically paragraph (5) stating "*[I]n case the assessment referred to in paragraph 3 shows that there are insufficient hedging opportunities in one or more bidding zones, the*

[11] Analysis of Electricity Forward Market Hedging Opportunities in Finnish, Estonian, Latvian and Lithuanian Bidding Zones´ Borders (the 'Finnish Assessment'), p. 18, Annex 3. The Finnish NRA attached this assessment as a supporting document to its referral letter, submitted by email on 11 March 2022.

[12] ENTSO-E, Statistical factsheet 2018, provisional values as of 5 June 2019, p. 2, Annex 5 to the material submitted by the Defendant.

competent regulatory authorities shall request the relevant TSOs: (a) to issue long-term transmission rights; or (b) to make sure that other long-term cross-zonal hedging products are made available to support the functioning of wholesale electricity markets." The Appellant interprets ACER's statement that "*[I]n Continental Europe, LTTRs can be used by market participants in smaller bidding zones to get access to the most liquid forward market of the region (e.g. forward products for delivery in the German bidding zone). This cannot be achieved by LTTRs in the Nordic region, since the most liquid forward market product in the Nordic Market (i.e. the Nordic system price products) does not relate to a single bidding zone and hence, no access is possible with a zone-to-zone product*" as an acknowledgement that as there is no adequate zonal price hedging in the Nordic markets none should be introduced. However, ACER's argument is not that no zonal price hedging should be introduced in the Nordic markets. ACER's conclusion, at Recital (72), is only that *"[T]o allow the consideration of regional specificities such as the Nordic electricity forward market, which is not well compatible with the zone-to-zone characteristics of LTTRs, the FCA Regulation explicitly allows to consider other solutions to address insufficient hedging opportunities, i.e. such as requesting the TSOs to 'make sure that long-term cross zonal hedging products are made available to support the functioning of the wholesale electricity markets', pursuant to Article 30(5)(b) of the FCA Regulation*".

60. The Appellant points out what in its view are further incorrect conclusions on the Nordic system price drawn by the Defendant, namely that: (a) as the Nordic system price is not regulated and EPAD are standard products relying on published day-ahead system prices, they could be offered by any European power exchange offering futures; (b) the Nordic system price does not take congestion into account; (c) EPAD would still be needed to hedge the basis prices risk even where the functioning of the Nordic system price would improve. Points (a), (b) and (c) are addressed below.

(i) On point (a) above, the Appellant stresses that the SYS is a proprietary tool of Nord Pool so that any solution based on EPADs would only perpetuate Nord Pool's monopoly. However, the Appellant is erroneous in referring to Nord Pool's monopoly. Nord Pool has only developed a methodology on which the price of the SYS products is calculated and for which it has been recognized as an administrator under the EU Benchmark Regulation.[13] Nord Pool has no monopoly on the trade of forward products such as the SYS or EPAD which are actually not offered via Nord Pool. They are offered via the exchanges Nasdaq (SYS+EPAD products) and EEX (SYS products) and are/can be offered via any broker, over the counter ('OTC') or could also be offered via any other exchange that would like to do so. In other words, there is *de facto* no monopoly on trading these products.

The Board of Appeal agrees with the Defendant's observation (paragraph 63 of the Defence) that the fact that the solution considered by ACER relies on the current market design based on a combination of the SYS and EPAD products, as prevailing in the Nordic markets, is not an error in itself. On the contrary, in its description of the Nordic markets, ACER considered that (a) no alternatives to the SYS have emerged and that (b) regardless of possible improvements to the SYS, EPADs would still be needed to hedge the basis price risk in most of the bidding zones under the Nordic system price.

[13] Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014, OJ L 171, 29.6.2016, p. 1 ("the EU Benchmark Regulation"). The Nordic system price (SYS), which is calculated and published by Nord Pool European Market Coupling Operator AS (EMCO), is considered a benchmark under the EU Benchmark Regulation, which came into force in Norway in December 2019. Nord Pool EMCO has been approved by the Financial Supervisory Authority of Norway, Finanstilsynet, to become an administrator of benchmarks under the EU Benchmark Regulation. An Oversight Function has been established by Nord Pool EMCO to ensure oversight of all aspects of the provision of the Nordic system price.

Hence, at Recital (75) of the Contested Decision, ACER reasonably concludes: *"..[T]herefore, amending the Nordic system price methodology cannot, on its own, improve hedging opportunities in a given bidding zone without increasing the need for EPADs in other bidding zones..*".

(ii) With respect to point (b), the Appellant argues that the weak correlation between SYS and the zonal prices means that any product based on SYS would always be less effective than a solution directly hedging the zonal price risk. However, the Appellant fails to recognize the impact of implicit allocation offered by the EPAD coupling solution versus the explicit allocation offered by LLTRs and fails to demonstrate why in the particular Nordic market design LTTRs would be proven to be a more effective solution.

(iii) Similarly, in point (c) the Appellant points out that as LTTRs allow for a direct hedge between zonal prices, they can provide a more efficient route with less complexity (paragraph 84-87 of the Appeal) and improve hedging opportunities not only in Finland but also in the Baltics, as through LTTRs Baltic market participants would gain access to the Swedish bidding zone. The Appellant, however, does not demonstrate why a correlation between the prices resulting from a solution directly hedging the zonal price risk with the assistance of LTTRs and bidding zone prices would be higher than a correlation between the sum of the prices resulting from a solution based on a combination of the SYS product and a coupled EPAD product and the zonal prices. In this respect, it is important to note that Fingrid does explicitly limit its reasoning to the prices of the SYS product and, therefore, it omits to make a comparison with the sum of the prices resulting from the combination of the SYS product and a coupled EPAD product.

61. A major concern of both the Appellant and the Defendant is the impact of any chosen hedging solution on the liquidity of the forward market. For example, ACER highlights (Recitals (76)-(79) of the Contested Decision) its concern that the introduction of LTTRs may split liquidity among parallel forward markets. On the other hand, the Appellant points out that in its assessment, ACER only considers possible negative consequences and presents them based on speculation rather than evidence, while ignoring positive consequences. According to the Appellant, ACER acknowledges that SYS products have diminishing liquidity because of their reduced correlation with the Nordic zonal prices and lack of possibilities to hedge the basis price risk (i.e. non-availability of EPADs). Importantly, the Appellant stresses that even if ACER's argument that LTTRs would reduce liquidity by splitting the markets (EPAD market and LTTR market) has a basis, a similar argument holds with ACER's own proposal, as there would be a split in the EPAD market because the EPADs for coupling would be different to the standard EPADs, thus creating a parallel market (paragraph 93 of the Appeal).

62. The Appellant, however, neither establishes that the premises of the reasoning of ACER were wrong, nor demonstrates that the reasoning of ACER in this respect was spurious. On the contrary, the reference by the Appellant to the "recent" precedent of the switch to an alternative hedging solution (i.e., bilateral contracts) in 2016 to avoid the strenuous requirements of financial regulation confirms that the introduction of new products (LTTRs) is likely to decrease the liquidity of the already existing forward market. Otherwise, the Finnish NRA would not have observed a decrease in the liquidity of Finnish forward markets in the period starting in 2016, acknowledging that "*looking at the market data, it could be observed that the positive trend concerning hedging opportunities that took place during the first assessment period during 2012-2016 had seized or turned to slightly deteriorating opportunities during the latter period starting in 2016. Combining this with almost all the numerous consultation responses indicating issues of some sort in the hedging markets, Energiavirasto concluded that the markets could no longer be interpreted to offer sufficient*

hedging opportunities for the market participants".[14]

63. Further, the Appellant makes an incorrect assertion by considering that the EPADs for coupling would be different to the standard EPADs currently available. As ACER noted in its Defence (paragraph 69), the EPAD coupling solution will enable (i) the coupling of the existing standard EPAD products exchanged on the Nordic power exchanges at the occasion of several auctions during which LT CZC is implicitly allocated, and (ii) the continuous trading of EPAD products on the basis of the auctioned EPADs. Moreover, if sufficient LT CZC is available, the volume of EPAD products exchanged during the auctions will increase and/or EPAD price spreads will reduce. This in turn will lead to an increased liquidity of auctioned EPAD products and, by way of consequence, the liquidity of the continuously traded EPAD products, on the basis of the auctioned EPADs.

64. Under the misinterpretation that coupled EPADs are a separate product from standard EPADs in the absence of the coupled solution, the Appellant claims (paragraph 88-96 of the Appeal) that coupled EPADs will increase compliance costs rising from financial regulation (i. e. MiFID II[15], EMIR[16], MIFIR[17]) and this will inevitably have an adverse effect to the forward market development, be discriminatory and essentially in breach of Article 3(d) of FCA Regulation reading: "*This Regulation aims […] (d) ensuring fair and non-discriminatory treatment of TSOs, the Agency, regulatory authorities and market participants*" (paragraph 96 of the Appeal). However, this argument made by the Appellant is incorrect given that market participants have already incurred costs for the implementation of EPADs and, EPAD market coupling will not add any cost to the current situation without market coupling. With respect to small and medium-sized enterprises (hereinafter 'SMEs') which have already switched to bilateral contracts, the Board of Appeal underlines that it is was not apparent and not demonstrated by the Appellant how the market coupling solution would worsen their situation. The Board of Appeal agrees with the Defendant that even if these SMEs continue to hedge on the bilateral (OTC) market segment, better liquidity on power exchanges may still improve their situation, since the more transparent price signals from the liquid exchanges may also lead to better offers on the OTC market (closer to the 'real market price' which is broadly visible at the power exchange).

65. It follows from the above that ACER in its assessment of the Nordic market did not fundamentally mischaracterise (i) the Nordic electricity markets, (ii) the Nordic system price and (iii) the liquidity of the market, laying the ground for even more serious errors in respect of the effect of LTTRs and EPADs. Thus, the claims of the Appellant should be dismissed as unfounded.

ACER is said significantly to overstate the adverse effect of LTTRs on the market, to overstate the positive effect of EPAD coupling and to fail to present and assess correctly the many complexities, uncertainties and deficiencies of EPAD coupling, in particular as regards (i) solving supply/demand asymmetry; (ii) further reducing liquidity and (iii) increasing the complexity of hedging in the Nordic region

Arguments of the Parties and Assessment

66. The Appellant argues that ACER, in its assessment of LTTRs versus EPADs makes a number

[14] Referral letter from the Finnish NRA of 8 March 2022, submitted by email on 11 March 2022 (p. 3 of Annex 4).
[15] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), OJ L 173, 12.6.2014, p. 349.
[16] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201, 27.7.2012, p. 1.
[17] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173, 12.6.2014, p. 84.

of errors as it disregards evidence from a significant number of Finnish market participants who have expressed their preference for LTTRs over EPADs. The Board of Appeal agrees with the statement that ACER made in its Defence (paragraph 74) that the mere fact that *some* Finnish market participants prefer LTTRs does not necessarily amount to economic "evidence". The so-called "evidence" alleged by the Appellant may demonstrate a preference of some market participants, but it is unable to demonstrate any error of assessment allegedly made by ACER.

67. The Appellant further claims that the introduction of LTTRs would place Finnish and Swedish market participants on a level playing field with participants in other bidding zones in the EU internal electricity market leading to harmonisation of products in the forward electricity markets. The Board of Appeal agrees with the Defendant (paragraph 75 of the Defence) that the primary aim of Article 30(5) of the FCA Regulation is not, as such, to harmonise the products being used by market participants across the EU electricity market, but rather to increase the hedging opportunities in the concerned bidding zones through the implementation of appropriate measures. Issuing LTTRs on the FI-SE bidding zones borders would indeed be a solution harmonised with large parts of Europe. However, such a solution may not necessarily provide a level playing field amongst market participants across the EU in terms of access to equally effective hedging opportunities. As explained in the Contested Decision (Recital (88) and (116)), "*some (smaller) market participants would find it difficult to participate in LTTR auctions. Lack of resources may be a barrier, limiting their hedging opportunities to the established hedging products, while bigger market participants would have a wider range of hedging products to use. This may also promote market concentration in the Nordic electricity forward market*". In this respect, as also acknowledged by the Appellant, bilateral trading implies higher transaction costs.

68. The Appellant cautions that the development of alternative measures under Article 30(5)(b) of the FCA Regulation carries a very significant risk that no workable solution is found in a timely manner as measures such as EPAD coupling have not been developed and implemented in practice (paragraphs 98-101 of the Appeal). However, although the EPAD coupling solution was indeed not implemented in practice at the time of the Contested Decision, the methodology is well aligned to the Single Intraday Coupling ('SIDC') and Single Day-Ahead Coupling ('SDAC') electricity market operation. Further, currently an EPAD coupled solution is being implemented between Swedish bidding zones so that practical experience with its implementation is already in place. In particular, during the oral hearing Energimarknadsinspektionen made reference to the recent developments on Svenska Kraftnät's pilot project on auctioning EPADs in Sweden. By September 2022, when ACER adopted the Contested Decision, Svenska Kraftnät was designing a pilot project to auction EPADs between SE2, SE3, and SE4. The first auctions took place on the 7th and 14th of February 2023 and further auctions are already scheduled. This execution shows that an EPAD-based solution is possible and that it already exists in the EU.

69. The Appellant also claims that ACER's statement regarding the absence of a secondary market for LTTRs is incorrect, as Article 44 of FCA Regulation foresees the transfer of LTTRs or their return through the Single Allocation Platform ('SAP') for relocation and although EPADs are traded continuously, this will not be the case for coupled EPADs (paragraphs 99 and 101(c) and (d) of the Appeal). However, the Appellant's claim is erroneous and it stems from previous misinterpretation that the coupled EPADs are different products to the standard EPADs. The proposed EPAD coupling relates to the existing EPAD products traded on a continuous basis, as well as through auctions in the context of the coupling (see also paragraph 63 above). The EPAD coupling, based on an auction procedure, does not change the fact that continuous trading for EPADs will remain in place. Further, the claim of the Appellant regarding the secondary trade or return of the LTTRs to the SAP is only based on the legal possibility provided by the FCA Regulation. Currently, secondary trading is minimal in Continental Europe. Evidence shows that during monthly auctions in

the period between 2019 and 2021, only 2% of the offered capacity stemmed from returned yearly LTTRs[18]. With respect to the transfer of LTTRs, so far, this opportunity has also been rarely used by market participants even though the Joint Allocation Office ('JAO'), the service company operating the SAP. The JAO publishes the list of LTTR holders and offers a notice board where LTTR holders can publish their willingness to transfer LTTRs. The Defendant points out that even if market interest were in place, the JAO cannot facilitate a potentially continuous trading of LTTRs on a secondary market without falling under financial regulation (i. e. MiFID II, EMIR, MIFIR), which would result in additional reporting obligations for both the JAO and market participants. This confirms that, in contrast to the EPAD market, where continuous trading is already in place and provides additional flexibility to participants, experience with LTTRs shows that (a) secondary trading is extremely limited and (b) continuous LTTR trading would be also subject to the requirements of financial regulation (as it is the case with EPADs where, however, market participants have already performed all necessary actions for compliance).

70. The Appellant also notes that a critical part of ACER's assessment is its belief that hedging via LTTRs on SE1-FI and SE3-FI bidding zone borders would shift part of the demand for EPADs from the Finnish to the Swedish bidding zone (Recital (92) of the Contested Decision). In the view of the Appellant, ACER is in error in its claim that LTTRs would decrease hedging opportunities in the Finnish bidding zone. The Appellant argues that LTTRs are expected to shift demand to the Swedish bidding zone only as regards the part of the hedging demand that cannot be serviced in Finland. Given that the interconnection capacity between Sweden and Finland is less than 20% of the Finnish peak demand, there is inadequate cross-zonal capacity to support a greater shift. On the contrary, by matching unserved demand in Finland with excess supply in Sweden, LTTRs are expected to improve cross border trading and hedging opportunities (paragraphs106-108 of the Appeal). ACER already acknowledged this point (Recital (76) of the Contested Decision) and explained that with EPAD coupling, which will also be matching demand, supply and cross zonal capacity, this movement towards the Swedish EPADs would have some positive impact, since one Swedish bidding zone (SE1) has an excess supply of EPADs due to generation surplus. However, beyond addressing an asymmetry in supply and demand, LTTRs may cause a shift of liquidity from Finnish to Swedish EPADs. Therefore, liquidity of the EPAD market in the Finnish bidding zone (for the remaining supply and demand in FI) would likely further deteriorate. As ACER explains at paragraph 87 of its Defence, if there is a demand/supply asymmetry amounting to 10%, while the interconnection capacity between Finland and Sweden represents 20% of the Finnish demand, there would indeed be no negative impact on the Finnish liquidity. However, beyond this asymmetry, *i.e.*, for the remaining 10%, there will be a shift, which will then affect and decrease the liquidity of the Finnish market.

71. ACER builds further on the potential impact of LTTRs on liquidity by reproducing in its Defence, and also in the Contested Decision, Figure 34 from the 2020 ACER Market Monitoring Report 2020 (paragraph 65 of the Defence, Recital (95) of the Contested Decision). The figure shows that the churn factor in forward electricity markets has decreased in the period 2018-2020 as opposed to the period 2016-2017. According to ACER, the shift of liquidity in small bidding zones is linked to the introduction of LTTRs, where the churn factor (or churn rate) represents the number of times electricity generated in a market is subsequently traded. Although the figure per se also shows a decrease in the churn rate in larger bidding zones so that this reduction can be attributed to other reasons including the introduction of financial regulation, the Board of Appeal agrees that LTTRs as a new product outside the core philosophy of the Nordic market design would inevitably foster the development of parallel markets (e.g., the usage of zonal products instead of hub-based products), which would mean a split of market liquidity, decreasing the overall availability

[18] ENTSO-E, EU's Electricity Forward Markets Policy Paper, December 2022, p. 12, Annex 9 of the Defence.

of hedging opportunities.

72. The Appellant raises further claims arguing that ACER makes additional errors in assuming that the introduction of LTTRs would result in a shift of trading from public trading venues to bilateral trading (paragraphs110 and 111 of the Appeal). The Appellant states the obvious i.e., market participants, as rational actors, prefer transparent trading as provided by public venues, unless these lack efficiency and result in excessive costs. The Appellant highlights that excessive costs can be avoided by regulatory intervention, and this is the kind of intervention necessary as opposed to the intervention provided by the Contested Decision which restricts the rights of the market participants to choose their trading arrangements according to their preference. Further, in claiming that LTTRs are an established product and that therefore cannot be considered an innovation, ACER mischaracterises the argument. According to the Appellant, the question is not whether LTTRs should be considered an innovation, but rather whether LTTRs add to the diversity of hedging opportunities (paragraphs112-115 of the Appeal) given that (a) LTTRs do not contain a risk of lock-in of products that no longer fulfil the market participants' hedging needs and (b) the current Nordic products no longer fulfil market participants' hedging needs, so a move towards LTTRs is likely to be a positive development. On these claims, ACER notes that both public trading venues and bilateral trading can generate high costs. The Board of Appeal agrees with the Defendant. As acknowledged by the Appellant itself, on one hand, trading at public venues implies "*excessive costs*", and on the other hand, bilateral trading entails "*higher transaction costs*" (paragraph 111 of the Appeal). The Appellant's argument on the shift to bilateral trading being the result of a rational choice by market participants also does not hold. It is well established and acknowledged by the Defendant (see paragraph 62 above), that the shift to bilateral trading in 2016 was not a result of a rational choice, but rather the impact of the introduction of financial regulation. As regards the innovative nature of LTTRs, ACER merely explained in the Contested Decision that LTTRs are not considered as *innovations coming from the market*, as they are rather targeted regulatory interventions. Therefore, as for any such intervention, all its potential effects should be assessed in light of the pursued objective (Recital (94) of the Contested Decision).

73. The Appellant continues by stating that ACER made an error in conducting its liquidity assessment at bidding zone level, rather than addressing the market as a whole (paragraph 118 of the Appeal). Using the example of small bidding zones in Continental Europe having access to the German bidding zone, the Appellant claims that, similarly, Finnish market participants with LTTRs could also gain access to efficient forward markets across the border in the Swedish bidding zone. ACER acknowledges that access to trading opportunities of the EU market as a whole is a fundamental objective of the European electricity market design. The Defendant stresses, however, that the subject matter of the Contested Decision is limited, pursuant to Article 30(5) of the FCA Regulation, to increasing the hedging opportunities of a specific bidding zone, namely the Finnish one. Importantly, ACER clarifies that the Appellant confuses (i) having alternative hedging products for market participants, with (ii) increasing the liquidity of the bidding zone of those market participants. The Board of Appeal agrees with the Defendant that introducing LTTRs will indeed provide Finnish market participants with more hedging alternatives *in terms of number of products*, but this will come at the expense of the liquidity of the Finnish bidding zone, thereby ultimately resulting in a decrease of *the hedging opportunities* in the Finnish bidding zone, contrary to the requirements of Article 30(5) of the FCA Regulation.

74. The input of market participants in the practical implementation of the alternative hedging opportunities (LTTRs, coupled EPADs) during market consultation has also been a topic of dispute. The Appellant claims that ACER did not explain its proposals for EPAD coupling in its consultation so that respondents are likely to have compared the LTTR-based solution with the current EPAD solution. The Appellant argues that the proposal described in the Contested Decision is significantly more complex than the proposal described in the

consultation (paragraph 121(a) and (b) of the Appeal). The Appellant also refers to the implementation of LTTRs on the Finnish-Estonian bidding zone border between April and October 2022, arguing that empirical evidence does not support ACER's argument that increased complexity of LTTRs is of concern for market participants (paragraph 123 of the Appeal). In the Defence (paragraph 104), the Defendant argues that the consultation question that the Appellant contests was of a more general nature, reading: "*Do you have concerns that issuing LTTRs on the FI-SE1 and FI-SE3 bidding zone borders may make hedging in the Nordics more complex? (single choice: Yes / No / I don't know). Please explain, if needed*". In the consultation "*[o]ut of 43 respondents, 28 of them confirmed that hedging would become more complex following the introduction of LTTRs*". The Board of Appeal can evaluate neither the level of understanding of market participants of the questions raised in the public consultation, nor the level detail of their evaluation before responding to this or other questions. However, the Board of Appeal acknowledges that ACER is correct in stressing that the proposed EPAD coupling solution will not affect the functioning of the current EPAD market from the market participant's perspective, other than calling for their participation in the coupled EPAD auctions. In practice, EPAD coupling does not require market participants to consider any other products or mix of products compared to the current EPAD market.

75. The Appellant, however, continues to argue that ACER makes a serious error of assessment in asserting that LTTRs might not be accessible to small or medium-sized market participants. In the view of the Appellant, since LTTRs do not fall within the scope of the EU financial market rules, collateral requirements are not as onerous as in the case of EPADs and there is no membership fee at the SAP (paragraph 121(c) of the Appeal). However, the consultation conducted by ACER (Recital (102) of the Contested Decision) revealed that a number of Finnish respondents were of the view that LTTRs would increase complexity. Complexity relates to the potential need of smaller market participants to *pay* service providers for participating in LTTR auctions. The Board of Appeal accepts the claim of the Defendant that it cannot be deduced that ACER "[*incorrectly portrayed*] *inaccessibility to small or medium-sized market participants as a feature of LTTRs only*", given that ACER did not make such a statement. Statements made are reproduced from the responses of participants to the consultation so that ACER did not commit an error of assessment in this respect.

76. A final core argument brought forward by the Appellant is that ACER is in error in postulating that LTTRs shall be undervalued, as this is a risk, not inherent to LTTRs, but to all arrangements where market participants take a position on the price of an underlying product long before the actual delivery (paragraph 121(d) of the Appeal). However, the Appellant does not provide support on a similar risk of undervaluation of coupled EPADs and fails to recognise the structural and systematic undervaluation of CZC under an LTTR solution, as also independently confirmed by ENTSO-E Policy Paper "EU's Electricity Forward Markets" of December 2022[19].

77. It follows from the above that ACER (i) did not overstate the adverse effect of LTTRs on the market, (ii) correctly and appropriately assessed the positive effect of EPAD coupling and (iii) did not fail to present and assess correctly the many complexities, uncertainties and deficiencies of EPAD coupling, in particular as regards (a) solving supply/demand

[19] See p. 11 Section 4.2 "The LTTR undervaluation", available at https://eepublicdownloads.blob.core.windows.net/public-cdn-container/clean-documents/Network%20codes%20documents/NC%20FCA/publications/ENTSO-E_Policy_Paper_forward_markets_Final.pdf. In its Policy Paper, ENTSO-E reports that in most borders the price of capacity in long-term markets is generally significantly lower than in day-ahead. This results in a financial swap from TSOs' congestion income (CI) towards winning market participants owning capacity rights. This represents a financial loss for end consumers because in most countries, this gap has to be compensated for by end consumers via their network tariffs.

asymmetry, (b) further reducing liquidity and (c) increasing the complexity of hedging in the Nordic region. Therefore, the claims of the Appellant should be dismissed as unfounded.

ACER's erroneous assessment of possible EPAD-based solutions, in particular as regards (i) the risk of tipping, especially in view of the observations by two large associations (Finnish Energy and the Association of Energy Users in Finland); (ii) a market maker function; (iii) cross-zonal coupling of EPADs; and (iv) EPAD coupling; and

ACER is also said to have "failed to carry out a holistic and comprehensive review of all academic and empirical evidence presented, before making the decision against the introduction of LTTRs", as observed by the expert report of OXERA, based on a review of the literature, consultation responses and experience in other markets.

Arguments of the Parties and Assessment

78. In section 6.4 of the Contested Decision, ACER assesses potential alternatives to LTTRs and concludes that two solutions supporting the existing EPAD market seem viable for providing hedging opportunities on the FI-SE bidding zone borders, namely: TSOs organising cross-zonal coupling of EPADs and TSOs supporting a market maker function in the continuous market for EPADs. The Appellant does not make submissions on the market maker function in this appeal, so this is not considered in the present analysis.

79. According to the Appellant, ACER's preferred solution of EPAD coupling is entirely hypothetical, has never been implemented and details of implementation have not been tested.

(i) In proposing this concept, ACER appears to draw on an analogy between forward market coupling and the single day-ahead coupling (SDAC) and single intraday coupling (SIDC), which also involve cross-border coupling. The Appellant argues that in contrast to SDAC and SIDC, where the products traded on both sides of the bidding zone border are identical (being interchangeable volumes of electricity, measured in MWh), EPAD coupling would involve the matching of different products, in this case the bidding zone specific EPAD contracts – SYHEL in Finland and SYLUL or SYSTO in Sweden (E1 and E3 respectively).

(ii) A market participant in Finland has the specific need to hedge precisely the Finnish zonal price risk and this need cannot be satisfied with the Swedish EPADs that hedge the Swedish zonal price risks. As the market participants' orders for different EPAD contracts cannot be matched directly across the bidding zone border, the market coupling operator itself would end up building a position. For example, if there was an undersupply of SYHEL contracts in the FI bidding zone and an oversupply of SYLUL contracts in the SE1 bidding zone, the market coupling operator would need to sell additional SYHEL contracts in Finland and buy additional SYLUL contracts in SE1 in order to ensure matching of all market participants' requirements. Somehow these actions would need to be coupled (e.g. through the available long-term capacity, which would limit the quantity of EPADs that could be purchased and sold on each side of the border).

(iii) According to the Appellant, this would not be a proper implicit allocation, as seen in SDAC and SIDC, because its efficiency would depend on the excess or deficit of EPAD orders for the relevant bidding zones.

80. On the above points raised by the Appellant, the Board of Appeal agrees with ACER that:

(i) The underlying commodity of an EPAD product is electricity, as it is the case for the SDAC and SIDC.

(ii) An EPAD coupling solution, due to the implicit allocation of CZC, will also allow the

Finnish market participant to move its price exposure to Sweden. Indeed, the EPAD coupling would de facto function in the same way as the SDAC and SIDC, since the Finnish market participant would get a Finnish EPAD which can be provided by a Swedish market participant on the basis of the implicitly allocated CZC.

(iii) The conclusion by the Appellant that "*the market coupling operator itself would end up building a position*" is erroneous and not complete as the overall sum of EPADs' volumes of buy and sell open positions (of TSOs) in all relevant bidding zones should always be equal to 0 in an EPAD coupling, while the TSOs' open positions regarding price spread between the different EPADs would be backed by the TSOs' day-ahead congestion income.

(iv) The success of an implicit allocation mechanism to increase the volume exchanged and/or to reduce the bid-ask spread will always depend on two factors: (i) the volume of CZC available for the implicit allocation, and (ii) the excess or deficit of orders in the relevant bidding zones. This is true for an EPAD coupling solution, as well as for the SDAC and SIDC. Moreover, even if there is no excess or deficit of orders in the relevant bidding zones, a market coupling solution (be it for EPAD products or the SDAC/SIDC) will always move the orders from one bidding zone to the other bidding zone depending on the price.

81. The Appellant also highlights concerns that the TSOs would not receive any long-term income at the time of the EPAD auctions, but only later, as EPAD contracts are settled at delivery. Further, as EPADs are derivatives, they are essentially out of the scope of the FCA Regulation and are not linked to cross zonal capacities and thus mechanisms for firmness and curtailment (Articles 53 and 56 respectively of the FCA Regulation). Such mechanisms, provided by the FCA Regulation, limit the amounts payable by TSOs where interconnector capacities are reduced in force majeure situations, or for operational security reasons. The Appellant concludes that overall EPAD coupling is therefore less efficiently connected to cross-zonal capacity allocation and does not reveal the value of cross-zonal capacity (paragraphs 162-163 of the Appeal). To these claims, ACER responds that "*[N]either the Finnish nor the Swedish TSOs have ever received any income from the allocation of LT CZCs at the relevant BZ borders. The fact that they will have to wait for the settlement at delivery for the first set of coupled EPADs in comparison to the implementation of LTTRs will be of no major impact particularly given their systematic undervaluation*". The Board of Appeal notes the argument of the Defendant and further stresses that the Appellant has failed to provide solid evidence as to why receiving income at EPAD delivery would be detrimental to the TSO, particularly since there is no solid evidence about a similar undervaluation of EPADs as is the case with LTTRs. The Board of Appeal also notes that the Contested Decision does not forbit TSOs to make arrangements concerning the firmness and the curtailment of CZC allocated under an EPAD coupling solution.

82. The Appellant makes further specific reference to a consultancy work commissioned by the Appellant to the company OXERA for an opinion on the Contested Decision. OXERA[20] concludes that from a broader European policy perspective, ACER's decision to reject the introduction of LTTRs in the Nordic markets, notably without elaborated empiric studies or trials, does not align with the European Commission's long-term objective of improving interconnection and decarbonisation and that in this sense, it is also not aligned with the resolution of the European Parliament of 14 March 2019[21] highlighting the need for further integration. The report bases some of its arguments on the findings of a previous report by

[20] Fingrid Oyj v. Acer Decision 12/2022 Fingrid Oyj Notice of Appeal, Annex 13, Expert Report – OXERA and List of Sources.

[21] European Parliament resolution of 14 March 2019 on climate change — a European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy in accordance with the Paris Agreement, OJ C 23, 21.1.2021, p. 116–125.

another consultant, Compass Lexecon, which also includes a comprehensive review of a series of previous studies on the Nordic markets. The latter was commissioned by the Swedish NRA[22] and the Appellant argues that ACER committed an error by not mentioning some elements of its findings with respect to liquidity and the benefits introduced by LTTRs. However, the Appellant and OXERA ignored what is explained in the executive summary and main part of the Compass Lexecon report reading "*[I]f the main policy objective is to improve the hedging possibilities of market participants in Swedish electricity market, we would tend to recommend measures improving the existing EPAD market*[23]" and "*[F]rom the three measures improving the existing hedging market in Sweden, the TSO-auctioned EPADs delivers the highest societal net benefit…The potential benefits of FTR auctions for hedging may come from indirect effects of increased liquidity in other hedging products, such as Nordic system price. However, these benefits are expected to be small*".[24] Thus, the particular report not only does not reinforce the Appellant's position, it also refers to Sweden and not to the Nordic market as a whole or to Finland and Sweden in particular.

83. It follows from the above that ACER did not erroneously assess possible EPAD-based solutions, in particular as regards (i) the risk of tipping, especially in view of the observations by two large associations (Finnish Energy and the Association of Energy Users in Finland); (ii) a market maker function; (iii) cross-zonal coupling of EPADs; and (iv) EPAD coupling. Also, it did not fail to carry out a holistic and comprehensive review of all academic and empirical evidence presented, before making the decision against the introduction of LTTRs. Therefore, the claims of the Appellant should be dismissed as unfounded.

Assessing the options against the objectives of the FCA Regulation

Arguments of the Parties and Assessment

84. Article 3 of the FCA Regulation provides as follows:

"*This Regulation aims at:*

(a) promoting effective long-term cross-zonal trade with long-term cross-zonal hedging opportunities for market participants;

(b) optimising the calculation and allocation of long-term cross-zonal capacity;

(c) providing non-discriminatory access to long-term cross-zonal capacity;

(d) ensuring fair and non-discriminatory treatment of TSOs, the Agency, regulatory authorities and market participants;

(e) respecting the need for a fair and orderly forward capacity allocation and orderly price formation;

(f) ensuring and enhancing the transparency and reliability of information on forward capacity allocation;

(g) contributing to the efficient long-term operation and development of the electricity transmission system and electricity sector in the Union."

85. As regards Article 3(a) of the FCA Regulation, the Appellant argues that the Contested Decision is not compatible with these objectives on the following grounds.

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[22] Measures to Improve Risk Hedging Opportunities on the Electricity Market in Sweden, A report to the Swedish Energy Market Inspectorate, Annex 11 of the Defence.

[23] P. 6 of the Compass Lexecon report.

[24] P.87 of the Compass Lexecon report.

(i) The EPAD coupling solution "*is based on an auction system […] and […] will not initially allow for continuous hedging*" (paragraph 169 of the Appeal). The Board of Appeal has already addressed this issue in paragraphs 62 to 64 and 69 above and finds ACER's conclusion in Recital (108) of the Contested Decision that "*LTTRs would thus put the Finnish market participants using LTTRs in a less advantageous position vis-à-vis the Swedish market participants who address their hedging needs with EPADs*" to be correct, given the absence of LTTR continuous trading.

(ii) The Appellant contends that "*ACER's conclusion that LTTRs would reduce liquidity is not based on the evidence, nor on the responses of stakeholders*" (paragraph 170 of the Appeal). The Board of Appeal has already analysed the claims of both the Appellant and the Defendant in paragraphs 62 to 64 and 67 to 73 above and agrees with the Defendant that the promotion of alternative products, vis-à-vis LTTRs, could cause a parallel market with several illiquid hedging products, instead of at least one sufficiently liquid product which could be continuously traded.

(iii) The Appellant argues that ACER fails to recognise that "*the existing bidding-zone-specific EPAD contracts (eg. SYHEL, SYLUL, and SYSTO) cannot be matched across bidding zone borders*" (paragraph 173 of the Appeal). However, the Appellant does not provide evidence on why existing EPAD products are inadequate given that EPAD coupling is another form of allocation of cross-zonal capacity. The Board of Appeal notes that in Recital (131) of the Contested Decision, ACER is clear that an EPAD contract provides a price hedge across bidding zones, namely between a bidding zone and a hub, and, if combined with another EPAD contract, a price hedge across two bidding zones. EPADs are therefore able to provide a full hedge against a cross-zonal price risk. Naturally, this is the case where available cross zonal capacity exists. In the absence of cross-zonal capacity, neither an LTTR solution nor EPAD coupling can provide sufficient mechanisms.

(iv) The Appellant argues that *"the new products that would need to be defined for EPAD coupling would not add trading volumes to the existing bidding-zone-specific EPADs*" and that "*these new EPADs would therefore also be likely to create parallel markets and to take liquidity from the existing EPADs*" and that *"due to the differences in those products, the secondary market would also not be stimulated*" (paragraph 174 of the Appeal). The Board of Appeal, in paragraph 80 above, has already expressed its disagreement with the view of the Appellant, given the fact that EPAD coupling consists of simultaneously matching standard EPAD products from different bidding zones, made possible by the implicit allocation of LT CZC, and that there is no issue of introducing new products. In the same context, the claim of the Appellant that "*EPAD coupling is based on untested and complex products*" is in error.

(v) The Appellant also contends that the EPAD coupling solution adds to the complexity of the forward market (paragraphs 176-177 of the Appeal) and does not promote harmonisation of the FCA market. The Board of Appeal takes note of the relevant experience gained with the implicit allocation done in the context of the SDAC and SIDC and finds that the Appellant provides no evidence regarding "*expected […] strict governance requirements on the MCO*" that would be imposed by ACER and/or the Commission. As noted in paragraph 67 above, the Board of Appeal shares ACER's view that pursuant to Article 30(5) of the FCA Regulation, the aim is to increase the hedging opportunities in the *concerned* bidding zones (borders) through the implementation of appropriate measures which however may differ from one bidding zone to another.

86. *On Article 3(b) of the FCA Regulation* the Appellant argues that when ACER considers (in Recital (112) of the Contested Decision) that LTTRs do not promote the optimal allocation of long-term cross-zonal capacity because there is a risk of speculative bidders becoming a dominant group and undervaluing LTTRs has no basis. The Appellant also mentions that the

Agency's reference to speculative bidders is unfounded because the consultation was inadequate, and that further ACER exaggerated the responses to support its position. The Appellant concludes that, if LTTRs are indeed considered not to promote the optimal allocation of long-term cross-zonal capacity, then this issue should be addressed, not by ACER, but by the legislator by way of amendment to Article 9 of the Electricity Regulation. Further, it is the view of the Appellant that ACER (in Recital (165) of the Contested Decision) makes a manifest error of assessment in concluding that EPADs "…would reduce the risk of undervaluing cross-zonal capacity or cross-zonal capacity allocated for non-hedging purpose…" and would therefore optimise the allocation of long-term cross-zonal capacity. The Appellant raises again the argument that cross-zonal capacity cannot be implicitly allocated to the existing bidding-zone-specific EPAD contracts because the different EPAD contracts cannot be matched.

87. As noted on several occasions above, the view of the Board of Appeal is that the claim of the Appellant about coupled EPADs being different products to the standard EPADs is erroneous. Further, the risk of speculative bidders undermining the value of LTTRs was indeed brought up by several respondents in the course of the public consultation, while the Appellant has not demonstrated with solid arguments as to why such a claim made by ACER does not hold. Finally, the Board of Appeal agrees with ACER that a proposed modification of the FCA Regulation or Electricity Regulation is out of the scope of the present decision. The Board of Appeal also notes that Article 9(1) of the Electricity Regulation equally allows for transmission system operators to issue long-term transmission rights or to *"have equivalent measures in place to allow for market participants [..] to hedge price risks across bidding zone borders"*. With its proposal (COM(2023) 148 final) of 14 March 2023[25], the Commission has recommended several amendments to the Electricity Regulation, the ACER Regulation, Directive (EU) 2018/2001[26] (hereinafter the "Renewable Energy Directive") and the Electricity Directive, to improve the Union's electricity market design. In the proposal, pending 1st reading in the European Parliament, Article 9 of the Electricity Regulation is replaced by new text providing that *"[B]y 1 December 2024 the ENTSO for Electricity shall submit to ACER, after having consulted ESMA, a proposal for the establishment of regional virtual hubs for the forward market. The proposal shall: [..] maximise the trading opportunities for hedging products referencing the virtual hubs for the forward market as well as for long term transmission rights from bidding zones to virtual hubs".* Thus, the proposed amendment continues to consider LTTRs as one of the possible hedging instruments amongst other that may exist and service the market participants.

88. On Articles 3(c) and (d) of the FCA Regulation, the Appellant assessed both paragraphs, reading *"(c) providing non-discriminatory access to long-term cross-zonal capacity"* and *"(d) ensuring fair and non-discriminatory treatment of TSOs, the Agency, regulatory authorities and market participants"* under the same sub-plea, although the former refers to non-discriminatory access to LT CZC, and the latter relates to non-discriminatory treatment of (inter alia) TSOs and market participants.

89. Once again, the Appellant considers that EPAD coupling would make hedging significantly more complex than LTTRs and that the costs of EPAD coupling would certainly be higher than the costs of LTTRs, because EPAD coupling would be a specific arrangement for the FI-SE borders only, calling inter alia for the development and implementation of the market coupling operator function, algorithm development and implementation, licences and servers, software development, etc. ACER (paragraph 145 of the Defence) acknowledges that LTTRs would indeed provide a cross-zonal hedging product which is harmonised across most of the European Union, thereby providing non-discriminatory access to LT CZC, but it

[25] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0148

[26] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), OJ L 328, 21.12.2018, p. 82.

argues that as highlighted by some stakeholders during the consultation, some market participants may have difficulties participating in LTTR auctions, and that introducing LTTRs may not provide a level playing field between market participants in terms of access to equally effective hedging opportunities.

90. The Board of Appeal has already analysed the input of market participants in the practical implementation of the alternative hedging opportunities on the complexity of LTTRs vs EPADs in paragraph 75 above, and has concluded that the argument of ACER on the potential complexity of LTTR implementation calling for additional resources may indeed be a challenge particularly for SMEs. In parallel, the Appellant provides no evidence as to why this would be otherwise. On the cost issue (coupled EPADs vs LTTRs) the Contested Decision (Recital (141)) already notes: *"higher costs for Fingrid may not necessarily arise. They may be even lower than the costs resulting from the introduction of LTTRs. Costs of establishing and operating the SAP auctioning LTTRs are shared among the relevant TSOs. These costs depend on the number of bidding zone borders with LTTRs administrated by the SAP. Therefore, adding new bidding zone borders with LTTRs to the SAP would result in proportionally higher costs for Fingrid. The costs resulting from the implementation of Article 30(5)(b) of the FCA Regulation is uncertain and subject to a TSO proposal, to be approved by the regulatory authorities, in accordance with Article 30(6) of the FCA Regulation. The eventual cost of the arrangements proposed by the TSO may not be necessarily higher (and may be even lower) than the increasing costs for Fingrid from adding bidding zone borders to the SAP".* The Appellant, although giving a range of expected values (100,000 euros for LTTRs and 500,000 euros for coupled EPADs, paragraphs 193-194 of the Appeal), provides no solid evidence e.g. backed by a cost or financial report, an economic assessment, or any other reliable source in support. In this context, the Appellant also calls for ACER to allow the implementation of LTTRs, as the solution that will be implemented following the Contested Decision "can be expected to be obsolete very soon". However, the Board of Appeal agrees with ACER (paragraph 156 of the Defence) that this is indeed speculative and is also not supported by the proposed amendment of the FCA Regulation, which continues to consider LTTRs as well as any other hedging solution. Further, the recent announcement of EEX about abolishing the EPAD product does not mean that EPADs will be actually abolished from EEX and that they will not be available from other exchanges.

91. The Board of Appeal also agrees with ACER that the Agency did not commit an error by not specifying in the Contested Decision a cost-sharing mechanism and a cost recovery mechanism for the EPAD coupling solution. The EU legislator has expressly conferred the competence for elaborating, approving, and implementing these cost-sharing and cost recovery mechanisms to TSOs and NRAs, pursuant to Article 30(6) and Article 58 of the FCA Regulation. ACER thus acted within the limit of its competence and powers, in line with the principle of conferral and Article 6(10) of the ACER Regulation, and in compliance with Article 30(5) of the FCA Regulation.

92. Further, the Board of Appeal does not consider discriminatory the fact that Finnish market participants will be required to bear the cost of two different solutions (one involving LTTRs, for the FI-EE border, and one involving EPADs, for the FI-SE borders). The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified (judgment of the Court of 15 September 2022, *Brown v Commission and Council*, C-675/20 P, EU:C:2022:686, paragraph 66 and the case-law cited). Under Article 30 of the FCA Regulation, the assessment of insufficient hedging opportunities and the decision on the relevant hedging products to address those insufficient hedging opportunities is done at bidding zone (border) level. The Board of Appeal agrees with ACER that it is entirely possible that, depending on the borders a bidding zone shares with other bidding zones, different hedging products may be provided to market participants to address the different hedging needs, and that in the light of their respective bidding zones borders, Sweden and

Finland do not have the same hedging issues, which in turn explains the difference in terms of hedging solutions implemented in their respective bidding zones.

93. Therefore, the Board of Appeal agrees with the Defendant that the Contested Decision is in line with Article 3(d) of the FCA Regulation; it agrees even more with the argument that the EPAD coupling solution will not change anything for market participants compared to a solution without EPAD market coupling, as it relies on the existing EPAD products.

94. Further, the Appellant does not prove that the implementation of two solutions in Finland will necessarily lead to higher costs for Finnish market participants, compared to the costs paid by the Swedish market participants for the implementation of one solution in Sweden, and merely reiterates its claim regarding the alleged competition issues related to Nasdaq, despite the fact that currently forward products related to the Nordic markets are offered by both Nasdaq (SYS+EPAD products) and EEX (SYS products) and also via any broker, OTC. Following the announcement of NASDAQ and EEX to update the current Nordic power market structure, replacing EPADs with zonal futures contracts, the Board of Appeal notes that this is a modification that goes further than the Contested Decision as (if implemented) it will equally affect the market of Sweden as well as Finland.

95. On Article 3(e) of the FCA Regulation, ACER claims (Recital (174) of the Contested Decision) that it "*sees no indication why EPAD coupling should not ensure a fair and orderly forward capacity allocation and orderly price formation*." The Appellant argues that ACER's proposed EPAD coupling solution would require developing specific allocation procedures which take the differences between EPADs on the one hand and SDAC and LTTRs on the other into account. Essentially, this would mean that the solution will differ significantly from those which are currently being applied or planned at EU level. In fact, because EPAD coupling appears to require two separate auctions (buy/sell), it will involve the market coupling operator taking a position on its own account, and will not take account of firmness and curtailment, meaning that there is a significant risk that the process will not result in orderly price formation.

96. As already commented above and also further substantiated in paragraph 115 of the Defence, the issue concerning the ownership of EPAD products does not exist. Consequently, the alleged risk of disputes in this respect does not exist either. As regards the access to the information related to the EPAD coupling, ACER explained (Recital (176) of the Contested Decision) that this mechanism can be established and operated in a transparent manner based on transparent rules and with the publication of the results of EPAD coupling. The detailed transparency process, being part of the "necessary arrangements" that TSOs are required to develop in accordance with Article 30(6) of the FCA Regulation, are not for ACER to establish, but will rather stem from an agreement between the TSO and the relevant National Regulatory Authority (hereinafter "NRA").

97. On Article 3(f) of the FCA Regulation, ACER accepts that LTTRs meet the requirements of Article 3(f) (Recitals (120) and (121) of the Contested Decision). However, ACER argues that EPAD coupling can also be designed in a way that is consistent with the objective in Article 3(f) (Recitals (175) and (176) of the Contested Decision). The Appellant argues once again that in reaching that conclusion, ACER ignores the fact that EPADs are financial instruments subject to financial regulatory requirements (collateral, risk etc), and subject to supervision by the financial regulatory authorities. However, in its assessment of the two models, ACER did not disregard the implications of the financial regulation for the EPAD-based solution. In fact, EPADs are already under financial regulation so that the coupling solution, as it does not introduce a new product, does not introduce further requirements too.

98. On Article 3(g) of the FCA Regulation, the Appellant argues that LTTRs are subject to significant risks of detrimental effects on the Nordic electricity forward market, which may undermine the effective functioning of this market. Further, the risk of undervaluation would

mean a non-optimised allocation of long-term cross-zonal capacity, leading to a reduction of congestion income of the relevant TSOs and consequently, the lack of resources for needed investments in the network. The Board of Appeal agrees with the arguments brought forward by ACER in its Defence (paragraph 176). The congestion income generated by the EPAD price spread under an EPAD coupling solution can generate additional resources to the TSOs to (i) reduce network tariffs or (ii) invest in the network development. In an EPAD coupling framework, the TSOs will always at least receive the congestion income related to the EPAD coupling, independently of the day-ahead prices. Therefore, the EPAD coupling solution would not reduce the resources required to be used for investments in the network. The situations which may exist when day-ahead congestion revenue is not sufficient to settle EPAD coupling can only occur if the volume of CZC allocated in the LT timeframe is higher than the volume of CZC allocated in day-ahead timeframe. This risk of costs (or gains) from CZC volumes beyond what is allocated in day-ahead timeframe could largely be avoided if TSOs limit the amount of CZC allocated in the LT timeframe to what is calculated in accordance with a long-term capacity calculation methodology pursuant to Article 10 of the FCA Regulation.

99. As regards the Appellant's claim on the costs related to the EPAD coupling, this has been addressed in paragraph 90.

100. The Board of Appeal dismisses further arguments brought forward by the Appellant also in the context of its assessment of Article 3(g) of the FCA Regulation in reference to the harmonisation of the LTTRs solution with other parts in Europe, as those arguments have already been substantively addressed above. In all cases, even if LTTRs are introduced on the FI-SE bidding zone borders, this would not mean a full harmonisation of forward products at EU level since different products will still *remain;* for example, the hub-based hedging products in the Nordic region, and the zonal hedging products in Continental Europe. It is worth noting that, in the proposal for an amendment of Article 9 of the Electricity Regulation, the Commission and the European Parliament continue to consider other hedging mechanisms as alternatives to LTTRs.

101. Finally, the Appellant claims that the EPAD coupling will require more time than the 2 years estimates envisaged by ACER. In this respect, ACER notes that it cannot be held accountable for any delays that would occur from the failure of the concerned TSOs or NRAs to fulfil their legal requirements in due time.

102. It follows from the above that Contested Decision is not based on manifest errors of assessment with respect to the assessment of the objectives set out in Article 3 of the FCA Regulation. Therefore, the Appellant's claims should be dismissed as unfounded.

SEE CORRIGENDUM OF 6 NOVEMBER 2023

V. The second plea

Arguments of the Parties

103. The Appellant alleges that ACER infringes the principle of conferral of powers as laid down in Article 5 of the TFEU. In the Appellant´s view, ACER´s decision that the Appellant, Kraftnät Åland and intervener Svenska Kraftnät, shall, without compelling reasons, "*make sure that other long-term cross-zonal hedging products are made available to support the functioning of wholesale electricity markets*", in circumstances where a request to issue LTTRs would have been consistent with the objectives of Article 3 of the FCA Regulation, an implementing act taken by the European Commission on the basis of Article 59(1)(b) of the Electricity Regulation, goes beyond the limits of ACER´s conferred powers.

104. The Appellant adds that, by adopting a decision which is not in accordance with the objectives of Article 3 of the FCA Regulation and on the basis of the textual, contextual and teleological interpretation of Article 6(10)(b) of the ACER Regulation, ACER goes beyond

the limits of its conferred powers. The Appellant invokes Joined Cases T-261/13 and T-86/14 (judgment of the General Court of 23 September 2015*, Kingdom of the Netherlands v European Commission,* T-261/13 and T-86/14, EU:T:2015:671) by analogy to affirm that the Commission cannot delegate powers to ACER that go beyond the limits of the Commission´s own powers. It also invokes Joined Cases T-684/19 and T-704/19 (judgment of the General Court of 16 March 2022, *MEKH v ACER*, T-684/19 and T-704/19, EU:T:2022:138, paragraph 101) and Case C-17/03 (judgment of the Court of 7 June 2005, *Vereniging voor Energie, Milieu en Water and Others v Directeur van de Dienst uitvoering en toezicht energie*, C-17/03, EU:C:2005:362, paragraph 41) to assert that provisions of EU law need to be interpreted considering their wording, context and objectives.

105. The Defendant responds that ACER neither exceeded the scope of its powers nor breached the principle of conferral under Article 5 of the Treaty on European Union[27] (hereinafter 'TEU') because ACER adopted the Contested Decision following the joint request of the Swedish and Finnish NRAs to adopt a decision in accordance with Article 30(5) of the FCA Regulation, on the basis of Article 6(10), first subparagraph, point (b) and second subparagraph, point (b) of the ACER Regulation. In the Defendant´s view, these legal provisions confer an express competence on ACER to adopt the Contested Decision and this has been confirmed by the General Court in Case T-631/19 (judgment of the Court of 7 September 2022, *BNetzA v ACER, T-631/19,* EU:T:2022:509, paragraphs 38-62).

106. The Finnish NRA states in its intervention that ACER exceeded the powers given to it by the Electricity Regulation and the ACER Regulation and infringed Article 5 of the TFEU. It adds that ACER misused its powers by failing to give proper grounds for its decision to disregard LTTRs, which it considers *"the standard model, already known, implementable solution and is already in place in one other Finnish bidding zone borders".*

Assessment

107. The Appellant erroneously invokes Article 5 of the TFEU, whereas the principal of conferral is embedded in Article 5(1) and (2) of the TEU. Article 5(1) and (2) of the TEU reads as follows: *"1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States*."

108. The Board of Appeal refers to its earlier decisions A-001-2021, A-007-2021, A-011-2021 and A-013- 2021 as to the interpretation of that principle.

109. The principle of conferral set out in Article 5(1) and (2) of the TEU is a fundamental principle of EU law, according to which the EU acts only within the limits of the competences that EU Member States have conferred upon it in the Treaties. These competences are defined in Articles 2 to 6 of the TFEU.

110. Under the principle of conferral, energy is a shared competence (Article 4 of the TFEU): the European Union (hereinafter "EU") and EU Member States are able to legislate and adopt legally binding acts. EU Member States exercise their own energy competence where the EU does not exercise it, or has decided not to exercise its own competence on the matter. ACER´s competences are shared competences within the meaning of Article 4 of the TFEU. When exercising these EU competences, it is subject to two fundamental principles laid down in Article 5 of the TEU, namely the principle of proportionality (the content and scope of EU action may not go beyond what is necessary to achieve the objectives of the Treaties) and the

[27] OJ C 326, 26.10.2012, p. 13.

principle of subsidiarity (in the area of its non-exclusive competences, the EU may act only if, and in so far as, the objective of a proposed action cannot be sufficiently achieved by the Member States, but could be better achieved at EU level).

111. ACER exercised its shared competences regarding energy and adopted the Contested Decision on the basis of Article 6(10), first subparagraph, point (b) and second subparagraph, point (b) of the ACER Regulation, which grants ACER the competence to adopt individual decisions on regulatory issues having effects on cross-border trade or cross-border system security which require a joint decision by at least two NRAs, when those NRAs jointly request ACER to adopt a decision. The Finnish and Swedish NRAs, competent for the bidding zone borders between Finland and Sweden (FI-SE1 and FI-SE3), acting as interveners in the present case, informed ACER in March 2022 that they were unable to adopt coordinated decisions under Article 30(5) of the FCA Regulation.

112. Article 6(10) of the ACER Regulation, read in conjunction with Article 30(5) of the FCA Regulation, is the legal basis of the Contested Decision.

113. ACER did not exceed its competence beyond the powers conferred by the ACER Regulation; on the contrary, it exercised the powers that it was under an obligation to exercise in accordance with Article 30(5) of the FCA Regulation and Article 6(10) of the ACER Regulation.

114. The Appellant contends, in essence, that ACER exceeded its competence by excluding LTTRs, contrary to the objectives laid down in Article 3 of the FCA Regulation. However, for the reasons described above in the assessment of the first plea (see paragraphs 85-102), the Board of Appeal has found that the Contested Decision is in conformity with those objectives. It follows that ACER did not exceed its competences and did not violate the principle of conferral.

115. The second plea is therefore unfounded.

VI. The third plea

Arguments of the Parties

116. The Appellant argues that by requesting the Appellant, Kraftnät Åland and intervener Svenska Kraftnät, without compelling reasons, to "*make sure that other long-term cross-zonal hedging products are made available to support the functioning of wholesale electricity markets*", thereby rejecting the default option of LTTRs, ACER has infringed Article 9 of the Electricity Regulation and Article 30(5) of the FCA Regulation.

117. The Appellant submits that, on the basis of a textual and contextual interpretation of Article 9 of the Electricity Regulation and Article 30(5) of the FCA Regulation, LTTRs must be considered the default option. In the Appellant´s view, by naming LTTRs explicitly in Article 9 of the Electricity Regulation, requiring TSOs to *"issue [LTTRs] or have equivalent measures in place",* the legislator made a clear and conscious choice for LTTRs as the default choice, while keeping the door open for equivalent alternatives. It adds that Article 30(5) of the FCA Regulation lists first LTTRs and then it lists alternatives after the LTTRs. It also observes that the FCA Regulation contains a number of provisions related to the design and structure of LTTRs but does not contain provisions on any other measures.

118. The Appellant considers that, given that LTTRs are the default option, ACER could only deviate from that option if there were compelling reasons to do so. However, in the Appellant´s view, the Contested Decision infringes Article 9 of the Electricity Regulation and Article 30(5) of the FCA Regulation, because ACER had no compelling reasons to deviate from the default option or any such reasons invoked by ACER were based on erroneous assumptions, an incorrect understanding of the facts or errors of assessment.

119. The Defendant responds that LTTRs are not the default option under Article 9 of the Electricity Regulation and Article 30(5) of the FCA Regulation; it refers to Article 30(6) of the FCA Regulation, stressing that the word *"or"* does not imply any hierarchical relation between LTTRs and other solutions and sets out that two forward market designs have emerged in the EU. The Defendant adds that, should the Board of Appeal nevertheless consider LTTRs to be a default option, ACER had compelling reasons not to choose LTTRs for the purpose of creating sufficient hedging opportunities on the FI-SE bidding zone borders.

120. The Finnish NRA states in its intervention that ACER infringes Article 9 of the Electricity Regulation and Article 30(5) of the FCA Regulation by dismissing LTTRs, the default option, without compelling reasons. It adds that the Contested Decision should not have stopped at choosing between LTTRs and other options, but it should have actively explained its choice in a clear and detailed manner. In its opinion, the Contested Decision "*leaves TSOs and regulators guessing what an implementable model should and could be"*.

Assessment

121. The Board of Appeal does not find that the legislative framework must be read as establishing LTTRs as the "default" option, and neither that the applicable provisions establish any form of hierarchy between LTTRs and "*other long-term cross-zonal hedging products*" (Article 30(5)(b) of the FCA Regulation).

122. Textually, there is no basis for the Appellant's arguments. Article 9(1) of the Electricity Regulation juxtaposes LTTRs and equivalent measures: "*In accordance with Regulation (EU) 2016/1719, transmission system operators shall issue long-term transmission rights or have equivalent measures in place to allow for market participants, including owners of power-generating facilities using renewable energy sources, to hedge price risks across bidding zone borders…*". Article 30(5) of the FCA Regulation likewise juxtaposes those two options: LTTRs or "*other long-term cross-zonal hedging products*". The fact that LTTRs are mentioned first does not, in and of itself, mean that LTTRs are the default option. The legislative framework does not use the terms "default option", nor any other terms that indicate any order of preference.

123. The fact that the "*other long-term cross-zonal hedging products*" are undefined, in contrast with LTTRs, likewise does not mean that LTTRs are the default option, or that there is an order of preference. All that can be deduced from the text of the above provisions is that the EU legislature did not seek to confine long-term cross-zonal hedging products to LTTRs, which are indeed an established cross-zonal hedging product. In substance, those provisions do not in fact prescribe a binary choice, but leave it to the competent authorities to choose the most appropriate cross-zonal hedging product.

124. A contextual interpretation does not lead to a different conclusion. The Appellant points to the fact that the FCA Regulation contains a number of provisions related to the design and structure of LTTRs (in particular Articles 1 and 31), but nothing on any other measure. However, the fact that the EU legislature sought to further regulate one product, and not others, which were left undefined, does not mean that there is an order of preference. As long as the long-term cross-zonal hedging product meets the objectives of the legislative framework, in particular those set out in Article 3 of the FCA Regulation, it can be chosen in preference over a different product.

125. It follows that the third plea is unfounded.

VII. The fourth plea

Arguments of the Parties

126. The Appellant alleges that, by rejecting LTTRs in favour of a recommended solution (EPAD coupling) that would require the Appellant to carry out tasks other than those required or permitted by Article 40 of the Electricity Directive and Article 9 of the Electricity Regulation, ACER has infringed both the Directive and the Regulation.

127. The Appellant contends that appointing a market coupling operator (hereinafter "MCO") that would organise EPAD coupling and match EPAD orders from different bidding zones and long-term cross-zonal capacities, and appointing a power exchange to collect, clear and settle the orders does not fall within the list of TSO tasks provided in Article 40 of the Electricity Directive or the Electricity Regulation. The Appellant maintains that hedging measures can be put in place without appointing a MCO and a power exchange, e.g. by means of LTTRs or equivalent measures in place without appointing a MCO and power exchange.

128. The Appellant sets out that Article 40(1)(a) to (m) of the Electricity Directive defines the tasks of TSOs relating to the development and operation of the transmission system to ensure a secure, reliable and efficient electricity system. The Appellant adds that these tasks are reflected in Finnish legislation, which allocates them to the Appellant. The Appellant has been granted a network licence by the Finnish NRA and this licence sets out the Appellant´s obligations and functions as the Finnish TSO. In the Appellant´s view, the allocation of new tasks to the Appellant would need an amendment of Finnish legislation and, where necessary, an amendment of the Appellant´s licence.

129. The Defendant responds that the Contested Decision does not impose the appointment of a MCO that would organise EPAD coupling and match EPAD orders from different bidding zones and long-term cross-zonal capacities, and the appointment of a power exchange to collect, clear and settle the orders. The Defendant considers that, according to Article 30(5) of the FCA Regulation, the only legal obligation imposed by ACER on the Finnish and Swedish TSOs in the Contested Decision is *"to ensure that other long-term cross-zonal hedging products are made available to support the functioning of wholesale electricity markets"*. The Defendant adds that the choice of the long-term cross-zonal hedging products is fully left to the competent TSOs and NRAs, in line with Article 30(6) of the FCA Regulation. The Defendant clarifies that it only recommends a solution in paragraph 215 of the Contested Decision, which is not mandatory.

130. The Defendant adds that the Contested Decision is in line with Article 9(1) of the Electricity Regulation, which provides that TSOs shall have *"equivalent measures in place"* for hedging purposes. This requirement corresponds, in its view, with the Contested Decision´s requirement to make sure that other long-term cross-zonal hedging products are made available.

131. In the Defendant´s view, the requirements of Articles 1 and 2 of the Contested Decision based on Article 30(5) and (6) of the FCA Regulation fall within the tasks and responsibilities of TSOs under Article 40(1)(a) and (b) of the Electricity Directive. If the Board of Appeal were to decide that this was not the case, the Defendant considers that the obligation *"to ensure that other long-term cross-zonal hedging products are made available to support the functioning of the wholesale electricity markets"* falls under Article 9(1) of the Electricity Regulation.

Assessment

132. As a starting-point, the Board of Appeal notes that the Contested Decision does not prescribe any particular long-term cross-zonal hedging product, contrary to the Defendant's argument. In its operative part, the Contested Decision merely excludes LTTRs on the grounds that within the context of the Nordic electricity market, LTTRs would not meet the objectives set out in the FCA Regulation. The Contested Decision thereby leaves it to the respective TSOs and NRAs to develop alternative products. In the preamble, which articulates ACER's

reasoning in substantial detail, the Contested Decision merely recommends EPAD coupling. EPAD coupling may require that TSOs appoint a MCO and a power exchange (hereinafter "the disputed acts"), but whether the actual long-term cross-zonal hedging products developed by the respective TSOs and NRAs involve such appointments entirely depends on the TSOs and NRAs' decisions.

133. The Board of Appeal examines the applicable legal provisions against the above-mentioned background.

134. Article 40(1)(a) and (b) of the Electricity Directive reads as follows:

"*1. Each transmission system operator shall be responsible for:*
(a) ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity, operating, maintaining and developing under economic conditions secure, reliable and efficient transmission system with due regard to the environment, in close cooperation with neighbouring transmission system operators and distribution system operators;
(b) ensuring adequate means to meet its obligations;
…".

135. As noted above, the Defendant argues that the disputed acts are covered by those provisions.

136. Article 40(9) of the Electricity Directive states that "*Member States or their designated competent authorities may allow transmission system operators to perform activities other than those provided for in this Directive and in Regulation (EU) 2019/943 where such activities are necessary for the transmission system operators to fulfil their obligations under this Directive or Regulation (EU) 2019/943, provided that the regulatory authority has assessed the necessity of such a derogation. This paragraph shall be without prejudice to the right of the transmission system operators to own, develop, manage or operate networks other than electricity networks where the Member State or the designated competent authority has granted such a right.*"

137. Article 9(1) of the Electricity Regulation states that "*In accordance with Regulation (EU) 2016/1719, transmission system operators shall issue long-term transmission rights or have equivalent measures in place to allow for market participants, including owners of power-generating facilities using renewable energy sources, to hedge price risks across bidding zone borders, unless an assessment of the forward market on the bidding zone borders performed by the competent regulatory authorities shows that there are sufficient hedging opportunities in the concerned bidding zones."*

138. The Board of Appeal considers that those provisions are sufficiently broad in scope to allow the relevant TSOs to adopt the disputed acts. Both the Electricity Regulation and the FCA Regulation provide for long-term cross-zonal hedging products, other than LTTRs. As those products are undefined, it cannot be excluded that they require acts such as the disputed acts, even if those acts are not expressly listed as being within the responsibilities or competences of the TSOs.

139. Furthermore, the disputed acts would be covered by Article 40(9) of the Electricity Directive. If those acts are considered necessary to fulfil the respective TSOs' obligations under the Electricity Regulation, and more specifically to develop long-term cross-zonal hedging products, other than LTTRs, the designated competent authorities (i.e. the respective NRAs) may authorise those TSOs to adopt those acts.

140. It follows that ACER has not infringed either the Electricity Directive or the Electricity Regulation.

141. The fourth plea is therefore unfounded.

VIII. The fifth plea

Arguments of the Parties

142. The Appellant alleges that the Contested Decision directly discriminates between Finnish market participants and market participants in other bidding zones, even though both categories of participants are in a comparable situation. It claims that all EU market participants are in a comparable situation because electricity regulation is an EU competence by virtue of Article 4(2)(i) of the TFEU. By adopting the Contested Decision, ACER treats Finnish market participants differently on the basis of their nationality and consequently infringes Article 18 of the TFEU and Article 21 of the Charter of Fundamental Rights, as well as the principle of equal treatment. The Appellant invokes case *AJD Tuna* (judgment of the Court of 17 March 2011, *AJD Tuna Ltd v Direttur tal-Agrikoltura u s-Sajd and Avukat Generali*, C-221/09, EU:C:2011:153, paragraphs 86-113).

143. First, the Appellant submits that the Contested Decision only has an impact on Finnish market participants, putting only those participants at a disadvantage, contrary to the Swedish participants. In its view, Finnish market participants will first have to incur costs to develop a brand-new EPAD-coupling product, which are significantly higher than the costs of implementing LTTRs, and will have to make additional costs to align their system with the future EU forward electricity markets legislative framework.

144. Second, the Appellant also submits that the Contested Decision treats the Finnish and Swedish market participants differently from market participants in other bidding zones and puts them at a significant disadvantage, because ACER pre-empts the future EU forward electricity markets legislation and uses Finnish and Swedish markets as guinea pigs for the EPAD-coupling solution (which has not been implemented in any other bidding zone), creating a local solution that will act as a barrier for future EU integration.

145. Finally, the Appellant claims that the Contested Decision indirectly discriminates against Finnish market participants without objective justification, because they have to bear the costs of developing two products instead of one, putting them at a significant disadvantage compared to market participants in other bidding zones. The Appellant alleges that Finnish market participants will have to incur significant costs to develop a brand-new EPAD-coupling product, as well as costs to develop LTTRs with respect to other bidding zone borders (FI-EE bidding zone border). The Appellant invokes Case *Sotgiu* (judgment of the Court of 12 February 1974, *Giovanni Maria Sotgiu v Deutsche Bundespost*, C-152/73, EU:C:1974:13, paragraph 11) and Case *ČEZ* (judgment of the Court of 27 October 2009, *Land Oberösterreich v ČEZ as*, C-115/08, EU:C:2009:660, paragraphs 95-97 and 108).

146. The Defendant responds that there is no direct discrimination against Finnish market participants because Finnish market participants and market participants in other EU Member States are not in a comparable situation for the purpose of establishing any discrimination. Given that the Contested Decision only concerns the FI-SE bidding zone borders, the only market participants in a comparable situation with the Finnish market participants are the Swedish market participants; only the latter need to be taken into account in order to assess whether Finnish market participants are discriminated against.

147. Furthermore, the Defendant maintains that Finnish market participants are not at a significant disadvantage, because they will not incur higher costs to implement the Contested Decision than to implement LTTRs, and neither incur additional costs to align their system with the future EU legislative framework. In the Defendant´s opinion, the Contested Decision neither pre-empts a decision of the EU legislator nor creates a solution that would hinder EU integration or put Finnish and Swedish market participants at a disadvantage.

148. The Defendant adds that the implementation of two hedging products in Finland is merely

the result of the application of the FCA Regulation. Because of that, not only other EU bidding zone borders are not in a comparable situation to the Finnish bidding zone borders, but even the Swedish bidding zone borders are not in a comparable situation to the Finnish bidding zone borders. In the Defendant´s view, the implementation of two hedging solutions in Finland does not necessarily mean higher costs than the implementation of one hedging solution, because of the followings: i) the costs for Finnish market participants will not increase with the EPAD market coupling, as it relies on existing EPAD products and ii) the costs for Finnish market participants as regards the use of LTTR products for the FI-EE bidding zone border will be incurred independently from the EPAD market coupling.

149. The Defendant also argues that there is no indirect discrimination against Finnish market participants. Even in the event that the Board of Appeal were to find indirect discrimination against Finnish market participants, the Defendant alleges that the Contested Decision pursues a legitimate aim and is appropriate and necessary to achieve that aim.

150. In its intervention, the Finnish NRA supports the Appellant´s claim that the Contested Decision fails to ensure equal treatment for Finnish market participants compared to Swedish and other European market participants, because it fails to give them an efficient remedy which would ensure that they have equal opportunities for hedging in a reasonable time. It maintains that the Contested Decision creates an *"obligation to develop the unknown"*, which will create a higher burden of costs for Finnish market participants compared to Swedish and other European market participants, and that there is a risk that these costs could become stranded.

Assessment

151. In line with the Board of Appeal´s consistent decision-making practice, ACER is bound by the general principles of EU Law, including the principle of non-discrimination (A-001-2017, A-002-2018, A-001-2019, A-003-2019, A-006-2019, A-001-2020, A-002-2020, A-003-2020, A-007-2020, A-008-2020, A-00-2021, A-007-2021, A-011-2021 and A-013-2021).

152. The principle of non-discrimination is laid down in Article 18 of the TFEU: "*[W]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*." It is also set out in Articles 20 of the Charter of Fundamental Rights, which reads "*[E]veryone is equal before the law*", as well as Article 21 of the same Charter, whereby according to paragraph (1) "*[A]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.*"

153. The principle of non-discrimination is also contained in the recitals of the Electricity Regulation and the FCA Regulation. Article 3(c) and (d) of the FCA Regulation states, as an objective of the FCA Regulation, *"(c) providing non-discriminatory access to long-term cross-zonal capacity; (d) ensuring fair and non-discriminatory treatment of TSOs, the Agency, regulatory authorities and market participants"*. Article 9(2) of the Electricity Regulation states that *"[L]ong-term transmission rights shall be allocated in a transparent, market based and non-discriminatory manner through a single allocation platform."*

154. The principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated equally, unless such treatment is objectively justified (Board of Appeal Decisions A-002-2018, A-001-2019, A-003-2019, A-001-2021, A-007-2021, A-011-2021, A-013-2021; see also judgment of the Court of 7 March

2017, *Rzecznik Praw Obywatelskich (RPO),* C-390/15, EU:C:2017:174, paragraph 41, and judgment of the Court of 17 December 2020, *Centraal Israëlitisch Consistorie van België e.a. and Others*, Case C-336/19, EU:C:2020:1031, paragraph 85).

155. In order to categorise situations as similar or different, they must be considered in the light of the aims of the measure in question: whether the requirement that situations must be comparable for the purpose of determining whether there is a breach of the principle of equal treatment has been met, must be assessed in the light of all the elements which characterize them and, in particular, in the light of the subject matter and purpose of the legislation which makes the distinction at issue (judgment of the Court of 22 January 2019, *Cresco Investigation GmbH v Markus Achatzi*, C-193/17, EU:C:2019:43, paragraph 42; judgment of the Court of 1 October 2015, *O v Bio Philippe Auguste SARL,* C-432/14 - O, EU:C:2015:643, paragraph 32; judgment of the Court of 26 June 2018, *MB v Secretary of State for Work and Pensions*, C-451/16 - *MB*, EU:C:2018:492, paragraph 42; and *AJD Tuna*, C-221/09 cited above, paragraph 93).

156. The Board of Appeal is of the view that any difference in treatment of Finnish market operators that may result from the implementation of the Contested Decision is justified by the fact that Finnish market participants are not in a comparable situation to either Swedish market participants, or to market participants in other Member States where LTTRs are used.

157. As regards the comparison with Swedish market participants, the first point to note is that there is no formal difference in treatment. The exclusion of the LTTRs on the SE-FI bidding zone borders is binding on both Swedish and Finnish market operators. The Board of Appeal accepts that ACER's recommended product, i.e. EPAD coupling, is likely to have different effects for Swedish and Finnish market participants. However, rather than aiming to treat Finnish market participants less favourably, the Contested Decision aims to increase liquidity of long-term hedging products in the Finnish bidding zone. Such greater liquidity will meet the objectives of the EU legislative framework and will improve the economic position of Finnish market participants. As the Board of Appeal has established (see the assessment of the first plea above), there is no error in ACER's assessment of the relevant markets and of the inadequacies of LTTRs to meet those objectives.

158. As regards the comparison with market participants in other Member States, where LTTRs are used, the Board of Appeal finds that there is no comparable situation. The prevalence of the Nordic system price, and the use of EPADs in Nordic countries, as analysed in the Contested Decision, distinguishes the Swedish and Finnish market participants from those in other Member States. The Board of Appeal again refers to its analysis of the first plea, where it has found no error in ACER's assessment.

159. Overall, the Board of Appeal is satisfied that any difference in treatment is justified in light of the subject-matter, the purpose of the applicable legislative framework and the purpose of the Contested Decision.

160. It follows that the fifth plea is unfounded.

IX. The sixth plea

Arguments of the Parties

161. The Appellant contends that, by requesting the Appellant, Kraftnät Åland and intervener Svenska Kraftnät to "*make sure that other long-term cross-zonal hedging products are made available to support the functioning of wholesale electricity markets*", ACER has infringed the principle of proportionality because the Contested Decision is neither appropriate nor necessary for attaining its objective, i.e. the creation of sufficient cross-zonal risk-hedging opportunities in the Finnish bidding zone in the short-term. The Appellant invokes Cases C-

11/70 (judgment of the Court of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-11/70, EU:C:1970:114), C-611/17 (judgment of the Court of 30 April 2019, *Italian Republic v Council of the European Union*, C-611/17, EU:C:2019:332, paragraph 55), C-482/17 (judgment of the Court of 3 December 2019, *Czech Republic v European Parliament and Council of the European Union,* C-482/17, EU:C:2019:1035, paragraph 77) and T-306/00 (judgment of the Court of First Instance of 11 December 2003, *Conserve Italia Soc. coop. rl v Commission of the European Communities*, T-306/00, EU:T:2003:339, paragraphs 127-151).

162. Given that action is appropriate only where it is capable of attaining the intended objective, the Appellant considers that ACER made a manifest error of assessment in concluding that EPAD coupling is appropriate to attain the intended objective, i.e. to create sufficient cross-zonal risk hedging opportunities on the Finnish bidding zone in the short term, *inter alia* because this will require the creation of a new and costly cross-zonal EPAD product, which does not exist to date and will require significant time to develop (approximately 38 months).

163. The Appellant also considers that action is necessary only where it cannot be replaced by some alternative form of action which would be equally efficient to reach the intended aim and would be less detrimental. The Appellant alleges that LTTRs are an alternative form of action to EPAD coupling, capable of increasing hedging opportunities in the Finnish bidding zone and solving the demand/supply asymmetry in the Finnish bidding zone. The Appellant claims that this is acknowledged by Sections 6.3.2.1 and 6.3.2.2 of the Contested Decision. The Appellant considers EPAD coupling as an inferior solution to LTTRs to attain the intended objective because LTTRs (i) are not likely to decrease liquidity of existing hedging opportunities, (ii) involve less complexity, (iii) do not require the development of a brand new product and will be available much more quickly, (iv) can be introduced at a much lower cost, (v) do not imply sunk costs following the enactment of the future EU legislative framework for the electricity forward market, and (vi) do not require amendments to Finnish law.

164. The Defendant responds that the appropriateness and necessity of the Contested Decision needs to be analysed in the light of its objective, i.e. the provision of sufficient hedging opportunities on the FI-SE bidding zone borders that must be implemented and made available for market participants within the deadlines prescribed by the EU legislator and in the light of, *inter alia*, the objective to contribute to the efficient long-term operation and development of the EU electricity transmission system and electricity sectors. In the Defendant´s opinion, the Appellant adds a temporal condition that is neither part of the legal requirements under Article 30(5) of the FCA Regulation nor part of the objectives pursued by the FCA Regulation or the Electricity Regulation by adding the words *"in the short term"* to the objective that the Contested Decision pursues.

165. The Defendant recalls that the Contested Decision does not impose EPAD coupling but imposes the implementation of other long-term cross-zonal hedging products, in line with Article 30(5)(b) of the FCA Regulation, as well as the principles of proportionality and subsidiarity.

166. The Defendant states that LTTRs are not appropriate for improving the hedging opportunities on the FI-SE bidding zone borders because, even though LTTRs would provide Finnish market participants with more hedging alternatives in terms of products, this would come at the expense of the liquidity of the Finnish bidding zone, thereby ultimately resulting in a decrease of the hedging opportunities in the Finnish bidding zone and in the whole Nordic region. ACER considers that other solutions, in particular EPAD coupling, do not pose the kind of risks for the existing hedging opportunities and the functioning of the Nordic electricity forward market that LTTRs pose. The Defendant adds that it is incorrect and unfounded to hold that EPAD coupling will require new and costly cross-zonal products and a significant time to develop. Even though the implementation of LTTRs would be quicker

than any EPAD-related solution, the Defendant considers the latter solution more suitable and less intrusive, rendering one year of delay acceptable.

167. The Defendant also states that LTTRs are neither equally effective nor less detrimental in the light of the intended aim.

168. In its intervention, the Finnish NRA indicates that the Contested Decision creates an *"obligation to start developing the unknown"*, which is a disproportionate requirement considering the legal implementation timelines set in Article 30(5) of the FCA Regulation.

169. In its intervention, the Swedish TSO Svenska Kraftnät states that, when TSOs are involved in market activities, the most cost-efficient solution should always be identified and implemented.

Assessment

170. The principle of proportionality is a general principle of EU law.

171. Article 5(4) of the TEU provides that "*[U]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*".

172. In line with the Board of Appeal´s consistent decision-making practice, ACER is bound by the general principles of EU Law, including the principle of proportionality (Board of Appeal Decisions A-001-2017, A-002-2018, A-001-2019, A-003-2019, A-006-2019, A-001-2020, A-002-2020, A-003-2020, A-007-2020, A-008-2020, A-001-2021, A-007-2021, A-011-2021).

173. The Board of Appeal finds that, under the sixth plea, the Appellant repeats arguments submitted under the first plea. The Appellant considers that the exclusion of LTTRs, and the recommendation to set up EPAD coupling, are neither appropriate nor necessary to achieve the objectives of the EU legislative framework. The Board of Appeal refers to its assessment of the first plea. Clearly, the Contested Decision is aimed at achieving the legislative objective of "*promoting effective long-term cross-zonal trade with long-term cross-zonal hedging opportunities for market participants*" (Article 3(a) of the FCA Regulation). The Board of Appeal has found no error in ACER's assessment of how best to achieve this objective. Under the sixth plea, the Appellant does not bring any new arguments to challenge that assessment. It follows that there is no need for the Board of Appeal to analyse this plea any further.

174. The Board of Appeal also notes that the fact that ACER refrained from imposing EPAD coupling in the Contested Decision, and merely recommended such a product, is in accordance with the principle of proportionality: Union action, here taken by ACER, is not exceeding what is necessary to achieve the objectives of the Treaties and of the relevant legislation. It is for the relevant TSOs and NRAs to shape the long-term cross-zonal hedging products that are appropriate for the FI-SE border.

175. It follows that the sixth plea is unfounded.

X. The seventh plea

Arguments of the Parties

176. In the Appellant´s view, ACER´s decision to reject LTTRs is based on an inadequate consultation. In doing so, ACER committed an infringement of Article 6(11) of the ACER Regulation. The Appellant claims that, by failing to provide sufficient information on the precise scope of its proposal during the consultation process, specifically on the details of its

proposed EPAD coupling solution, ACER did not allow the stakeholders to fully understand what they were consulted on. The stakeholders were, in its view, unable to assess the real complexity of the proposed EPAD coupling model compared with LTTRs, and to make their views known on the actual proposals.

177. The Appellant also submits that ACER has infringed Article 6(11) of the ACER Regulation, because it failed, when preparing the Contested Decision pursuant to Article 6(10) of the same Regulation, to satisfy the minimum standards for a consultation process set out by the European Commission in its Communication "*Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*" (COM(2002) 704 final, p. 19[28]; see also Commission Staff Working Document, "*Better Regulation Guidelines*", SWD(2017) 350 final, box 2 at p. 37[29]).

178. The Appellant refers to the description of EPAD coupling in ACER´s consultation. The Appellant alleges that this description was not sufficiently detailed despite the Appellant's requests to provide details prior to the consultation. In the Appellant´s opinion, stakeholders were therefore unable to assess ACER's proposal properly and were effectively unable to assess what they were consulted on.

179. The Appellant also claims that ACER infringed Article 6(11) of the ACER Regulation by failing to include a description of the main features open for discussion. The Appellant lists the main features of ACER´s EPAD-coupling proposal, as set out in paragraph 153 of the Contested Decision. It alleges that these features were highly significant to allow for an understanding of the product´s complexity and impact on the market and that none of these features were mentioned in the consultation. In the Appellant´s view, it would not have been possible to infer them readily from ACER's mere reference to "*TSOs' coupling of EPADs (ie. with an auction of EPADs)"*. The Appellant considers that, if stakeholders would have been consulted minimally on these features, they would have likely realised that LTTRs were a less complex and more efficient solution than EPAD coupling.

180. Finally, the Appellant alleges that ACER´s preliminary position did not meet the requirements of Article 6(11) of the ACER Regulation, because it failed to explain how the proposal could be achieved. The Appellant adds that it repeatedly requested ACER for more information about the relation between cross-zonal capacity and EPADs and how TSOs would allocate the long-term cross-zonal capacity in practice.

181. The Defendant responds that the obligation to consult, set out in Article 6(11) of the ACER Regulation regards the "*[NRAs] and [TSOs] concerned*" and that the Finnish and Swedish NRAs and TSOs were properly consulted throughout the entire administrative procedure leading up to the Contested Decision. The Defendant provides details of the different stages of the consultation process to demonstrate that ACER extensively consulted and exchanged with the Finnish and Swedish NRAs and TSOs, and that they were given multiple opportunities to provide comments, observations or questions on the upcoming decision.

182. Regarding the description of the proposed EPAD coupling solution, the Defendant adds that ACER cannot be required to elaborate and design every aspect of this (or any other) option in great detail, and neither that ACER consults the concerned NRAs and TSOs on each aspect of this (or any other) option. In the Defendant´s view, the Communication on the minimum standards for the Commission's consultation processes put forward by the Appellant is irrelevant, as ACER is not bound by this document.

183. The Defendant also states that the Appellant provides a misleading description of the information provided by ACER on the EPAD coupling solution during the public

[28] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:en:PDF

[29] https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2017/0350/COM_SWD(2017)0350_EN.pdf

consultation. It states that additional information on the main and most important features of the EPAD coupling solution was provided to the concerned TSOs and NRAs in the context of the public consultation, providing a series of background documents to all stakeholders, among which (i) the assessment of the Finnish NRA, (ii) the assessment of the Swedish NRA, and (iii) a Study on measures to improve hedging opportunities on the electricity market in Sweden referred to as the 'Compass Lexecon report' of March 2022, which thoroughly analysed the EPAD coupling solution - at a public workshop, in ACER´s preliminary position, during meetings held with the Finnish and Swedish NRAs and TSOs and at the oral hearing with the Appellant.

184. Finally, the Defendant contends that the Appellant's allegation that stakeholders other than the Finnish and Swedish NRAs and TSOs were not properly consulted must be dismissed as being outside the scope of Article 6(11) of the ACER Regulation and in any event as unjustified.

185. In its intervention, the Finnish NRA points out that ACER has violated the affected parties´ right to be heard by failing to carry out a proper consultation prior to the adoption of the Contested Decision.

Assessment

186. Article 6(11) of the ACER Regulation provides that "*[W]hen preparing its decision pursuant to paragraph 10, ACER shall consult the regulatory authorities and transmission system operators concerned and shall be informed of the proposals and observations of all the transmission system operators concerned.*"

187. First, the Board of Appeal notes that the Contested Decision excludes LTTRs, and does not prescribe, but merely recommends EPAD coupling. In so far as this plea is focused on the alleged lack of details provided by ACER on the EPAD coupling product, in the course of the consultation, it is important to bear in mind that the Contested Decision leaves the relevant TSOs and NRAs completely free in how to set up long-term cross-zonal hedging products, as long as those products are not LTTRs.

188. Second, the Board of Appeal notes that Article 6(11) of the ACER Regulation merely requires consultation of the regulatory authorities and transmission system operators concerned. In so far as the Appellant focuses on the more limited content of the public consultation, its plea is not supported by Article 6(11) of the ACER Regulation. It is clear from the file that the Finnish and Swedish TSOs and NRAs were extensively consulted. The Appellant itself admits that it was able to comment on ACER's preliminary position. The question is therefore whether that specific consultation was adequate, and not whether the public consultation provided sufficient details.

189. Third, the Board of Appeal notes that the legal basis for the Appellant's seventh plea is limited to Article 6(11) of the ACER Regulation. Its references to the European Commission's standards for consultation have no bearing on whether ACER conducted a proper consultation, as those standards (a) are concerned with the Commission's own policy making, not that of EU agencies; and (b) are not referenced in Article 6(11) of the ACER Regulation. Moreover, it is not for the Board of Appeal to supplement the Appellant's plea, for example by exploring other legal provisions and principles that may govern ACER's obligation to consult.

190. Against that background, the Board of Appeal finds that Article 6(11) of the ACER Regulation was complied with. As the Contested Decision makes clear, ACER consulted the TSOs and NRAs concerned, and gave them ample opportunity to ask questions and express their views. ACER organised four video conferences, notified the parties of its preliminary position, held an oral hearing with the Appellant, shared all parties' input and gave them a

final opportunity to submit any eventual comments. That consultation process took place between 21 March 2022 and 8 July 2022 (see the Contested Decision, Recitals (12)-(17)). In formal terms, Article 6(11) of the ACER Regulation was clearly complied with.

191. The fact that, in the consultation process, ACER may not have given as much details about the precise operation of its EPAD coupling recommendation, compared to what it included in the Contested Decision, does not amount to a failure to consult. As the Defendant stated, ACER's position and decision will itself evolve over the course of the procedure (Defence, paragraph 337). It is therefore understandable that the Contested Decision is further "fine-tuned" (ibid). Indeed, such fine-tuning is clearly indispensable as part of a proper consultation process.

192. The seventh plea is therefore unfounded.

XI. The eighth plea

Arguments of the Parties

193. The Appellant claims that the current status of the Finnish legislation and terms of the Appellant's licence represent an objective and absolute impossibility for the Appellant to implement the Contested Decision´s request to the TSOs concerned to ensure that other long-term cross-zonal hedging products are made available to support the functioning of wholesale electricity markets. The Appellant considers that it is forced to "do the impossible", because it does not have the competence to amend Finnish legislation, to amend its licence or to force the Finnish legislator or Finnish NRA to do so. In the Appellant´s view, this infringes the general principle of EU law that *"no one is obliged to do the impossible"* and renders the Contested Decision invalid. The Appellant refers to Joined Cases C-622/16 P to C-624/16 P (judgment of the Court of 6 November 2018, *Scuola Elementare Maria Montessori Srl v European Commission,* C-622/16 P to C-624/16 P*,* EU:C:2018:873, paragraphs 79 and 82); Case C-179/15 (judgment of the Court of 3 March 2016, *Daimler AG v Együd Garage Gépjárműjavító és Értékesítő Kft,* C-179/15*,* EU:C:2016:134, paragraph 42); and Case C-75/97 (judgment of the Court of 17 June 1999, *Kingdom of Belgium v Commission of the European Communities*, C-75/97, EU:C:1999:311, paragraph 86).

194. The Defendant considers that the principle of the primacy of EU law, which establishes the pre-eminence of EU law over the law of the Member States, requires that all EU Member State bodies give full effect to EU law and provides that the Member States´ national laws may not undermine the effect given to EU law. The Defendant adds that, by virtue of Article 288 of the TFEU, regulations are binding in their entirety and directly applicable in all Member States (judgment of the Court of 2 April 2020**,** *CRPNPAC and Vueling Airlines SA*, Joined Cases C-370/17 and C-37/18, EU:C:2020:260, paragraph 74 and case-law cited). The Defendant contends that, when acting on the basis of Article 6 of the ACER Regulation, ACER was bound by the general principles of EU law and ensured compliance with EU energy law. The Defendant invokes Case T-631/19 (judgment of the Court of 7 September 2022, *BNetzA v ACER,* T-631/19, EU:T:2022:509, paragraphs 46-48 and 51) as well as an earlier Decision by ACER´s Board of Appeal in Case A-003-2020.

195. The Defendant claims that, when taking the Contested Decision, ACER was limited to strictly applying EU law, irrespective of the national laws of the Finnish and Swedish NRAs and TSOs. In its view, the obligation imposed in the Contested Decision directly derives from the (correct) application of the regulatory framework, as prescribed by the EU legislator. In the Defendant´s opinion, given that the Contested Decision is in line with applicable EU law, the primacy of EU law requires the competent Finnish bodies to comply with the Contested Decision, as it is merely an implementation of the applicable EU law (*i.e.*, Article 30(5) of the FCA Regulation jointly read with Article 30(6) of the FCA Regulation). If this implies

national legislative amendments or other administrative procedures, it is for the relevant Finnish bodies to do so within the prescribed deadlines under Article 30(6) of the FCA Regulation, jointly read with Article 6(10) of the ACER Regulation.

196. The Defendant further invokes Article 59(1)(b) and (g) of the Electricity Directive. It also states that the Appellant´s claim that EPAD coupling would be objectively and absolutely impossible to implement from a legal perspective is contradicted by past experience of similar projects (e.g. the Trilateral Market Coupling) where there was no specific regulation on the mechanism.

197. The Swedish TSO Svenska Kraftnät states in its intervention that, according to its assessment, ACER is not required to take Finnish law into account when deciding on a measure pursuant to Article 30(5) of the FCA Regulation or any other EU regulation.

Assessment

198. The Board of Appeal refers first to its earlier Decision A-003-2020 (consolidated) at paragraph 210: "*[F]inally, even though the Board of Appeal duly examined the description of the Dutch balancing market design provided by Appellant I, it reaffirms its previous decisions according to which it is not for the Board of Appeal to interpret the law of the Member States and that neither the Agency's Director nor its Board of Appeal should make ad hoc exceptions to harmonised, Union-wide regulation of the Third Energy Package and Clean Energy for All Europeans Package in order to adapt to national regulation. Doing so would be discriminatory and contrary to the primacy and effectiveness of EU Law and the goal of creating an internal energy market. It also highlights that the Agency is not bound by the NRAs´ competences under national law because the Agency does not exercise a delegated power but a power that is directly conferred to it by the EU legislator via Regulation (EU) 2019/942.*"

199. The Board of Appeal also refers to Case T-631/19 (judgment of the Court of 7 September 2022, *BNetzA v ACER,* T-631/19*,* EU:T:2022:509, paragraphs 46-51), in which the General Court characterised ACER's decision-making and regulatory powers.

200. The Board of Appeal has found that ACER properly exercised its decision-making powers when adopting the Contested Decision and complied with the relevant EU legislative framework. The Contested Decision is binding on its addressees, and as an EU legal act, it is binding on the EU Member States. Having the force of EU law, the Contested Decision has primacy over any inconsistent national laws. Therefore, it follows that, in so far as the implementation of the Contested Decision requires changes to the Appellant's licence, or to Finnish legislation, the Republic of Finland is under an obligation to effect those changes.

201. The eighth plea is therefore unfounded.

Additional submissions after the oral hearing

202. The Board of Appeal has examined the Applicant and the Defendant's submissions that were requested by it, as well as those that were spontaneous. The unsolicited submissions of the parties were communicated to the other party for informative purposes.

203. The Board of appeal will in the future continue to refuse to put on file any unsolicited submissions and will not communicate such submissions to the other party.

204. As to the substance, the Board of Appeal has examined the factual situation as it existed at the time of adopting the Contested Decision and concluded that the facts put forward by the Appellant and commented upon by the Defendant, to the extent that they are established and relevant, do not affect the Contested Decision and that no error can be detected in it. The

operations described are for the most part still pending and therefore hypothetical in essence; as such, they are not capable of affecting the Contested Decision.

For the above reasons, the Board of Appeal, pursuant to Article 28(5) of the ACER Regulation, hereby:

dismisses the Appeal and confirms the Contested Decision.

Done at Ljubljana, 24 October 2023

For the Registry

The Registrar
S. VAONA

For the Board of Appeal

The Chairperson
M. PREK