

**DECISION OF THE BOARD OF APPEAL
OF THE AGENCY FOR THE COOPERATION OF ENERGY
REGULATORS**

11 July 2019

(Application for annulment – ACER Decision No. 02/2019)

Case number	A-001-2019 (consolidated)
Language of the case	English
Appellants	Appellant I. Amprion GmbH Appellant II. Transnet BW GmbH Both Represented by: White & Case LLP
Defendant	Agency for the Cooperation of Energy Regulators ('the Agency' or 'ACER') Represented by: Alberto Pototschnig, Director <i>ad interim</i>
Interveners	Commission de Régulation de l'Énergie ('CRE') Represented by: Jean-François Carencu, President; Commission for Electricity and Gas Regulation ('CREG') Represented by: Koen Locquet, Acting President of Board of Directors (Both on behalf of Defendant);

Application for Revision or annulment of Decision of the Agency for the Cooperation of Energy Regulators No. 02/2019 of 21 February 2019 on the Core CCR TSOs' proposals for the regional design of the day-ahead and intraday common capacity calculation methodologies ('Decision No. 02/2019' or 'Contested Decision')

THE BOARD OF APPEAL

composed of Andris Piebalgs (Chairman), Walter Boltz (Rapporteur), Miltos Aslanoglou, Yvonne Fredriksson, Jean-Yves Ollier, Mariusz Swora (Members).

Registrar: Andras Szalay

gives the following

Decision

I. Background

Legal background

1. Commission Regulation (EU) 2015/1222¹ ('CACM Regulation') laid down a range of requirements for cross-zonal capacity allocation and congestion management in the day-ahead and intraday electricity markets. These requirements include the development of capacity calculation methodology ('CCM') in each capacity calculation regions ('CCR')².

¹ Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, OJ L 197, 25.7.2015, p. 24–72

² Articles 20 to 26 CACM Regulation

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2. Transmission system operators ('TSOs') in each CCR are required to develop a common proposal on a common coordinated CCM within the respective capacity region.³ This proposal is subject to approval of the concerned national regulatory authorities ('NRAs').
3. The concerned NRAs should take a decision within six months from receipt of the proposal by the last regulatory authority or they can require the TSOs to amend their proposal. When the NRAs fail to reach an agreement, within the six-month period (or within the two-month period in the event of re-submission), the Agency is called upon to adopt a decision on the TSOs' proposal.⁴

Facts giving rise to the dispute

4. By 17 September 2017, within ten months of the publication of ACER Decision No 06/2016⁵, TSOs in the Core capacity region were required to submit a proposal for a common coordinated CCM.⁶
5. On 15 September 2017, the Core region TSOs submitted to the Core region NRAs their proposals on intraday and day-ahead capacity calculation methodology. On 9 March 2018, the Core region NRAs issued two requests for amendment concerning the two proposals (one for each). On 4 June 2018, the Core region TSOs submitted the amended proposals.
6. On 21 August 2018, the Chair of the Core Energy Regulators' Regional Forum informed the Agency that the Core region NRAs did not reach a unanimous agreement on the amended proposals and requested that the Agency extend the

³ Articles 7a), 9(1) and 20(2) CACM Regulation

⁴ Article 8(1) Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators OJ L 211, 14.08.2009, p. 1.

⁵ ACER Decision No 06/2016 of 17 November 2016 on the Electricity Transmission System Operators' Proposal for the Determination of Capacity Calculation Regions

⁶ Article 20 CACM Regulation

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deadline to adopt a decision or that the Agency adopt a decision on the amended proposals.

7. Between 11 September 2018 and 6 February 2019, the Agency consulted several times, at least at twenty five different occasions⁷, the Core region NRAs and TSOs and held a public consultation.
8. On 21 February 2019, upon Article 8(1) of Regulation (EC) No 713/2009 and Article 9(12) of the CACM regulation, the Agency launched Decision No 02/2019 on the Core CCR TSOs' proposals for the regional design of the day-ahead and intraday common capacity calculation methodologies (the 'Contested Decision').

Procedure

9. On 23 April 2019, Amprion GmbH ('Appellant I.' or 'Amprion') and Transnet BW GmbH ('Appellant II.' or 'Transnet', together with Appellant I.: 'Appellants') filed an appeal with the Registry of the Board of Appeal in the German language. The appeals were registered, respectively, under the case number A-001-2019 and A-002-2019.
10. On 25 April 2019, the Chairman of the Board of Appeal requested information from the Appellants as well as from Defendant with regard to the language regime used in the proceeding which led to the launch of the Contested Decision.
11. On 26 April 2019, the Appellants, replying to the request, referred to their initial submission to the German NRA where they submitted their proposal in the German language. The Defendant, in its submission sent on the same day, stated that the language of the Agency's proceedings following the referral and leading to the Contested Decision was English.

⁷ See Article 14 of the Contested Decision

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12. On 20 April 2019, the Chairman of the Board of Appeal launched its reasoned decision declaring that the language of the proceedings before the Board of Appeal is the English language and set a deadline to the Appellants to re-submit their applications in the language of the proceedings. The decision referred to Article 18(1) of the Rules of Procedure of the Board of Appeal which stipulates that the language in which the notice of appeal has been lodged shall be the language of the case on appeal. If the appellant is the addressee of the decision (like in the case at hand) against which the appeal is brought, the notice of appeal shall be lodged in the language of the decision or in one of the official languages of the Community appearing in the submission, which gave rise to the decision.
13. On 29 April, the announcements of appeal were published on the Agency's website.
14. On 2 May 2019, the Appellants re-submitted their notice of appeal in the English language.
15. On 6 May 2019, in accordance with Article 195) of the Rules of Procedure of the Board of Appeal ('Rules of Procedure'), the Registrar communicated the composition of the Board of Appeal to the Parties.
16. By the deadline of 9 May 2019, two entities, the Commission for Electricity and Gas Regulation ('CREG') and the Commission de Régulation de l'Énergie ('CRE') filed their requests to leave to intervene, both on behalf of the Defendant, with the Registry. The Board of Appeal invited the main Parties to make observations to these requests to which the Appellants submitted their observations on 17 May 2019.
17. On 21 May 2019, the Board of Appeal sent a proposal to the Parties to extend the deadline of both appeal proceedings⁸ by one month in order to be able to reach its final decision by 23 July 2019, at latest. Since Article 19 of Regulation (EC) No 713/2009 does not directly foresee such extension, the Board of Appeal notified the Parties that it would decide upon the extension only if the Parties gave their prior

⁸ A-001-2019 and A-002-2019

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written agreement to this procedural step. On 22 May 2019, the Appellants gave their consent to the extension and waived their rights to challenge the Board of Appeal's final decision on the mere ground of the extension⁹. On 23 May 2019, the Defendant also gave its agreement to the extension.

18. On 21 May 2019, the Chairman of the Board of Appeal, in accordance with Article 14(2) of the Rules of Procedure, granted the requested confidentiality to Transnet in case A-002-2019 and instructed that the confidential and non-confidential versions be handled separately by the Registry.
19. On 22 May 2019, after extending the deadline by five calendar days due to the late service of the notice of appeal in English, the Defendant submitted its defence to the Registry both in cases A-001-2019 and A-002-2019. The Chairman of the Board of Appeal, in accordance with Article 16(2)-(3) of the Rules of Procedure, provided the Parties with the opportunity to carry out a second exchange of writs.
20. On 27 May 2019, by its respective decisions in appeal cases A-001-2019 and A-002-2019, the Board of Appeal granted the right to intervene to CREG and to CRE, both on behalf of the Defendant. The Interveners received access to the non-confidential version of the case documents. On 5 June 2019, CRE lodged a supplementary submission with the Registry.
21. On 27 May 2019, the Board of Appeal adopted its decision on consolidation of cases A-001-2019 and A-002-2019 into A-001-2019 (consolidated).
22. On 28 May 2019, the Board of Appeal notified the main Parties and the Interveners of the consolidated case and, upon the previously given unanimous agreement of the main Parties, of the extension of the deadline of the appeal proceeding and, consequently, that the final decision of the Board of Appeal will be communicated to the Parties by 23 July 2019, at latest.

⁹ The Appellants, however, reserved their right to challenge the final decision based on other grounds.

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23. On 31 May 2019, the Appellants submitted their reply (second submission) to the Defendant's defence.
24. On 9 June 2019, the Defendant filed its rejoinder (second submission) with the Registry.
25. On 10 June 2019, upon the decision of the Chairman of the Board of Appeal, the Registrar notified the Parties of the date of closure of the written procedure.
26. On 11 June 2019, the Board of Appeal, by the request of the Appellants, held an oral hearing. On 20 June 2019, the draft summary minutes of the hearing were sent to the main Parties for their comments. After receiving comments on 25 June 2019 from both the Appellants and the Defendant, the summary minutes were finalized and sent to the Parties on 1 July 2019.

Main arguments of the Parties

27. The Appellants argue that the Agency: (i) decided in the Contested Decision upon issues that have not been subject to a disagreement between the NRAs and so did not fall into the Agency's competency, and committed substantive errors of law regarding the DA CCM, notably: (ii) further amended the lawful amended DA CCM and ID CCM proposals, (iii) erroneously determined the minimum level of remaining available margin ('minRAM') for cross-zonal exchanges and incorrectly considered the impact of capacity on the non-core bidding zone borders in the calculation of the MinRAM, (iv) breached requirements of the CACM regulation in the determination of Critical Network Elements and Contingencies, (v) unlawfully limited the loop flows; and (vi) decided in a materially unlawful way regarding ID CCM. With regard to above, the Appellants requested that the Contested Decision be annulled and the case be remitted to the competent body of the Agency.
28. The Defendant contests all claims and arguments, claiming that the Appellants' arguments and pleas are based on fundamental misconceptions of the relevant legal

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rules and the relevant regulatory framework and on an erroneous interpretation of the law. As such, they are unfounded and the appeal should be dismissed in its entirety.

II. Admissibility

Admissibility of the appeal

Ratione temporis

29. Article 19(2) of Regulation (EC) 713/2009 provides that “[t]he appeal, together with the statement of grounds, shall be filed in writing at the Agency within two months of the day of notification of the decision to the person concerned, or, in the absence thereof, within two months of the day on which the Agency published its decision.”
30. The notice of appeals, submitted originally in cases A-001-2109 and A-002-2019, was submitted on 23 April 2019, challenging ACER Decision No. 02/2019, which was serviced to the Appellants on 21 February 2019.
31. In accordance with Article 25(7) of the Rules of procedure, if a period would end on a Saturday, Sunday or official holiday of the Agency, the period shall end with the expiry of the last hour of the first following working day. Given the fact that both 21 and 22 April 2019 were holidays, and 23 April 2019 was the first working day, the date of submission of the notices of appeal fulfil this requirement.
32. The appeals were received by the Registry in writing, by e-mail, and they contained the statement of grounds, respectively.
33. Therefore, the appeals are admissible *ratione temporis*.

Ratione materiae

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34. Article 19(1) of Regulation (EC) 713/2009 states that decisions referred to in Article 7, 8 and 9 of this Regulation may be appealed before the Board of Appeal.
35. The Contested Decision was issued, among others, on the basis of Article 8(1) of Regulation (EC) 713/2009, which is explicitly mentioned in its introductory part.
36. Therefore, since the appeals fulfil the criterion of Article 19(1) of Regulation (EC) 713/2009, the appeals are admissible *ratione materiae*.

Ratione personae

37. Article 19(1) of Regulation (EC) 713/2009 provides that “*any natural or legal person, including national regulatory authorities, may appeal against a decision referred to in Articles 7, 8 or 9 which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.*”
38. The Appellants are addressees of the Decision and, thus, further assessment on the direct and individual concern is not needed. The admissibility of the appeals was not contested by the Defendant.
39. The appeals are therefore admissible *ratione personae*.

III. Merits

Remedies sought by the Appellant

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40. The Appellants request the Board of Appeal to annul the Contested Decision and to remit the matter to the competent Agency body for a new decision to be adopted in compliance with the legal opinion of the Board of Appeal.

First Plea: Competency of ACER

1. Conferral of decision-making power on the Agency.

41. This Part of the Plea is dealt with jointly with Part 2 of the present Plea.

2. The Agency's competence and standard of review when adopting the Contested Decision

42. The Appellants argue that, in adopting the Contested Decision, the Agency has exceeded the limits of its decision-making competence and violated the principle of conferral (Appeal, sections I (1) and (2)).

43. It is beyond doubt, as noted by the Appellants (para 29), that any and all actions by the Agency, including the adoption of the Contested Decision, are governed by the principle of conferral, which is both explicitly recognized in Article 5(2) of the Treaty of the European Union ('TEU') and a general principle of EU Law. The applicability to the activity of the Agency of the limits deriving from general principles of EU Law, which include the principle of proportionality, has already been recognized by the Board of Appeal¹⁰.

44. The Appellants accurately describe the relevant legal framework¹¹ when they point out that Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management ("CACM" or "CACM Regulation") imposes on TSOs (and nominated electricity market operators) the obligation to develop a proposal for common capacity calculation methodologies. Article 9(5) and (6) CACM

¹⁰ See Case A-002-2018, paras 52 and 54

¹¹ Paras 31-32 of the Appeal

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then confer on NRAs the competence to approve these methodologies. If more than one NRA is involved, they must follow the cooperation procedure set out in Article 9(10) to (12) CACM, which includes a referral of the decision to the Agency, if the NRAs in question are unable to reach an agreement.

45. However, the Appellants consider that, under Article 9(12) CACM, together with Article 8(1) of Regulation (EC) 713/2009, the Agency is only empowered to decide on issues on which NRAs have been unable to reach an agreement¹². They argue that this is confirmed, *a contrario*, by the fact that if the NRAs had been able to reach an agreement on the amended terms proposed by the TSOs within the applicable time limits, the Agency would not have been empowered to act in any way¹³. At the oral hearing, the Appellants stated that the Agency's competence is "*derivative, triggered by the disagreement of the NRAs*"¹⁴.

46. They also consider that the Agency's power and discretion to act in this case: (i) cannot exceed the powers attributed, and are subject to the same limits applicable, to the competent NRAs¹⁵; (ii) according to Article 8(1) of Regulation (EC) 713/2009, may only be exercised if the requirements set out in subparagraphs (a) and (b) are fulfilled¹⁶; (iii) must comply with the principle of proportionality¹⁷.

47. The Appellants further argue that the conferral of powers upon the Agency by the provisions in question must be interpreted in light of the objectives pursued by those provisions, which they see as acting exceptionally, and in a supporting role, to ensure the adoption of uniform DA CCM and ID CCM by the NRAs¹⁸.

¹² Paras 25, 26, 30, and 36-39 of the Appeal

¹³ Para 38 *ibid.*

¹⁴ Minutes of the oral hearing, p.3

¹⁵ Paras 26, 34, 37, 40 and 42 of the Appeal

¹⁶ Paras 33 and 36 *ibid.*

¹⁷ Para 35 *ibid.*

¹⁸ Para 36 *ibid.*

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48. Finally, the Appellants also invoked, in passing, an infringement of the principle of subsidiarity¹⁹.
49. It should be noted, from the outset, that the Appellants do not clearly set out how precisely, in their view, the Agency has overstepped its competence. In order for this claim to be discussed and applied herein, to achieve the outcome sought by the Appellants, they would have needed to indicate the specific aspects or issues which were regulated in the Contested Decision which exceeded the powers granted to the Agency, namely by - according to the Appellants' interpretation of the law – dealing with “determinations which have already been accepted by the NRAs in the preceding consultation procedure”, which could then “no longer be questioned or amended by the Agency”²⁰. Considering the content of the appeals, even if, *ad arguendum*, the Board of Appeal were to agree with the Appellants on their interpretation of the limitation of the Agency's powers, it would not be able to conclude that those powers were exceeded, because the Appellants do not indicate the specific issues which they believe were agreed upon by the NRAs, and in relation to which the Agency arrived at a different decision from the one which had been agreed to by the NRAs.
50. The preceding conclusion would suffice to exclude the relevance of this plea. But it is prudent and useful to address the underlying interpretation of the legal framework put forward by the Appellants.
51. In this regard, two preliminary points should be made. First, the principle of subsidiarity has no relevance for the present discussion. As is clearly set out in Article 5(2) TEU, the principle of subsidiarity governs the attribution of competence to the EU or to the MS in areas of shared competence. As set out in the Treaty, and in Protocol No 2 attached thereto, this principle is applicable to the determination of the EU Institutions' legislative powers. Even if one were to accept that there could, in theory, presently or in the future, be circumstances where the principle of subsidiarity could be relevant in the

¹⁹ Para 38 *in fine*

²⁰ Appeals, para 43

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context of the determination of the Agency's powers, the case in question is clearly not one such situation. When acting under Article 9(12) CACM and under Article 8(1) of Regulation (EC) 713/2009, the Agency is exercising a competence which, at that stage of the procedure, given the specific circumstances, is exclusive to it. In order for the principle of subsidiarity to be relevant, the adoption of the Contested Decision would have to be a shared competence between the Agency and the NRAs, where either one or the others could act. However, in the specific context of the adoption of the Contested Decision, under EU Law, only the Agency was empowered to act.

52. Second, the principle of proportionality is also not relevant for the present discussion. The principle of proportionality applies to the Contested Decision, but its application does not determine whether the Agency had the competence to adopt the Contested Decision, but rather whether it exercised that competence in accordance with the principle of proportionality. If this principle were infringed, the Contested Decision would be null and void, but not because the Agency was not empowered to adopt it. This point is made further clear by the fact that, under this plea, the Appellants provided no specific arguments demonstrating how the principle of proportionality was infringed. This discussion properly belongs within the Appellants' remaining pleas challenging the substance of the Contested Decision, to the extent that it is raised therein.

53. As for the remaining substance of the legal issue raised by the Appellants, it is similar to the issue already addressed by the Board of Appeal in Case A-001-2017 (consolidated), para 57 *et seq.*

54. As noted above²¹, it is, in principle, the competence of the NRAs to jointly adopt the DA CCM and ID CCM drafted by the TSOs. They may require amendments to the TSOs' proposed draft. When the NRAs fail to reach an agreement within the set deadline, the Agency is empowered to act and to adopt the DA CCM and ID CCM.

²¹ See also Contested Decision, para 2

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55. Once the requisites for the adoption of a decision by the Agency, according to Article 9(11) and (12) CACM, together with Article 8(1) of Regulation (EC) 713/2009, are met, the Agency is both entitled and required to adopt the decision which should have been adopted by the NRAs, but which these were unable to agree upon. Accordingly, the Agency takes the position which was held by those NRAs and is under a legal obligation to adopt the decision in question, in accordance with the letter and spirit of the applicable Regulations.
56. As the Appellants recognize²², and has been previously stated by the Board of Appeal, the Contested Decision requires the assessment of complex technical issues, and the Agency enjoys a certain margin of discretion in this assessment. However, the discretionary power granted to the Agency in respect of a decision such as the Contested Decision is not unlimited. It is circumscribed by various conditions and criteria which limit the Agency's discretion, which include the requirements specifically set out in the relevant legal framework²³. The Appellants also correctly note²⁴ that the Agency's discretionary power is limited by the general principles of EU Law, including the principle of proportionality.
57. As the Board of Appeal has already clarified, there are no explicit provisions providing that the Agency may or shall request an amendment to the TSOs proposal, unlike the procedure of Article 9(12) CACM, which is available to NRAs. Neither Article 8(1) of Regulation (EC) 713/2009, nor Articles 9(11) and 9(12) CACM, explicitly limit the ability of the Agency to amend or change the proposal of the TSOs. On the other hand, these regulations do not explicitly provide that the Agency is competent to modify the TSOs' proposal. Thus, the analysis should consider other elements beyond the letter of the CACM Regulation, such as its purposes²⁵.

²² Appeals paras 26 and 41

²³ See Case A-001-2017 (consolidated), para 69

²⁴ Paras 26 and 41

²⁵ See Case A-001-2017 (consolidated), para 63

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58. Recital (5) of Regulation (EC) 713/2009 provides that the Agency was established “*to contribute towards the effective functioning of the internal markets in electricity and natural gas. The Agency should also enable national regulatory authorities to enhance their cooperation at Community level and participate, on a mutual basis, in the exercise of Community-related functions*”²⁶.
59. The Contested Decision is based on the failure of the ordinary procedure to determine the DA CCM and ID CCM, in which, after receiving the TSOs proposal, the NRAs shall seek an agreement, and only if and when the NRAs have not been able to reach an agreement in the time-period given, the Agency is compelled to decide on the matter in question. Therefore, the Agency’s powers are granted by Article 8(1) of Regulation (EC) 713/2009 and Article 9(11) and (12) CACM in order to solve a non-conventional situation. The limitations of the decision-making powers and procedures available to the Agency should be considered in the view of this objective²⁷.
60. The Board of Appeal has already held that, if the Agency had no discretion to modify the TSOs’ proposal and was compelled to request an amendment, the decision-making process could become inefficient if the NRAs and/or TSOs were not willing to reach an agreement, since the proposals could go back and forth many times, causing significant delays or a stalemate²⁸.
61. It must also be held that the Agency’s competence to adopt a decision under Article 9(11) or (12) CACM, and to determine the content of that decision, cannot be limited by the issues on which there was, or there was not, agreement between the NRAs. Firstly, no such limitation is imposed by the letter of those provisions or of Article 8(1) of Regulation (EC) 713/2009. Secondly, it may not be possible to effectively decide on a given issue without dealing with another issue, given the potential interaction and cross-effects between the two. Thirdly, and more importantly, such a limitation would run

²⁶ See Case A-001-2017 (consolidated), para 64

²⁷ See Case A-001-2017 (consolidated), para 65

²⁸ See Case A-001-2017 (consolidated), para 67

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counter to the principle of legality and to the objectives of the EU legal framework which the Agency must apply. Regardless of whether the decision is taken by the NRAs or by the Agency, the decision-maker(s) is required to ensure that the content of the decision is in accordance with the law, namely in what concerns the pursuit of the objectives set out in the CACM Regulation, in compliance with the principle of proportionality. The addressees of the decision, and all those directly and individually concerned by it, are entitled to seek judicial review of that decision, to ensure compliance with EU Law. The Agency could not be forced to disregard its obligations under EU Law because the NRAs had agreed on an approach or an interpretation which, in the Agency's view, is contrary to EU Law. The Appellants' approach could lead to such a result. In this respect, the Board of Appeal agrees with the Agency's statement on its duty to apply EU law at the Oral Hearing: *"The CACM Regulation and the Electricity Regulation have to be interpreted autonomously and, being EU law, the Agency has to apply them independently from the NRA's views."*²⁹

62. Furthermore, the Appellants' position seems to rest on the erroneous assumption that the powers of the NRAs, when acting under Article 9(12), are limited by the amendments submitted by the TSOs. The procedure of Article 9 is meant to lead, preferably, to the adoption of methodologies drafted by TSOs. But this is not a necessary outcome. If the TSOs do not submit the amendments requested by the NRAs, and their amended draft does not comply with EU Law or does not sufficiently ensure the attainment of the Regulation's objectives, the NRAs may, and must, alter the methodologies, introducing the necessary amendments. If the NRAs are unable to agree, the Agency takes on this role and is equally empowered to amend the methodologies as it deems necessary.

63. Even if, *ad arguendum*, the Board of Appeal were to agree with the Appellants' position that, in theory, a request for the Agency to act under Article 9(12) CACM could limit

²⁹ Minutes of the oral hearing, p.4

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the Agency's powers to the scope of the issues on which the NRAs had disagreed, this would still not lead to the outcome sought by the Appellants in the present case.

64. In the present case, the NRAs requested amendments to the TSOs' proposed draft. Keeping in mind what was stated above, in para 48, it must be stressed that the Appellants have not argued that the Agency adopted a decision dealing with an issue which did not fall within the scope of the amendments requested by the NRAs, in a different way than what was already agreed to by the NRAs. Furthermore, the NRAs were unable to reach an agreement on the amended draft submitted by the TSOs.

65. In an email dated 21 August 2018, sent to the Agency by the Chairman of the Core Energy Regulators' Regional Forum, meant to submit the matter to the Agency under Article 9(12) CACM, the Chairman stated: *"This letter was the outcome of the process within the [CERRF] on these proposals. The letter sets out the areas of non-agreement which constitute the reasons for referring the proposal for decision to ACER"*³⁰.

66. The letter attached to this email³¹ states that the *"Core NRAs could not agree on their view on several substantial points"*, and describes as follows the points of disagreement:

"different understandings between some Core NRAs on how to avoid undue discrimination between internal and cross-zonal exchanges in accordance with Article 21(1)(b)(ii) of the CACM Regulation";

"Firstly, Core NRAs could not agree on whether grid security concerns addressed in Article 16(3) of Regulation (EC) No 714/2009 and Article 1.6. lit. a of Annex I of that Regulation, or economic efficiency concerns – in the context of a zonal system – addressed in Article 1.5. lit. a of Annex I of that Regulation, allow for a proportional and legally justified unequal treatment between internal and cross-border flows and/or trade. Consequently, Core NRAs could not agree on indicators to measure undue discrimination to identify whether a CCM is compliant with European legislation or not."

³⁰ Agency's Defence, Annex 1

³¹ Agency's Defence, Annex 2

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“Secondly, no agreement was found on how a CCM could be designed in order to be compliant with relevant Articles of the CACM Regulation. For different Core NRAs the proposed selection of CNECs described in Article 5 of the DA CCM and the use of a minimum Remaining Available Margin (hereafter minRAM) described in Article 13a of the DA CCM are sufficient to avoid undue discrimination, or can at least be taken as a reasonable starting point in order to mitigate the effects of the discrimination. For some other Core NRAs the 5% threshold for the Power Transfer Distribution Factor for all lines (cross-border and internal) and the uniform 20% minRAM requirement are not sufficient in this respect. Their reason for this is that those measures do not prevent loop flows from severely limiting cross-border flows and internal lines from pushing congestion to the border. In addition, having loop flows and internal flows in the base case leads to discrimination between internal and cross-border flows, since flows in the base case get unjustified priority. Those same NRAs have also stated that TSOs have not motivated why above values are sufficient to avoid undue discrimination.”

“Thirdly, there was a discussion on the definition of the FRM, whether it is the uncertainty on the observed flows, or the uncertainty of the observed flows in the case the respective critical branch would suffer from the worst case contingency along all hours of the year – calculated by Core TSOs through simulations in N-1 state”.

“Some of the other controversial points were the approach to external constraints and which level of transparency – with regard to European and national legislation – can and shall be provided to NRAs and market participants in the methodology”

67. The letter concludes by noting that the NRAs *“did not reach a unanimous agreement to either approve the proposals, to request to the Agency to extend the deadline for decision or to request the Agency to adopt a decision on the Core DA and ID CCMs. In that case, the Rules of Procedure of CERRF require the CERRF Chair to refer the decision to the Agency - in accordance with Article 9(12) of the CACM Regulation – on behalf of the Core NRAs”.*

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68. It follows from the above that the adoption of the Contested Decision fell upon the Agency, not because the relevant NRAs requested it, but because, within the two months deadline, they were unable to reach an agreement on the amended proposal submitted by the TSOs, or even to agree on whether to request the Agency to adopt this decision. It also follows that the letter informing the Agency about the developments which empowered it to act did not provide an exhaustive overview of all the points on which there was disagreement between the NRAs, as evidenced by the use of the expression *“some of the other controversial points are...”*.
69. The Core NRAs’ Non-paper of 18 September 2018 (i.e. after the two months deadline for the NRAs to reach a decision) does not change this assessment. It was adopted at a time when the Agency had already been informed that the NRAs were unable to reach an agreement within the legal deadline, and had already become empowered to adopt the Contested Decision. As such, it is impossible for anything laid out in the Non-paper to have the effect of limiting the Agency’s powers relating to the adoption of the Contested Decision. The Non-paper expressly recognises that it is intended as a mere *“support for the decisions of the Agency” “on a working RCC (Regional Coordination Committee) level”* (p. 2)
70. Accordingly, the Appellants’ arguments, in this regard, rest on an erroneous assumption. It is true that Article 9(11) and (12) CACM, together with Article 8(1) of Regulation (EC) 713/2009, only empower the Agency to decide when the NRAs have not been able to reach an agreement. However, in the present case, the NRAs were not able to reach an agreement on the DA CCM and ID CCM, as a whole. It cannot be argued that the Agency’s decision-making powers, in this case, are narrower than the adoption of the DA CCM and ID CCM, as a whole, and, namely, that they are limited by some specific points on which there was disagreement between the NRAs.
71. In the case at hand, there wasn’t a unanimous decision by the NRAs to refer the matter to the Agency, following disagreement on certain specified points. Rather, there was disagreement on several points, including even on whether to refer the decision to the

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Agency, and there was a failure to adopt a common position. Thus, the Agency could never be limited by specific points of disagreement identified in a referral decision, because there was no referral decision. The initiation of the procedure before the Agency resulted from the infringement of the two months deadline, and not from a decision adopted by the NRAs. As noted above, the Agency wasn't even informed, precisely, of all the points on which there was disagreement.

72. Finally, the success of the Appellants' argument also depends on there being some issue(s), in what concerns the substance of the Contested Decision, that fall(s) outside the scope of the disagreements between the NRAs, as described above. However, the Appellants failed to indicate which specific points of the Contested Decision, in their view, do not fall within the scope of disagreement between the NRAs. The burden of allegation in this regard rests on the Appellants. It is not for the Board of Appeal to identify, of its own initiative, specific points of the Contested Decision on which the NRAs may have agreed or disagreed. Furthermore, if any such specific point were raised before the Board of Appeal, it would still have to be assessed whether the Agency's tackling of that issue was not required by its decision on other issues on which the NRAs did disagree, considering cross-effects between the issues. In the present case, given the absence of allegation of specific issues in which this may have occurred, it is impossible to carry out this assessment.

73. It follows that Parts 1 and 2 of the First Plea must be dismissed as unfounded.

3. *The Board of Appeal's competence and standard of review*

74. Considering the transversal importance of this issue, for nearly all the arguments put forward by the Appellants, it is convenient to begin by clarifying the Board of Appeal's scope of review of the Contested Decision. While this issue has been clarified in

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previous decisions of the Board of Appeal, the Appellants disagree with the position previously adopted³².

75. According to settled case-law of the Court of Justice of the European Union³³ (“CJEU”), when complex economic and technical issues are involved, the appraisal of the facts is subject to more limited review upon appeal.

76. The Board of Appeal hereby reaffirms its settled decision-making practice³⁴, according to which, in the limited timeframe it is given to decide on the appeal of the Contested Decision, considering the principle of procedural economy, and with regard to the complex economic and technical issues involved, it is not able to, and should not, carry out its own complete assessment of each of the complex issues raised. Instead, it must limit itself to decide whether the Defendant made a manifest error of assessment.

77. In the present case, it is accepted by the Appellants³⁵, and not in dispute, that the Agency enjoys a certain margin of discretion when adopting the Decision provided for in Article 9(12) CACM³⁶. Accordingly, in light of the above, in the present case, considering the arguments raised by the Appellants, review of the Contested Decision by the Board of Appeal should be limited to the identification of a manifest error of assessment.

78. The Appellants’ argument³⁷ according to which Art. 19(5) of Regulation (EC) 713/2009 grants the Board of Appeal the right to exercise any power which lies within the competence of the Agency does not change this assessment. The extent of the Board of Appeal’s powers once it has decided that the decision should be annulled has no bearing

³² Appeal, section I(3)

³³ Case C-12/03 P *Commission v Tetra Laval* EU:C:2005:87, para. 39; Case T-201/04 *Microsoft v Commission* EU:T:2007:289, para. 89; Case T-301/04 *Clearstream v Commission* EU:T:2009:317, para. 95; Case T-398/07 *Spain v Commission* EU:T:2012:173, para. 62; Case C-452/10 *BNP Paribas v Commission* EU:C:2012:366, para. 103; Case T-29/10 *Netherlands et al v Commission* EU:T:2012:98, para. 103; Case T-68/89 *Società Italiana Vetro v Commission* EU:T:1992:38, para. 160.

³⁴ Case A-001-2017 (consolidated), para 108, Case A-001-2018, para 52, and Case A-002-2018, para 63)

³⁵ Appeals paras 26 and 41

³⁶ See Case A-001-2017 (consolidated), para 67; Case A-001-2018, para 47; Case A-002-2018, para 63

³⁷ Appeals paras 27 and 44-46

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on the determination of scope of its review when deciding whether the decision should be annulled. By analogy, in the legal order of the EU (and of several MS), it is, in certain circumstances, possible for judicial authorities to alter administrative decisions which they deem null and void, but they are required to respect the discretionary margin of the administration when dealing with complex technical matters, and to find the decision invalid only if a manifest error of assessment is detected.

79. The Appellants also argue that the CJEU's case-law on the assessment of complex economic and technical issues, quoted by the Board of Appeal in Case A-002-2018, does not apply to review of Agency decisions by the Board of Appeal, because this review precedes the judicial review exercised by the CJEU³⁸. In this regard, the Board of Appeal's reference to the case-law in question did not imply that such case-law applied directly to proceedings before the Board of Appeal. Rather, it was meant to demonstrate the existence of a general rule, in EU Law, of respect for the discretionary margin of the administration when deciding on complex technical matters, and the corresponding limitation of the review of such decisions on appeal. As restated above, the Board of Appeal's finding that the same limitation applies to the present proceedings is based on Art. 19 of Regulation (EC) 713/2009 and on the specific characteristics of the Board of Appeal and of the appeal proceedings before it, including the limited timeframe and the principle of procedural economy. Given the high degree of complexity of the technical issues to be assessed and the need to review large numbers of documents and facts, the procedure before the Board of Appeal, as established by the EU legislator, is not compatible with an effective exercise of detailed, unlimited review, nor is such a review required by the *ratio legis* of Art. 19 of Regulation (EC) 713/2009. The fact that the Board of Appeal is composed of specialists with relevant experience in the energy sector allows the Board of Appeal to be capable of making a determination of whether a manifest error of assessment has occurred, but it does not change these conclusions. It is in this sense that para 117 *in fine* of Case A-001-2018 should be understood.

³⁸ Para 45 *ibid.*

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80. It should further be noted that the Appellants' right to effective judicial remedies is entirely protected and guaranteed by the EU legal order, including by Art. 20 of Regulation (EC) 713/2009.

81. It follows that Part 3 of the First Plea must be dismissed as unfounded.

Second Plea: Substantive errors of law in the Contested Decision regarding the DA CCM

1. Lawfulness of the TSOs Amended DA CCM and ID CCM Proposals

82. The Appellants argue that, given that the Amended DA CCM and ID CCM Proposals of the Core TSOs were lawful, there was no need for ACER to amend them and that all amendments contained in the Contested Decision are, hence, unlawful.

83. In this respect, we refer to what has been set out above in Parts 1 and 2 of the First Plea. Moreover, this consideration of unlawfulness per se of ACER's amendments to the Core TSO's Proposals is legally unbecoming, given that Article 8(1) of Regulation (EC) No 713/2009 and Article 9(12) of Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management ("CACM") require ACER to intervene precisely because the Core NRAs failed to agree on the said Proposals. If these Proposals had not required any amendments and had been agreed upon by the Core NRAs, there would be no need for ACER's intervention whatsoever. In so doing, ACER substitutes the NRAs, as expressly provided for by Article 7(7) of Regulation (EC) No 713/2009.

84. For the sake of completeness, the Board of Appeal notes that the Core NRAs' Non-paper of 18 September 2018 expressly states that the Core TSOs' Amended Proposals were "lacking clear, transparent and harmonized definitions, as well as defined and justified thresholds and values" (III, p. 3). The Non-paper states on the general quality of the said Proposals that "requirements of the CACM Regulation were not sufficiently met in the Amended DA and ID CCM Proposals" (III, p. 3).

85. It follows that Part 1 of the Second Plea must be dismissed as unfounded.

2. *MinRAM*

86. As a preliminary observation, the Board of Appeal notes that the claims expressed by the Appellants in Parts 2, 3 and 4 of the Second Plea clearly derive from Germany's enhanced sensitivity to cross/border trade due to its geographic location, as the Appellants expressly recognise in their appeal³⁹.

2.1. *Erroneous determination of the MinRAM for cross-zonal exchanges*

87. The Appellants allege that the Core TSOs' Amended Proposals correctly contained a minRAM for cross-zonal exchanges of 20% of the maximum allowable flow on CNECs, which, in their opinion, is sufficient to avoid undue discrimination between internal and cross-zonal exchanges. Accordingly, they challenge the Contested Decision, which increases the minRAM for cross-zonal exchanges on CNECs up to a level of 70% of the maximum allowable flow.

88. Even though the Appellants acknowledge that the CACM requires rules to avoid undue discrimination between internal and cross-zonal exchanges in CCM Proposals and that defining a minRAM is an adequate solution to avoid such discrimination (both in the Appeal and in the minutes of the oral hearing, p.13), they allege that a minRAM threshold of 70% is contrary to a joint reading of Article 21(b)(ii) CACM and Point 1.7 of Annex I to Regulation (EC) 714/2009. The Appellants stated at the Oral Hearing that they had "*no means to determine whether the Decision's assertion that a 70% threshold is necessary to avoid undue discrimination because nowhere in the decision does the Defendant explain the metric by which that determination has been made.*"⁴⁰

³⁹ para 74 of the Appeals

⁴⁰ Minutes of the oral hearing, p.7

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89. The Appellants assume, as a starting point for their reasoning, that a minRAM threshold of 70% limits interconnection capacity, as opposed to a 20% threshold. However, a minRAM threshold of 70% on a CNEC merely implies that at least 70% of the maximum allowable flow is reserved for cross-zonal exchanges. This unavoidably sets a limitation on the maximum availability for the rest of the capacity (internal flows, loop flows and reliability margin). The Board of Appeal notes, in addition, that these two percentages are not comparable because they are calculated in a different manner and on the basis of different elements..
90. The Appellants oppose the fact that a minimum RAM threshold entails a maximum threshold for internal flows, loop flows and reliability margin. However, capacity on CNECs is not unlimited. Hence, reserving a minimum capacity for cross-zonal trade necessarily implies setting a maximum capacity for other exchanges (internal trade, loop flows and reliability margin). Notwithstanding the fact that this is commonplace, the Appellants do not seem to agree with it. They allege that no “implicit” requirement can be deduced from the CACM and that ACER should not have set an “implicit” maximum threshold for other than cross-zonal exchanges in para 123 of the Contested Decision. Yet, the underlying reasoning is straightforward: if, on a scale of 100, at least 70 are reserved for cross-zonal exchanges, non-cross-zonal exchanges are unavoidably limited to a maximum of 30% in situations in which cross-zonal exchanges will use all reserved capacity. In other terms, in the scenario at hand of finite capacity, setting a minimum goes hand-in-hand with setting a maximum.
91. The Appellants further rely upon the first threshold of 20% that was approved by the CWE NRAs to avoid restrictions on cross-zonal exchanges at specific hours of the day. First of all, the Board of Appeal highlights that the CWE region is only a subset of the Core Region. Secondly, this CWE NRA agreement was reached in December 2017 and has been applied since 26 April 2018 as a temporary solution, awaiting the result of a

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CBCO-selection study, which is pending⁴¹. A temporary solution cannot be interpreted as a sufficient solution for the future. On the contrary, the principle of maximisation in Article 16(3) of Regulation (EC) 714/2009 implies that whenever a solution is found which would allow to provide higher capacity for cross-border trade, this solution needs to be applied.

92. The Appellants also claim that ACER introduces modifications to the Core TSOs' Amended Proposals on the mere basis that these modifications are adequate, but that ACER doesn't adduce any other justification beyond its adequacy. The Appellants allege, in particular, that the Contested Decision does not provide any justification for the 70% threshold.
93. The Agency's justification is duly set out in the Contested Decision⁴². Setting a minRAM avoids undue discrimination because it minimises the negative impact of internal congestions and loop flows on cross-zonal capacities. Indeed, as set out by Articles 3 and 21 CACM and Article 1.7 of Annex I to Regulation (EC) 714/2009, such discrimination is not suitable for electricity exchanges in the EU and hinders competition.
94. The Appellants fail to acknowledge that discrimination between internal and cross-zonal trade is inherent to zonal congestion management. Zonal models prioritize internal trade per definition. That is why the applicable regulation states that it aims to avoid "undue" discrimination. Taking account of the *de facto* discrimination in favour of internal trade in zonal models, it aims at reaching an acceptable or optimal level of discrimination in order to promote the internal market, even though discrimination cannot be totally eradicated. They also fail to place capacity calculation in a wider congestion management context. Capacity calculation is one of the various available measures to remedy congestions. If there were no congestions, there would be unlimited trade of

⁴¹ Common position paper of CWE NRAs on the update of the Flow-based market coupling methodology, August 2018, <https://assets.ilr.lu/energie/Documents/ILRLU-1685561960-541.pdf>

⁴² Para 119 thereof

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electricity and it would not be necessary to calculate and allocate capacities. Other means are remedial actions (short-term), reconfiguration of bidding zones (medium to long-term) and network infrastructure (long-term). Capacity calculation as a tool for congestion management is aimed at maximising cross-border trade in line with operational security and guaranteeing that the internal electricity market functions efficiently. Therefore, CCMs constitute tools aimed at finding an optimal balance between short and long-term measures.

95. Congestion management rules are set to create a fully functioning internal market for electricity. A low level of cross-border exchanges limits the transport of electricity between Member States, discriminates between network users in different parts of the network, distorts competition between market participants, does not provide the correct incentives and efficient economic signals to TSOs and can result in free-riding on neighbouring networks via loop flows. Furthermore, low levels of capacity available for cross-border exchanges where higher levels would be technically feasible are not in line with the principle of maximisation of cross-border trade in Article 16(3) of Regulation (EC) 714/2009.

96. That is the reason why CCM Proposals need to comply both with the CACM, in particular Article 21(1)(b)(ii), which seeks to avoid undue discrimination between internal and cross-zonal exchanges and with Regulation (EC) 714/2009, in particular its Article 16(1) and Point 1.7 of its Annex I, which state that congestion management should be non-discriminatory, market-based and competitive and should provide efficient economic signals to market participants and TSOs. ACER correctly stresses in its Defence that *“competition is the only guiding principle for the management of congestions that fully complies with the principles set out in Article 16(1) of the Electricity Regulation. Competition implies that all requests for trade are ordered according to their economic value (i.e. price) and only those requests are granted, which offer the highest price for the scarce capacity of the congested network elements”*⁴³.

⁴³ Defence, para 12

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97. In this context, setting a minRAM for CNECs aims at avoiding undue discrimination. They avoid TSOs limiting cross-zonal capacities to solve internal congestions (except where this is justified for reasons of economic efficiency and operational security). If the TSOs wished to limit cross-zonal capacity to solve their internal congestions, their Appeal should have demonstrated that reasons of economic efficiency or operational security justified these restrictions. Furthermore, if these justifications had been provided, they would need to be demonstrated at the level of the Core CCR, and not just at the individual TSO or Member State level.
98. With respect to the 70% threshold of minRAM in the Core CCM Proposals, the Contested Decision justifies this threshold, which is indispensable to avoid undue discrimination between internal and cross-zonal exchanges.
99. If a minRAM of 20% were maintained for cross-zonal trade - even though 20% is only a minimum and a higher level could be reached - situations could still occur where the vast majority of capacity would be used for internal trade (because the reliability margin is expected to be low). A minRAM threshold of 20% would not be able to avoid these situations. A threshold of 70%, on the contrary, ensures that cross-zonal exchanges are not discriminated against compared to internal exchanges.
100. ACER reached the figure of 70% through a benchmarking exercise on data made available by the CWE and Nordic TSOs. This was reiterated by the Agency at the Oral Hearing⁴⁴. These data were not challenged by the Appellants. ACER observed that the average reliability margin in the existing CWE flow based capacity calculation was of approximately 12% of the maximum admissible flow. ACER observed furthermore that a relatively well-defined bidding zone configuration such as the Nordic CCR (which is fully compliant with Point 1.7 of Annex I to Regulation (EC) 714/2009) was almost always⁴⁵ characterised by a level of loop flows and internal flows below 20% of the

⁴⁴ Minutes of the oral hearing, p.8

⁴⁵ 90% of the cases, see para 123 of the Contested Decision.

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maximal allowable flows in the positive direction and 16% in the negative direction. Hence, capping loop flows and internal flows in a CCM to 15% would reduce discrimination. That is why, having closely reviewed the remaining input data of NRAs, TSOs and other stakeholders, ACER decided to cap the internal flows, loop flows and reliability margin to a maximum of 30% of maximal allowable flows on CNECs (Contested Decision, para 124). This consequently required that at least 70% of maximal allowable flows on CNECs be reserved for cross-zonal exchanges.

101. The Agency states in its Decision that the 70% threshold is conservative. The Contested Decision expressly states in footnote 12 that its estimated 70% threshold is conservative as it is based on limited existing information and explains that ACER's annual Market Monitoring Reports contain more optimistic estimates.

102. The Agency argues that its conservative approach is due to the lack of sufficient capacity calculation in Continental Europe. This is expressly set out in Recommendation 02/2016⁴⁶, which stresses that *“the CWE region (...) has in general not yet reached the level of efficiency, transparency and non-discrimination required by the European legal and regulatory framework”*⁴⁷. This is due to the fact that capacity calculation methodologies assume that *“the network must be able to accommodate all flows resulting from internal exchanges, whereas cross-zonal capacities and cross-zonal exchanges comply with operational security limits. As a consequence of this approach, requests for internal exchanges get unlimited and prioritised access to the scarce network capacity which is not already used by internal exchanges”*⁴⁸. It adds that in some extreme cases, for example on certain German borders, the cross-zonal capacity has been reduced to almost zero.

⁴⁶ Recommendation of the Agency for the Cooperation of Energy Regulators No. 02/2016 of 11 November 2016 on Common Capacity Calculation and Redispatching and Countertrading Cost Sharing Methodologies

⁴⁷ P. 2 of Recommendation 02/2016

⁴⁸ P. 5 of Recommendation 02/2016

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103. In light of this approach, the Agency expressly recognises in its Decision that the minRAM threshold will have to be reassessed and improved once better information on the functioning of flow-based capacity calculation in the Core CCR is available⁴⁹.

104. Furthermore, it should be noted that, in setting a 70% minRAM threshold, ACER duly takes account of the fact that all Core TSOs committed to guarantee 20% minRAM of maximum allowable flows in their Amended Proposal independently of the volume of unscheduled allocated flows. Indeed, ACER expressly establishes that the 70% minRAM can further be reduced by unscheduled allocated flows, to the extent that such a reduction does not result in a RAM below 20% of the maximum admissible flow⁵⁰.

105. The Contested Decision also foresees exceptions where needed: a transitional possibility to gradually and incrementally implement the 70% threshold by 2025 is granted to CNECs benefiting from a derogation or CNECs with an action plan to address structural congestion⁵¹.

106. In its justification, ACER relies upon the high-level principles set out in its Recommendation 02/2016, which TSOs and NRAs are invited to follow when developing, approving, implementing and monitoring congestion management measures. These high-level principles aim to ensure that CCM is developed pursuant to Articles 20(2) and 74(1) CACM and reflect transparent, non-discriminatory, market-based solutions. The first principle is, thus, that a cross-zonal CCM should not consider limitations on internal network elements, whereas the second principle is that, in the common CCM, capacity of cross-zonal network elements should not be reduced in order to accommodate loop flows. The implementation of these principles ensures that discrimination between internal and cross-zonal exchanges is prevented or at least minimised and duly justified and that the maximum capacity of the interconnections

⁴⁹ Contested Decision, footnote 12

⁵⁰ Contested Decision, paras 126-127

⁵¹ Ibid., paras 127 and 128 and Article 17 of Annex I thereto

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and/or the transmission networks affecting cross-border flows are made available to market participants.

107. The Agency does not refer to Recommendation 02/2016 as a legal basis for its Decision, but invokes it as a soft law instrument. The non-binding nature of this Recommendation does not affect its key role in assisting the regulatory authorities and market players in sharing good practices as a soft law instrument. The Agency was urged to draft this Recommendation by the European Commission in its letter of 31 August 2016 in order to enhance integration of the EU electricity market and to boost the internal market. Recommendation 02/2016 is legally valid as it was issued at the European Commission's request in accordance with Article 7(2) of Regulation (EC) 713/2009 and following a favourable opinion of ACER's Board of Regulators, delivered in accordance with Article 15(1) of Regulation (EC) 713/2009.

108. The Appellants also invoke a lack of close collaboration with ENTSO and the TSOs, contrary to the CACM Recitals.

109. Firstly, the very procedure foreseen by the CACM whereby TSOs draft and amend Proposals for approval by NRAs implies a close collaboration between ACER, the NRAs and the TSOs.

110. Secondly, the Contested Decision was preceded by an extensive public consultation in December 2018, during which TSOs, NRAs and stakeholders had 20 days to comment on various aspects of the CCM, including *“(i) the avoidance of undue discrimination between internal and cross-zonal trade, ad in particular the suggested approaches on the selection of CNECs as well as the minRAM”*⁵².

111. Thirdly, the Agency closely cooperated with all Core NRAs and TSOs and further consulted on the amendments to the proposed CCMs during numerous teleconferences

⁵² Contested Decision, paras 13 and 24; and Annex III thereto

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and meetings and through exchanges of amendments, as set out in paras 14 and 20-23 of the Contested Decision. In so doing, the Agency “(a) *tried to clarify the default approaches to capacity calculation and the framework for deviations, in particular the necessary level of transparency over the reasons for deviations and measures taken for their resolution (e.g. (..) threshold for minimum RAM (..); (b) with respect to the treatment of non-discrimination, and in particular CNEC selection and a threshold regarding minimum RAM further discussed the proportionate rules and thresholds to be applied in the short term, then in the longer run, and the appropriate transition phase from this initial phase to the final one*”⁵³.

112. Fourthly, ACER approached TSOs, NRAs and stakeholders for opinions and data related to the setting of a minRAM with a view to avoiding undue discrimination, as noted in para 123 of the Contested Decision.

113. Furthermore, although ACER envisages a reassessment of the minRAM threshold, it determined the 70% minRAM threshold on the basis of the input of TSOs. Indeed, as set out in detail in the Contested Decision⁵⁴, when determining the 70% minRAM threshold, ACER used the CWE and Nordic TSOs’ input as a benchmark. Fifthly, among the 9 stakeholders who participated in the public consultation and tackled the issue, 5 explicitly suggested a starting point above 20%.

114. In addition, the Appellants challenge the fact that the Contested Decision makes a reference to instruments of the Clean Energy Package for All Europeans (“Clean Energy Package”), in particular, Article 16(8) of the draft Recast Regulation (EC) 714/2009, which establishes a mandatory minRAM of 70% on CNECs. The Appellants claim that the Agency could not make any reference to draft Recast Regulation (EC) 714/2009 in its Decision because the Recast Regulation was only a draft and had not yet entered into force. At the Oral Hearing, the Appellants added that “*the 70% threshold in the Decision and the 70% threshold in the Clean Energy Package are two entirely*

⁵³ Ibid. para 23

⁵⁴ Ibid. para 123

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different thresholds. The Agency's one comes with the apparent implicit recognition that there is also a 30% limit on loop flows and on other connection capacities while the Clean Energy Package is explicit: as soon as you reached 70% minRAM, you avoided undue discrimination. In terms of competence, the Decision effectively interprets the undue discrimination requirement as going beyond the Clean Energy Package as the 70% 'there' has come with a mandatory 30% loop flow limitation in the Decision. The superior position of the legislation obviously cannot be interpreted by an individual decision. The requirements set out in the Decision are higher than those in the Clean Energy Package."⁵⁵

115. Even though these statements are unclear, if the Appellants allege that respecting the 70% is one way of meeting the maximisation requirement whereas it could legally be possible to not discriminate but still have less than 70 % available, the Board of Appeal observes that the maximisation principle of Article 16(3) of Regulation (EC) 714/2009 clearly provides an argument against this. The 70% is a *de minimis* requirement and TSOs have the obligation to maximize trade beyond 70% if they can, without applying costly remedial actions.

116. The Board of Appeal clarifies that the Clean Energy Package includes 8 different legislative acts, two of which are of particular relevance for the CCM and are referred to by the Agency in its Decision, namely a Recast Regulation (EC) 714/2009 (entitled Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, hereinafter "Regulation (EU) 2019/943") and a Recast Electricity Directive (EC) 2009/72/EC (entitled 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, hereinafter "Directive 2012/27/EU").

⁵⁵ *Minutes of oral hearing, p.7*

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- 117.. These Proposals introduce stricter and harmonised rules for capacity mechanisms (reconciling the EU objectives of security of supply and emission reduction), enhance regional coordination in order to improve market functioning and competitiveness and foster an internal electricity market. In particular, they allow electricity to move freely to where it is most needed and when it is most needed via undistorted price signals and, in so doing, allow consumers to benefit from cross-border competition. They are expected to drive the investments necessary to provide security of supply, whilst decarbonising the European energy system.
118. Recast Regulation (EC) 714/2009 and Recast Electricity Directive (EC) 2009/72/EC have formally been adopted by the Council on 22 May 2019 as Regulation (EU) 2019/943 and Directive (EU) 2019/944, entered into force on the 20th day following the day of their publication in the Official Journal, i.e. on 4 July 2019, and will apply as of 1 January 2020.
119. The Appellants correctly state that Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943) had not been adopted and was not part of the legal order at the time the Agency adopted the Contested Decision. That is precisely the reason why the Agency did not rely upon Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943) as a legal basis when taking its Decision. The Agency took the Contested Decision in accordance with the existing legal order according to the principle that the legality of an act is reviewed with respect to the facts and the state of the law at the time it is adopted.
120. However, the Contested Decision contains some references to the Clean Energy Package which merely seek to highlight that the Agency's Decision is not only in line with the applicable legal framework, but also with the Clean Energy Package's objectives. Given that Regulation (EC) 714/2009 and the CACM Regulation are the legal basis for the Contested Decision, ACER logically also tested its Decision against draft Recast Regulation (EC) 714/2009 of the Clean Energy Package.

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121. As Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943) did not apply at the time of the adoption of the Contested Decision and as the Agency did not infringe the principle of legal certainty given Recast Regulation's stage in the legislative process, it is irrelevant for the purpose of this Appeal to rule upon the compatibility of the Contested Decision with Article 16(8) of Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943). The Board of Appeal observes that Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943) has formally been adopted on 22 May 2019, entered into force on the 20th day following the day of its publication in the Official Journal (i.e. on 4 July 2019) and will be applicable as of 1 January 2020. This will be earlier than the entry into force of the Contested Decision (not expected before December 2022⁵⁶). Hence, even if there were an inconsistency between the Contested Decision and Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943) - issue upon which there is no need for the Board of Appeal to rule - (Regulation (EU) 2019/943) would in any case prevail over the Contested Decision as of its entry into force according to the principles of "*lex posterior*" and "*lex superior*".

122. Finally, the Appellants adduce that the Agency went beyond its powers of review when amending the recitals of the Core TSOs' Amended Proposals because these recitals were in line with the objectives of Article 3 CACM, as the Agency expressly recognises in para 56 of its Decision.

123. Para 56 of the Contested Decision sets out that the Core TSOs' Amended Proposals "*address*" all objectives listed in Article 3 CACM except Article 3(g). Yet the fact that the Amended Proposals addressed the CACM objectives does not by any means imply that the Proposals comply with the said objectives and that their compliance is sufficiently clearly and adequately worded.

⁵⁶ This takes account of 1 December 2020 as the first date of implementation of the Core CCM, plus 18 months for the submission of the proposal and at least 6 months for regulatory approval.

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2.2. *Incorrect consideration of the impact of capacity on the non-core bidding zone borders in the calculation of the minRAM*

124. The Appellants claim that Article 17(4) of Annex I (DA CCM) to the Contested Decision is unlawful.

125. The Appellants claim that the Contested Decision underestimates the impact of capacity on the non-Core bidding zone borders when calculating the minRAM and consequently endangers the operational security of the network, contrary to Article 3(c) CACM. This is, in the Appellants' opinion, due to the fact that ACER's DA CCM measures the said impact on the basis of the forecasted exchange instead of the available exchange. The argument is split in two parts: 2.2.1. infringement of Article 3(c) CACM; and 2.2.2. detailed assessment of the Contested Decision's methodology. At the oral hearing, the Appellants stated that *"the net availability of capacity should be the net transfer capacity and not the capacity already allocated on the day-ahead market as the Decision requires – which is clearly only a subset of all capacity 'available'"*⁵⁷.

2.2.1. *Infringement of Article 3(c) CACM*

126. Pursuant to Article 26(3) CACM, TSOs may always reduce cross-zonal capacity during validation process, for reasons of operational security, to ensure secure network operations. Accordingly, Annexes I (DA CCM) and II (ID CCM) to the Contested Decision⁵⁸ allow TSOs to check whether operational security is ensured under various network configurations (including, where necessary, various flows forecasts stemming from non-Core exchanges). Given that TSOs may always reduce cross-zonal capacity during the validation process, the DA CCM's consideration of the non-Core exchanges cannot endanger operational security, as claimed by the Appellants. In addition, the risk

⁵⁷ Minutes of oral hearing, p.8

⁵⁸ Recital (22) and Articles 4(5) and 20 of Annex I; recital (21) and Articles 4(9) and 19 of Annex II

linked to erroneous forecast of exchanges outside the Core Region is covered by the reliability margin as foreseen by Article 8(1) of the Contested Decision.

127. Therefore, the Contested Decision does not infringe Article 3(c) CACM. ACER's DA CCM correctly takes account of the impact on non-Core bidding zone borders and, in so doing, does not endanger operational security.

2.2.2. Detailed assessment of the present methodology

128. The methodology foreseen by the Contested Decision by which the impact of non-Core cross-zonal capacities and exchanges is calculated is in accordance with Article 26(3) CACM⁵⁹. *Ad arguendum*, and even if the Agency was not obliged to follow the Core TSOs' Amended Proposals, the Agency did not materially alter the methodology of the Core TSOs' Amended Proposals in this respect.

129. The Agency only added a possibility to split flows from internal and cross-zonal non-Core exchanges. For the rest, the Agency's methodology is identical to the methodology foreseen by the Core TSOs Amended Proposals: flows are calculated on the basis of the forecast of exchanges, based on a common grid model, and exchange uncertainties are reflected in a reliability margin.

130. Similarly to the Core TSOs' Amended Proposals, the Agency's Decision uses a different calculation method for flows from cross-zonal Core exchanges (which do not need to be determined during the capacity calculation) and flows from cross-zonal non-Core exchanges (which, like internal exchanges, need to be determined during the capacity calculation but are based on forecasts given that they are not known at the time of the capacity calculation).

⁵⁹ Contested Decision, para 32.

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131. The methodology duly respects the requirements of Article 26(3) CACM,⁶⁰ because, during the validation process, TSOs retain the right to reduce the capacity for reasons of operational security. Operational security is defined via operational security limits, as defined in CACM, which are determined as fixed values of current, voltage, frequency etc. This has to be differentiated from uncertainties originating from consideration of flows from other CCRs which are covered by the flow reliability margin.

132. In other words, the right of TSOs to adjust cross-zonal capacity during the validation phase for reasons of operational security is unaltered by the Contested Decision. Indeed, after all other capacity calculation stages (cross-zonal capacity is calculated by a capacity calculator based on each TSO's individual grid models containing their forecasts and available costly and non-costly remedial actions and the resulting capacities are offered on the market for trading by power exchanges), the TSOs analyse the market results from a perspective of operational security, i.e. the TSOs assess whether the market results are feasible and can be implemented or whether, if such is not the case, cross-zonal capacities need to be reduced.

133. *Ad arguendum*, the Appellants' claims in this respect are contradictory. Given that they claimed that the Core TSOs' Amended Proposals were lawful and should not have been amended (see above, Part 1 of the Second Plea), it is inconsistent that they oppose a methodology which is identical to the Proposals' methodology. Furthermore, the Appellants do not propose any alternative methodology to take account of non-Core capacity.

2.2.2.1. Consideration of the forecasted exchange instead of the available capacity

⁶⁰ See also para 137 of this Decision

134. The Appellants claim that the measurement of the impact on non-Core bidding zone borders on the basis of forecasted exchange, as opposed to available exchange, leads to exchange levels that are lower than the real exchange levels.

135. In relying upon forecasted exchanges, the Agency fully respects Article 26(3) CACM, which does not impede the use of forecasted exchanges. During the validation process TSOs retain the right to reduce the capacity for reasons of operational security. Operational security is defined via operational security limits, as defined in CACM, which are determined as fixed values of current, voltage, frequency etc. This has to be differentiated from uncertainties originating from consideration of flows from other CCRs which are covered by the flow reliability margin.

136. The Board of Appeal observes that relying upon actual market forecasts in the capacity calculation is in line with the applicable regulatory framework and that congestions should not be addressed by capping the input of available capacity in the capacity calculation but by bidding zone reconfigurations or by network investments. TSOs need to balance their obligation to maximize capacity on the market with their duty to maintain operational security.

137. *Ad arguendum*, and even if the Agency was not obliged to follow the Core TSOs' Amended Proposals, the Agency did not materially alter the methodology of the Core TSOs' Amended Proposals in this respect.

2.2.2.2. Dangers of changing the forecasted/expected market direction

138. The Appellants claim that ACER's DA CCM endangers operational security because the market direction of forecasted exchanges can change and turn the relieving effects of forecasted exchanges into burdening effects and vice-versa.

139. The methodology of the Contested Decision does not endanger operational security because forecasts of the flows from other CCRs are only one element of all the forecasts TSOs have to make for capacity calculation (e.g. Generation Shift Keys, generation from renewable energy sources, etc.).

140. Given that TSOs may always reduce cross-zonal capacity during the validation process, the DA CCM's consideration of the non-Core exchanges cannot endanger operational security, as claimed by the Appellants. In addition, the risk linked to erroneous forecast of exchanges outside the Core Region is covered by the reliability margin as foreseen by Article 8§1 of the Contested Decision.

141. *Ad arguendum*, and even if the Agency was not obliged to follow the Core TSOs' Amended Proposals, the Agency did not materially alter the methodology of the Core TSOs' Amended Proposals as to the impact of relieving flows on the minRAM requirement.

142. It follows from the above that Part 2 of the Second Plea must be dismissed as unfounded.

3. Determination of Critical Network Elements and Contingencies ("CNECs")

143. The Appellants argue that the mechanism established by the Contested Decision to select the Critical Network Elements and Contingencies ("CNECs") in Article 5 of its Annex I (DA CCM) is unlawful. In particular, the Appellants claim that sections (6), (7) and (8) of Article 5 (1) breach the CACM Regulation; (ii) introduce a mechanism of

determination of CNECs that is unjustified by Point 1.7 of Annex I to Regulation (EC) 714/2009 and (iii) contravene the principle of proportionality.

3.1 Breach of the CACM Regulation

144. The Appellants argue that the mechanism established by Article 5(6), (7) and (8) of Annex I (DA CCM) to the Contested Decision creates “*a rule-exception relationship with regard to the consideration of internal lines: internal lines do not in principle qualify as CNECs and can only -exceptionally- be considered as CNECs*” (Appeal, para 100). The Appellants claim that the mechanism foreseen in this Article infringes (i) Article 29(3)(b) CACM, (ii) Article 32 *et seq.* of the CACM and (iii) TYNDP and TEN-E-Regulation (paras. 102 to 121).

145. Articles 5(7) and 5(8) of Annex I of the Contested Decision establish the following:

“(7) The proposed list of internal CNECs pursuant to paragraph 5 and 6 shall not include any internal network element with contingency with a maximum zone-to-zone PTDF below 5%, calculated as the time-average over the last twelve months.

(8) The proposal pursuant to paragraphs 5 and 6 shall include at least the following:

(a) a list of proposed internal CNECs with the associated maximum zone-to-zone PTDFs referred to in paragraph 7;

(b) an impact assessment of increasing the threshold of the maximum zone-to-zone PTDF for exclusion of internal CNECs referred to in paragraph 7 to 10% or higher; and

(c) for each proposed internal CNEC, an analysis demonstrating that including the concerned internal network element in capacity calculation is economically the most efficient solution to address the congestions on the concerned internal network element, considering, for example, the following alternatives:

- i. application of remedial actions;*
- ii. reconfiguration of bidding zones;*

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iii. *investments in network infrastructure combined with one or the two above; or*

iv. *a combination of the above.*

Before performing the analysis pursuant to point (c), the Core TSOs shall jointly coordinate and consult with all Core regulatory authorities on the methodology, assumptions and criteria for this analysis.”

3.1.1. Breach of Article 29(3)(b) CACM

146. First of all, the Board of Appeal highlights that the Appellants wrongly quote Article 29(3)(b) CACM. They pretend, in para 105 and 108 of the Appeal, that Article 29(3)(b) CACM excludes “*network elements*” from capacity calculation when they are not significantly influenced by a change in the bidding zone net positions.

147. However, the very wording of Article 29(3)(b) CACM reads that “*critical network elements*” are excluded from capacity calculation when they are not significantly influenced by a change in the bidding zone net positions. It is a two-step test: first determining which network elements are critical and, then - only after this step has been taken - determining which critical network elements are significantly influenced.

148. Secondly, the Appellants’ arguments rest upon the assumption that Article 29(3)(b), in conjunction with Article 27(4)(d), is the only legal basis for CNEC determination⁶¹.

149. This assumption is erroneous or, at least, incomplete, since the legal basis for the determination of CNECs is not limited to Article 29(3)(b) CACM, in conjunction with Article 27(4)(d), but involves many other provisions of the CACM and Regulation (EC) 714/2009, as set out above.

150. The determination of CNECs as capacity calculation inputs is governed by various provisions of the CACM Regulation. Although the CACM Regulation does not provide

⁶¹ Appeals, para 103

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an exhaustive list of criteria for determining CNECs for the purpose of capacity calculation, it imposes various requirements with regard to the determination of the CNECs, e.g. (i) rules for avoiding undue discrimination between internal and cross-zonal exchanges (Article 21(1)(b)(ii) CACM), (ii) exclusion of critical elements that are not significantly influenced by the changes in bidding zone net positions (Article 29(3)(b)), and (iii) flow calculations on critical network elements and adjustments by assuming no cross-zonal power exchanges within the capacity calculation region, applying the rules for avoiding undue discrimination between internal and cross-zonal exchanges (Article 29(7)(d)).

151. Furthermore, the determination of CNECs as capacity calculation inputs is also governed by Regulation (EC) 714/2009, e.g. in its Article 16(1) (“*network congestion problems shall be addressed with non-discriminatory market-based solutions which give efficient economic signals to the market participants and transmission system operators involved*”) and Point 1.7 of its Annex I, which imposes efficiency and operational security requirements (“*when defining appropriate network areas in and between which congestion management is to apply, TSOs shall be guided by the principles of cost-effectiveness and minimisation of negative impacts on the internal markets in electricity*”). The latter requirements are expressly set out in para 112 of the Contested Decision.

152. Finally, the determination of CNECs must also be in accordance with the overarching objectives of Article 3 of the CACM Regulation (optimal use of transmission infrastructure, efficient long-term operation and development of transmission systems and non-discriminatory access to cross-zonal capacity).

153. Hence, the Core TSOs’ obligation to propose a list of internal CNECs, set out in Article 5(7) and 5(8) of Annex I (DA CCM), has a manifest legal basis in both the CACM (Articles 3, 21(1)(b)(ii), 29(3)(b), 27(4)(d) CACM) and in Regulation (EC) 714/2009 (Article 16(1) and Point 1.7 of its Annex). The Contested Decision is also in line with ACER’s Recommendation 02/2016, in which TSOs and NRAs are invited to follow

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when developing, approving, implementing and monitoring congestion management measures. Hence, a systematic analysis of all requirements laid down by the CACM Regulation on CNEC selection evidences that the mechanism established in the Contested Decision to determine CNECs does not breach the CACM Regulation but has the CACM, among others, as its legal basis.

154. These legal requirements for CNEC determination establish that significance is not a sufficient criterion to comply with CACM and ensure an optimal use of the transmission infrastructure, an efficient long-term operation and development of the electricity transmission system, non-discriminatory access to cross-zonal capacity and an efficient solution of congestion problems. Other criteria need to be considered. As the Contested Decision expressly explains and justifies (paras 112-118), the Core TSOs' Amended Proposals erroneously established the significance criterion as the only criterion to define CNECs without taking into account other elements as efficiency or operational security. This is contrary to the CACM Regulation and to Point 1.7 of Annex 1 to Regulation (EC) 714/2009. The rationale of the Core TSOs' obligation to propose a list of internal CNECs is clearly set out in paras 114 and 115 of the Contested Decision: the "criticality" of internal network elements does not only depend on significance but also on economic efficiency and operational security.

155. Therefore, the "criticality" established by Article 29(3)(b) of the CACM Regulation, of internal network elements should not only be based on their physical significance, but also on the other elements foreseen in the regulation. However, it does not mean that the physical significant aspect referred to in Article 29(3)(b) does not play a relevant role. This exclusion criterion (elements "*not significantly influenced*" by the changes in bidding zones net position) operating on an already established list of CNECs is complemented by secondary exclusion criteria set out in Articles 5(7), (8)(a) and (8)(b) of Annex I of the Contested Decision.

156. Additionally, the Appellants allege that the focus on specific (cross-border) transmission lines for the purpose of capacity calculations in the Contested Decision

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does not consider sufficiently the entire European transmission network and misconceives the technical relevance of internal network elements in a highly meshed overall system⁶².

157. The Appellants not only fail to specify to which extent ACER errs on the technical relevance of internal network elements, but most importantly fail to acknowledge that the Contested Decision is taken in the context of a zonal congestion management model aimed at creating an internal electricity market. Discrimination between internal and cross-zonal trade is inherent to zonal congestion management models: internal trade enjoys privileged access to the scarce capacity of the congested network elements compared to the cross-zonal trade. Hence, an equal treatment of all trade in the EU in a zonal model would require an EU-wide bidding zone. However, EU legislation has set-up a zonal model as a means of congestion management. In this context, cross-zonal network elements are critical for the calculation of cross-zonal capacity by default. The inclusion of additional internal critical network elements would lower the level of cross-border trade and therefore needs to be approached in a restrictive manner. Therefore, the process for the selection of CNECs for the capacity calculation in the Contested Decision is precisely an instrument to avoid undue discrimination between internal trade and cross-zonal trade, in accordance with Point 1.7 of Annex 1 to Regulation (EC) 714/2009 (see also ACER's Recommendation 02/2016). Indeed, pushing internal congestion to the border is contrary to the EU Treaty. This has been highlighted by the European Commission in COMP/AT 40.461- DE/DK-Interconnector (Tennet).

158. Finally, the Appellants argue that the exclusion of internal network elements further implies enormous costs of redispatching (ultimately allocated via the network tariffs to the network user) and that these costs will be borne, in particular, by network users in Germany⁶³.

⁶² Appeals, para 113

⁶³ Ibid. paras 114 and 115

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159. As stated in Recital 27 of the CACM Regulation, the objective of establishing single day-ahead and intraday coupling cannot be successfully achieved without a certain set of harmonised rules for capacity calculation, congestion management and trading of electricity. Therefore, the contested provisions harmonise requirements that apply in all Member States of the Core Region. The Appellants ignore the fact that consumers and grid users from other Member States in the Core Region are subject to the same financial burden, as the same requirement applies equally there. In the case at hand, it is not under discussion that the Contested Decision applies to all TSOs of the Core Region equally. Therefore, Article 5 of Annex I to the Contested Decision does not discriminate (because the treatment is the same) against consumers, grid users and other market participants in Germany compared to consumers, grid users and other market participants in other Member States of the Core Region. Trades within the German bidding zone differently are not treated differently from trades within other bidding zones in the Core Region, and cross-zonal trades involving the German bidding zone are not treated differently from other cross-zonal trades within the Core Region.

160. The Appellants narrowly focuses on an alleged negative impact of the Contested Decision on the German consumers without taking account of the significantly adverse impact that the existing internal congestions within Germany currently have on the consumers outside Germany. However, the selection of CNECs needs to be assessed at regional or European level, and not just at national level.

161. The Contested Decision has to be interpreted in its context, i.e. an EU market shaped in different regions, and will have a positive impact on the entire Core Region, which includes Germany. The Contested Decision only deals with capacity calculation, which is a congestion management method aimed at maximising cross-border trade while recognising current congestion and respecting operational security, irrespective of other solution in the long run, e.g. a more efficient bidding zone configuration or faster investments in network infrastructure in Germany.

3.1.2. Breach of Article 32 et seq CACM

162. The Appellants further argue, regarding the breach of Article 32 *et seq.* of the CACM Regulation, that Article 5(8)(c) of Annex I to the Contested Decision takes into account the reconfiguration of bidding zones and, therefore, “ACER introduces “*through the back door*” a procedure which circumvents the conditions set out by the CACM Regulation”⁶⁴. The Appellants added at the Oral Hearing that *the reconfiguration of bidding zones cannot, therefore, be factored into the capacity allocation and congestion management because neither the TSOs nor the Defendants have the power to require such actions.*”⁶⁵

163. This argument rests on an erroneous assumption. A mechanism which requires an efficiency assessment taking into account, among others, the possibility of a reconfiguration of bidding zones in order to assess the inclusion of an internal network element as a CNEC, cannot be considered, under any circumstance, as a mechanism that introduces “*through the back door*” a reconfiguration of the bidding zones.

164. As stressed in ACER’s Defence, capacity calculation and allocation is one of the many congestion management solutions that are available to the TSOs. CCMs are tools to maximise cross-border trade in the event of congestions on the grid until the enduring solutions are implemented: they ensure economically efficient DA capacity calculation to maximise cross-border trade in line with operational security and guarantee that the internal electricity market functions efficiently. In so doing, they prevent the on-going situation where the internal electricity market and cross-border trade suffer from severe capacity limitations due to delayed (or failed) implementation of the medium or long-term solutions to address congestion. Congestions in electricity networks are very unstable and often frequently moving between different network elements, making it not

⁶⁴ Ibid. para 116

⁶⁵ Minutes of oral hearing, p.5

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always possible to design bidding zones such that internal congestions will never occur. In its Recommendation 02/2016, ACER clearly states that *“the implementation of the short-run solutions serves as a back-up option and ensures that the functioning of the internal electricity market is not significantly hampered”*⁶⁶. They function as a *“safety net in cases where the market situation calls for a new enduring solution, which requires significant implementation time”* (idem). In other words, capacity calculations are short-term solutions to remedy congestion (whilst avoiding that congestion unduly discriminates between internal and cross-border exchanges), whereas the reconfiguration of bidding zones is an alternative solution on the longer run (such as investments in the network infrastructure). When a proposal of internal CNECs is made in the context of a capacity calculation, it should therefore be assessed whether the inclusion of a CNEC in this calculation is the most efficient solution to remedy to congestion or whether alternative solutions are more adequate.

165. In addition, the requirement to provide NRAs with a robust assessment including cost considerations on an issue which has a direct impact on the development of cross-border trade is an obligation that derives directly from Article 36 of Directive 2009/72/EC. This states that NRAs are required to *“take all reasonable measures in pursuit of the following objectives... (a)... ensuring appropriate conditions for the effective and reliable operation of electricity networks, taking into account long-term objectives; (b) developing competitive and properly functioning regional markets within the Community in view of the achievement of the objectives referred to in point (a); (c) eliminating restrictions on trade in electricity between Member States, including developing appropriate cross-border transmission capacities to meet demand and enhancing the integration of national markets which may facilitate electricity flows across the Community; (d) helping to achieve, in the most cost-effective way, the development of secure, reliable and efficient non-discriminatory systems that are consumer oriented...”* The importance of cost considerations and an assessment of

⁶⁶ Point 3.5 thereof

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alternatives in the selection process of CNECs is therefore fully in line with the applicable legislation.

166. Furthermore, in line with what ACER argues in its Defence, an analysis of whether a bidding zone review would be a more efficient alternative than capacity calculation does not amount to a decision on whether and how to implement such review. The bidding zone review process is governed by Article 32 *et seq.* CACM and the Contested Decision does not interfere with this process. Even if the outcome of the analysis is that the inclusion of a CNEC is not the most efficient alternative, this does not have the consequence of imposing a change to the bidding zone configuration.

167. As stated before, it is irrelevant for the purpose of this Appeal to rule on the compatibility of the methodology to select CNECs of the Contested Decision with Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943)

168. It follows from all the above that Article 5 of Annex I (DA CCM) to the Contested Decision does not infringe Article 32 *et seq.* CACM.

3.1.3. Breach of TYNDP and TEN-E-Regulation

169. The Appellants claim that Article 5(8)(c)(iii) of Annex I to the Contested Decision - which considers network infrastructure investments in combination with remedial actions or reconfiguration of bidding zones as an alternative with to capacity calculation - contravenes the provisions for the creation of the Ten-Year Network Development Plan (“TYNDP”) and Regulation (EU) 347/2103 on guidelines for trans-European energy infrastructure (“TEN-E-Regulation”), because it circumvents both European requirements for TYNDP and PCI-planning in accordance with the TEN-E-Regulation,

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which determine the requisite procedures for strategic network development for the purpose of the completion of a functioning internal energy market⁶⁷.

170. Again, this argument rests on an erroneous assumption. A mechanism which requires an efficiency assessment taking into account various solutions - among others, the possibility of network infrastructure investments - in order to assess the inclusion of an internal network element as a CNEC in a capacity calculation, cannot be considered, under any circumstance, as a mechanism that *de facto* implies a network infrastructure investment.

171. It is crucial to place Article 5(8)(c)(iii) of Annex I to the Contested Decision in its context, i.e. the determination of CNECs for capacity calculations in the Core Region. This has nothing to do with EU-wide measures to facilitate network investments such as TYNDP and PCI.

172. Article 5(8)(c)(iii) of Annex I to the Contested Decision only establishes that network infrastructures investments have to be taken into account as an alternative congestion management measure to capacity calculation.

173. As stressed in ACER's Defence, capacity calculation and allocation is one of the many congestion management solutions that are available to the TSOs. CCMs are transitional measures until the enduring solutions are implemented: they ensure economically efficient DA capacity calculation to maximise cross-border trade in line with operational security and guarantee that the internal electricity market functions efficiently during transition phases. In so doing, they prevent the on-going situation where the internal electricity market and cross-border trade suffer from severe capacity limitations due to delayed (or failed) implementation of the enduring solutions. Congestions in electricity networks are very unstable and often frequently moving between different network elements, making it not always possible to design bidding zones such that internal

⁶⁷ Appeals, paras. 120 and 121

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congestions will never occur. In its Recommendation 02/2016, ACER clearly states that *“the implementation of the short-run solutions serves as a back-up option and ensures that the functioning of the internal electricity market is not significantly hampered”*. They function as a *“safety net in cases where the market situation calls for a new enduring solution, which requires significant implementation time”* (idem). In other words, capacity calculations are short-term solutions to remedy congestion (whilst avoiding that congestion unduly discriminates between internal and cross-border exchanges), whereas the reconfiguration of bidding zones is an alternative solution on the longer run (such as investments in the network infrastructure). When a proposal of internal CNECs is made in the context of capacity calculation, it should therefore be assessed whether the inclusion of a CNEC in this calculation is the most efficient solution to remedy to congestion or whether alternative solutions are more adequate.

174. In line with what ACER argues in its Defence, an analysis of whether a network infrastructure investment would be a more efficient alternative than capacity calculation does not amount to a decision on whether and how to implement such investment. However, if a TSO were to assess that a network infrastructure investment is indeed a more efficient alternative than capacity calculation to remedy congestions, it can submit these investments for inclusion in TYNDP or TEN-E-frameworks, if they are not already included.

175. It follows from all the above that Article 5 of Annex I (DA CCM) to the Contested Decision neither breaches TYNDP nor infringes the TEN-E-Regulation.

3.2. Point 1.7 of Annex I Cross-Border Regulation does not exclude internal CNECs in general.

176. The Appellants argues that, contrary to what the Contested Decision expressed, the Agency does not act in accordance with Point 1.7 of Annex I to Regulation (EC)

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714/2009, which establishes that internal network elements can only be exceptionally classified as CNECs⁶⁸.

177. Point 1.7 establishes that *“when defining appropriate network areas in and between which congestion management is to apply, TSOs shall be guided by the principles of cost-effectiveness and minimisation of negative impacts on the internal market in electricity. Specially, TSOs shall not limit interconnection capacity in order to solve congestion inside their own area, save for the abovementioned reasons and reasons of operational security. (...)”*. This paragraph must be understood as follows: critical network elements (CNEs) limit cross-zonal capacity whereas Point 1.7 does not allow for a limitation of cross-border capacity because of internal congestions except for reasons of economic efficiency and of operational security. The Contested Decision is, hence, justified in the sense that internal network elements do not limit interconnection capacity and cannot be defined as CNEs as a general rule.

178. The Appellants add that the proposed threshold of 5% in Article 5(7) of the Annex I (DA CCM) to the Contested Decision would have been sufficient to comply with Point 1.7 of Annex I to Regulation (EC) 714/2009. Hence, according to the Appellants, the Contested Decision should not have modified this 5% threshold.

179. Firstly, the Appellants do not justify or produce any evidence explaining why the 5% threshold would have been sufficient to comply with Point 1.7 of Annex I to Regulation (EC) 714/2009.

180. Secondly, as has been set out above, the Contested Decision clearly explains in its para 112 that the significance threshold of 5% applicable for internal network elements should not be the only criterion for CNEC selection because it is unable to address undue discrimination as required by the CACM Regulation. That is precisely why Point

⁶⁸ Appeals, paras 120 to 125

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1.7 of Annex I to Regulation (EC) No 714/2009 requires economic efficiency and operational security as criteria for internal congestions to limit cross-zonal capacities.

181. The Board of Appeal observes that, even though the Agency is not bound by the NRAs' Non-Paper of 18 September 2018, this Paper indicated that some NRAs also questioned the applicability of the 5% threshold.

182. Finally, the threshold is not rigid. Article 5(8)(b) of Annex I (DA CCM) to the Contested Decision requires TSOs to perform an impact assessment for increasing this threshold for internal critical network elements from 5% to 10% or higher.

183. In light of the above, the Board of Appeal considers that the Contested Decision is in accordance with Point 1.7 of Annex 1 to Regulation (EC) 714/2009. What is more, the Contested Decision is legally based, *inter alia*, on Point 1.7 of Annex 1 to Regulation (EC) 714/2009.

3.3. Disproportionality

184. The Appellants claim that the strict requirements for the exceptional inclusion of internal network elements in Article 5(6), (7) and (8) of Annex I (DA CCM) to the Contested Decision contravene the principle of proportionality on the grounds that they are not necessary, excessive and will lead to disproportionate costs of re-dispatching⁶⁹.

3.3.1. Necessity

3.3.1.1. The provisions of the amended proposal constitute a less restrictive means

185. The Appellants allege that there was no need for ACER to modify the Core TSOs' Amended Proposals because these Proposals provided for a less restrictive means that was sufficient to comply with the CACM Regulation.

⁶⁹ Appeals paras 126 to 152

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186. As set out above, the Board of Appeal fully supports the Contested Decision. The amendments introduced by the Agency to the Core TSOs' Amended Proposals were necessary to ensure compliance with the CACM and Regulation (EC) 714/2009, i.e. to achieve a CNEC selection that ensures non-discrimination between internal exchanges and cross-zonal exchanges on CNECs, economic efficiency and operational security.

187. The Appellants invoke the fact that a 5% threshold had been approved by the CWE NRAs in 2015, i.e. prior to the creation of the Core Region (which was precisely carried out at remedying congestion). However, even though the Agency is not bound by the NRAs' Non-Paper of 18 September 2018, this Paper indicated a disagreement on the 5% threshold and hence, a patent need for the Agency to intervene (notwithstanding the fact that the Agency's intervention was based on the failure to reach an agreement, as outlined above).

188. The Appellants also claim that the exclusion of internal network elements from the capacity calculation affects operational security, challenge the suitability of redispatch measure to remedy the overload of internal network elements and allege that the Contested Decision does not trigger a fair and orderly price formation.⁷⁰

189. The Appellants' reasoning is that the Contested Decision excludes internal network elements from capacity calculation, which will lead to more cross-zonal capacity, more remedial actions and possible operational security violations. Once again, the Appellants fail to acknowledge that discrimination between internal and cross-zonal trade is inherent to zonal congestion management. Zonal models prioritize internal trade per definition. That is why the applicable regulation states that it aims to avoid "undue" discrimination. Taking account of the *de facto* discrimination in favour of internal trade in zonal models, it aims at reaching an acceptable or optimal level of discrimination in

⁷⁰ Appeal paras 130 to 133

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order to promote the internal market, even though discrimination cannot be totally eradicated.

190. It also fails, once again, to place capacity calculation in a wider congestion management context. As said above, capacity calculation is one of the various available tools to maximise cross-border trade in the event of congestions on the grid, whilst ensuring operational security. Other means are remedial actions (short-term), reconfiguration of bidding zones (medium to long-term) and network infrastructure (long-term). Capacity calculation is aimed at finding an optimal balance between cross-border trade and operational security in the context of existing congestions. Therefore, the decision as to whether congestions on network elements will be managed by capacity calculation or other measures needs to be done prior to the capacity calculation. In other terms, the biannual selection process of CNECs taken for the purpose of capacity calculation— i.e. a short-term decision whether internal network elements can limit cross-zonal trade - needs to take account of all available congestion management measures.

191. The necessity and proportionality of the definition of CNECs cannot be assessed outside of the wider regulatory context, which is aimed at gradually creating an internal electricity market, balancing the short-term advantages and disadvantages of some measures with the long-term advantages and disadvantages of other measures. In the absence of Article 5 of Annex I (DA CCM) and Article 5 of Annex II (ID CCM) to the Contested Decision, the zonal model would imply that priority access to the scarce capacity of internal network elements (implied by the congestion on those elements) would be given to internal trade and cross-zonal trade would be limited, contrary to the maximisation principle in Article 16(3) of Regulation (EC) 714/2009.

192. The Appellants fail to grasp the essence of capacity management: where capacity calculation would not prove to be the economically most efficient means to address congestion, the TSOs have alternative measures to ensure operational security. As to the costs of redispatching measures, they are part of the efficiency analysis that the TSOs

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carry out in accordance with the Annexes to the Contested Decision. The Agency's methodology only excludes internal network elements when this is, according to the TSO, the most efficient solution.

193. Excluding CNECs when they are only marginally affected by cross-border flows in order to reduce undue discrimination of cross-border flows does not relieve the TSOs from the responsibility of assessing operational security and, if necessary, taking whatever remedial action is necessary to assure the secure operation. Furthermore, it has to be noted that the TSO should not allow the connection of any additional generation unit if such connection is likely to endanger the operational security of the network or could result in undue discrimination of cross-border flows.

194. Finally, the Appellants allege that the exclusion of internal network elements from the capacity calculation will generate additional costs for German consumers.

195. The Appellants' reasoning is that the exclusion of internal network elements from the capacity calculation and corollary increase of remedial actions will particularly affect Germany and that the bulk of the costs of the remedial actions will be borne by German consumers. Once again, the Appellants fail to take account of the wider congestion management policy aimed at creating an internal electricity market. According to this regulatory policy, German consumers belong to a Core Region which, in turn, is a part of the EU internal electricity market. The compliance of the selection of CNECs needs to be assessed at regional or European level and not just at national level. The Appellants narrowly focus on an alleged negative impact of the Contested Decision on German consumers without taking account of the significantly adverse impact that the existing internal congestions within Germany currently have on the consumers outside Germany. The Contested Decision has to be interpreted in its context, i.e. an EU market shaped in different regions, and will have a positive impact on the entire Core Region, which includes Germany. The Contested Decision only deals with capacity calculation, which, as set out above, is a short-term solution to remedy German internal congestion issues,

irrespective of other solutions in the long run, e.g. a more efficient bidding zone configuration or faster investments in network infrastructure in Germany.

3.3.1.2. No risk of further discrimination

196. The Appellants allege that the requirements of Article 5 of Annex I (DA CCM) to the Contested Decision are not necessary to avoid undue discrimination between internal trade and cross-zonal trade on CNECs because this is already avoided by the minRAM threshold (even if it amounts to 20%)⁷¹.

197. As has been set out in detail in Part 2 of the Second Plea above, it is not only true that a minRAM threshold is not sufficient to avoid undue discrimination between internal trade and cross-zonal trade on CNECs, but also that a minRAM threshold of 20% is not sufficient to attain this goal.

3.3.2. Excessive requirement for the verification of the significance of internal network elements

198. The Appellants allege that the requirements contained in Article 5(8)(c) of Annex I (DA CCM) to the Contested Decision are excessive and inadequate because the required analysis is too extensive to be performed with the resources available to the TSOs, whereas simplifications would produce erroneous results. According to the Appellants, the analysis of the TSOs for the biannual CNEC selection is practically unfeasible or implies unacceptable efforts (in particular, the assessment of the reconfiguration of bidding zones given that the behaviour of market participants is difficult to predict). As a result, the goal of avoiding undue discrimination between internal and cross-zonal trade on CNECs does not justify the excessive collection, processing and evaluation of data in order to exceptionally define internal network elements as CNECs⁷². The

⁷¹ Appeals, para 135

⁷² Ibid. paras 137 to 151

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Appellants reiterated at the Oral Hearing that *“to conduct such analysis, however, is something of an exercise in hypotheticals when one needs to factor in the possible configurations resulting from an as yet unconducted bidding zone review; it is unclear how this could be done and indeed whether it is even feasible to do so at all”*⁷³.

199. The analysis that is imposed upon the Core TSOs is not rigid and allows Core TSOs and NRAs sufficient leeway to determine how to carry out this analysis. Article 5(8)(c) reads as follows: *“Before performing the analysis pursuant to point (c), the Core TSOs shall jointly coordinate and consult with all Core regulatory authorities on the methodology assumptions and criteria for this analysis”*. The Core TSOs therefore enjoy sufficient flexibility to ensure that the analysis is shaped in such a manner that it does not engender excessive efforts.

200. Moreover, in carrying out their analysis, the Contested Decision compels the TSOs to take account of alternative measures to capacity calculation but it does not specify which alternatives should be considered. The decision to assess and implement alternative measures remains a choice to be made by the TSOs. The CCM provides a list of examples of alternative measures that could be considered but it is not an exhaustive list. The Contested Decision does not state that TSOs are obliged to consider every example. It is therefore erroneous to argue that the CCM obliges TSOs to carry out a detailed analysis of a bidding zone review and therefore requires excessive effort.

201. The Board of Appeal notes that the future electricity system will generally be characterised by an increase in computing efforts, data retention, hourly weather and market forecasts and outcomes, quarterly reporting on cross-zonal capacity reductions, etc. (partly due to shorter-term markets with significantly increased penetration of renewables and regional capacity calculation).

⁷³ Minutes of the oral hearing, p.6

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202. Since the TSOs are the appropriate as well as the designated operators to propose the methodology, and thus can determine the complexity and effort required, it will be to a large degree their responsibility to propose methodologies and approaches that reflect the state of the art without requiring excessive resources.

203. The Board of Appeal also notes that, given that the capacity calculation methodology is proposed by the TSOs, TSOs can propose modifications to the methodology if they consider the methodology as inadequate.

3.3.3. Disproportionate costs

204. The Appellants claim that the general exclusion of internal network elements in the long run is liable to lead to disproportionate costs of redispatching⁷⁴.

205. Firstly, as set out above, the Appellants fail to consider the context of congestion management and fail to consider that there are other options available to TSOs, allowing them to manage congestions in such a way that the associated costs would remain at economically efficient level. Remedial actions (and their costs) will be a part of the analysis that the TSOs will have to carry out. This analysis will also take account of alternative measures to capacity calculation. However, the decision to implement such alternative measures remains a choice to be made by the TSOs.

206. Secondly, the costs associated with remedial actions need to be balanced against the costs of including internal network elements in capacity calculation.

207. Thirdly, the Board of Appeal does not consider re-dispatching costs in the range of <10% of renewable costs as disproportionate, especially since these costs are only relevant until other, long-term measures are taken (e.g. network investments). The extent of remedial actions is largely dependent on the configuration of the bidding zones

⁷⁴ Appeals, paras 152-154

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and whether the neighbouring zones suffer from an inefficient configuration. The cost of remedial actions can therefore be significantly reduced by a reconfiguration of bidding zones or speeding-up of network investments. In the event of a non-optimal configuration of the bidding zones, the extra costs need to be paid by the regional system operators responsible for these inefficiencies, in order to avoid undue discrimination between internal and cross-border flows.

208. Finally, one has to bear in mind that re-dispatching costs are temporary. The necessity for larger and frequent re-dispatching measures usually arises when generation development and network expansion are not properly coordinated. However, this is a temporal phenomenon as TSOs are generally obliged to expand the network to meet demand. Hence, significant re-dispatching measures only occur until the network capacity is expanded. Since the coordination of connecting generation and expanding networks is a responsibility of TSOs (in conjunction with NRAs and Governments), temporary re-dispatching costs are to large degree determined by the TSOs' actions or failure to implement timely network investments.

209. It follows from the above that Part 3 of the Second Plea must be dismissed as unfounded.

4. Unlawful limitation of loop flows

210. The Appellants allege that Recital (19) of the Contested Decision, as well as Articles 10(5) and 16(3)(d)(vii) of Annex I (DA CCM) to the Contested Decision imply an unlawful limitation of loop flows and an unlawful reliance upon ACER's Recommendation 02/2016.

211. As noted above in the Second Plea 2.1, the determination of a minRAM threshold of 70% is not only lawful but also necessary to avoid undue discrimination between internal and cross-zonal exchanges and enhance the integration of the internal electricity market and, given that the CNECs' capacity is a limited resource, it unavoidably implies

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a corollary maximum availability of 30% for the rest of the capacity (internal flows, loop flows and reliability margin).

212. Regarding Recommendation 02/2016, the Board of Appeal refers to what was stated above in Part 2(a) of the Second Plea in relation to the minRAM.

4.1. Decision-making powers

213. The Appellants allege that the Core TSOs' Amended DA Proposals do not contain any explicit provisions on loop flow limitations and claim that the NRA's Non-Paper only addresses loop flows to the extent that it relates to undue discrimination between internal and cross-zonal exchanges.

214. Firstly, as a general remark, the Appellants' reasoning is flawed. The Appellants overlook that the setting of a minRAM threshold for cross-zonal trade on a CNEC with limited capacity automatically involves a corollary limitation of available capacity for the rest on that CNEC (internal flows, loop flows, reliability margin).

215. Secondly, the limitation of loop flows has a legal basis in Article 21(1)(b)(ii) CACM and Point 1.7 Annex I to Regulation (EC) 714/2009.

216. Thirdly, as set out in the First Plea, the adoption of the Contested Decision fell upon the Agency, not because the relevant NRAs requested it, but because, within the two months deadline, they were unable to reach an agreement on the Core TSOs' Amended Proposals, or even to agree on whether to request the Agency to adopt this decision. Moreover, even if the Agency were bound by the Core NRA's request to adopt a decision, such request simply did not exist. Hence, even if, *ad arguendum*, the Board of Appeal were to agree with the Appellants' position that, in theory, a request for the Agency to act under Article 9(12) CACM could limit the Agency's powers to the scope of the issues on which the NRAs had disagreed, this would still not imply that the Agency did not have the power to decide on the limitation of loop flows because:

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- (i) the Core NRA’s letter of 21 August 2018, evidences a debate on the limitation of loop flows as it held that there were “*different understandings between some Core NRAs on how to avoid undue discrimination between internal and cross-zonal exchanges in accordance with Article 21(1)(b)(ii) of the CACM Regulation*” as well as different understandings on the necessary “*minimum Remaining Available Margin (...) to avoid undue discrimination*” (see para 38 above); this letter added that some Core NRAs held that certain minRAM threshold levels did “*not prevent loop flows from severely limiting cross-border flows and internal lines from pushing congestion to the border. In addition, having loop flows and internal flows in the base case leads to discrimination between internal and cross-border flows, since flows in the base case get unjustified priority*”; and
- (ii) the Core NRA’s Non-paper of 18 September 2018 expressly referred to the limitation of loop flows, albeit with a different terminology, namely the “*reduction of the use of cross-zonal transmission lines for domestic trade before capacity calculation in the called base case (i.e. loop flows)*” (p. 9).

217. Consequently, in line with the First Plea, the Agency did not act *ultra vires*.

4.2. Breach of the CACM rules

218. Even though the Appellants acknowledge that loop flows partially amount to remedial action due to their relieving effects, they allege that the Contested Decision breaches the CACM, which regulates remedial action but does not regulate loop flows in the CCM. The Appellants invoke a breach of Articles 3(d), 3(d), 21(1)(b)(iv), 25(2) and 25(5) CACM. They hold that Articles 10(5) and 16(3) (d)(vii) of Annex I (DA CCM) to the Contested Decision create a rigid CCM and remedial action method, whereas the CACM is more flexible in that it requires a mere description of the capacity calculation approach and allows TSOs to individually determine remedial action to be used in capacity calculation in line with its objectives.

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219. The CACM provisions that, in the opinion of the Appellants, have been breached, do not refer to the limitation of loop flows.

220. The limitation of loop flows in the Contested Decision has, as a legal basis, Article 21(1)(b)(ii) CACM read in conjunction with Point 1.7 of Annex I to Regulation (EC) 714/2009, which expressly mandates the avoidance of undue discrimination between internal and cross-zonal exchanges⁷⁵. The CACM provisions invoked by the Appellants - with no explicit or implicit reference to loop flow limitations - are not capable of limiting CACM provisions with an explicit or implicit reference to loop flow limitations (Article 21(1)(b)(ii) CACM, read in conjunction with Point 1.7 of Annex I to Regulation (EC) 714/2009).

221. By limiting loop flows, the Contested Decision duly complies with Article 21(1)(b)(ii) CACM and Point 1.7 of Annex I to Regulation (EC) 714/2009, which expressly mandate the avoidance of undue discrimination between internal and cross-zonal exchanges. In this respect, the Contested Decision corrected the Core TSOs' Amended Proposals, whose methodology to coordinate remedial actions (Article 15 DA CCM and Article 14 ID CCM), albeit economically efficient, was not capable of fully removing potential undue discrimination⁷⁶.

222. Indeed, the methodology to coordinate remedial actions proposed by the Core TSOs in Articles 15 (DA CCM) and 14 (ID CCM) of their Amended Proposals is aimed at: (i) increasing RAM on network elements with lower RAM values prior to the coordination of remedial actions; and (ii) reducing RAM on network elements with higher RAM values prior to the coordination of remedial actions. This methodology is economically efficient, but it is not capable of avoiding undue discrimination between internal exchanges and cross-zonal exchanges. This is because internal CNECs in a congested bidding zone usually have very low RAM values, because a high proportion of capacity on these CNECs is reserved for internal flows (the Agency's Defence, para 127, which

⁷⁵ Contested Decision, para 121

⁷⁶ Ibid., paras 145-147

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illustrates this with histograms of RAM values of internal and cross-zonal CNECs in the CWE region). In order to increase RAM values on internal CNECs, the Core TSOs' methodology reduces internal flows on those CNECs and redirects them to cross-zonal CNECs where these flows are considered as loop flows and consequently reduce cross-zonal capacity. This creates undue discrimination between internal exchanges and cross-border exchanges, contrary to Article 21(1)(b)(ii) CACM and Point 1.7 of Annex I to Regulation (EC) 714/2009. Indeed, the Core TSOs solve the problem of internal congestion in a bidding zone by reducing cross-zonal capacity between bidding zones.

223. To avoid these situations of undue discrimination between internal exchanges and cross-zonal exchanges, the Agency's methodology sets a cap on loop flows resulting from remedial actions to ensure that cross-zonal capacity is not reduced in an attempt to solve internal congestion. In order to do so, the Contested Decision is twofold: (i) Article 10 of its Annex I (DA CCM) and Article 10 of its Annex II (ID CCM) establish a methodology to determine remedial actions that allows TSOs to determine the initial settings of remedial actions in such a way that the initial level can be reduced below the allowed level; and (ii) Article 16 of its Annex I (DA CCM) and Article 17 of its Annex II (ID CCM) establish rules on adjustments of power flows that prohibit to increase loop flows beyond the allowed level or that prohibit any loop flow increase in case the initial loop flows already exceed the allowed levels.

224. The Appellants add that, by limiting the loop flows in the CNECs, these provisions undermine the optimisation sought by the Non-costly Remedial Action Optimisation ("NRAO"), given that they prohibit remedial actions increasing loop flows, except for Monitored Network Elements with a Contingency (Article 16(3)(d)(vi) Annex I to the Contested Decision (DA CCM)). The Appellants allege that this is in breach of Articles 3(d) and 25(5) CACM.

225. The Contested Decision duly takes account of remedial actions without cost in Article 16(3)(d)(vii) of its Annex I (DA CCM), as mandated by Article 25(5) CACM. However, in so doing, loop flows are limited in order to avoid undue discrimination between

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internal and cross-zonal exchanges. Article 25(5) CACM by no means states that loop flows should not be limited when taking account of remedial actions without cost. It merely states that “[e]ach SO shall take into account remedial actions without costs in capacity calculation”.

226. The general objective set out in Article 3(d) CACM - “*optimising the calculation and allocation of cross-zonal capacity*” - should, furthermore, be interpreted in conjunction with the specific requirement of Article 21(1)(b)(ii) CACM, which requires that the capacity calculation methodology should contain rules to avoid undue discrimination between internal and cross-zonal exchanges to ensure compliance with Point 1.7 Annex I to Regulation (EC) 714/2009. However, if the limitation of loop flows in order to avoid undue discrimination (Article 16(3)(d)(vii) Annex I to the Contested Decision (DA CCM)) were somehow to interfere with the optimisation of remedial actions without cost, this would in any case be mitigated by the minRAM threshold (Article 10(5) Annex I to the Contested Decision (DA CCM)).

227. The limitation of loop flows in ACER’s DA CCM aims to prevent that the optimisation of remedial actions without cost shifts internal congestion into cross-border congestion. Indeed, this shift would imply that TSOs which are not responsible for the initial internal congestion would need to bear the costs of actions to remedy congestion that would have shifted from internal trade to cross-zonal trade. This would unduly discriminate between internal and cross-zonal exchanges and violate Article 21(1)(b)(ii) CACM and Point 1.7 of Annex I to Regulation (EC) 714/2009. The Contested Decision avoids this undue discrimination and violation of the CAMC and Regulation (EC) 714/2009 by limiting loop flows when coordinating remedial actions.

4.3. No legal basis to limit loop flows arising from Art. 24 Cross-Border Regulation

228. The Appellants allege that Article 24 of Regulation (EC) 714/2009 does not constitute a legal basis to limit loop flows, and that the recommendation to limit loop flows

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contained in Recommendation 02/2016 does not exempt the Agency from having to rely upon a legal basis when limiting loop flows in its Decision.

229. Firstly, the Agency does not invoke Article 24 of Regulation (EC) 714/2009 as a legal basis to limit loop flows its Decision. Article 21(1)(b)(ii) CACM and Point 1.7 Annex I to Regulation (EC) 714/2009 provide a sufficient legal basis⁷⁷.

230. Secondly, ACER's Recommendation 02/2016 is a lawful piece of soft law which, although non-binding upon TSOs and NRAs, requires ACER to adopt a consistent approach in its decision-making.

4.4. Illegal anticipation of the requirements of the Clean Energy Package

231. As set out above in Part 2.1 of the Second Plea, the Agency did not rely upon the Clean Energy Package as a legal basis for its Decision. The references to the Clean Energy Package merely seek to highlight that the Agency's Decision is not only in line with the currently applicable legal framework, but also with the Clean Energy Package's objectives. Given that the Point 1.7 Annex I to Regulation (EC) 714/2009, read in conjunction with Article 21(1)(b)(ii) CACM, is the legal basis for the limitation of loop flows in the Contested Decision, ACER prudently also tested its Decision against the proposed Recast Regulation (EC) 714/2009 of the Clean Energy Package.

232. The Board of Appeal notes that the European Commission carried out an elaborate Impact Assessment in the context of the Clean Energy Package⁷⁸, in which it highlights the importance of avoiding undue discrimination between internal exchanges and cross-zonal exchanges, which is the rationale for the limitation of loop flows. The Impact Assessment establishes:

⁷⁷ see Second Plea 4(b)

⁷⁸

https://ec.europa.eu/energy/sites/ener/files/documents/mdi_impact_assessment_main_report_for_publication.pdf

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“In an increasingly inter-connected electricity market, the lack of common approach and coordination can seriously imperil security of supply across borders and dangerously undermine the functioning of the internal electricity market. In addition, missing opportunities to exchange energy with neighbours remains a key obstacle to the internal energy market. Even where interconnectors are in place, they often remain unused due to a lack of coordination between Member States. Rules are therefore needed that ensure that the use of interconnection is not unduly limited by national interventions. Based on the above-mentioned shortcomings and underlying drivers, the present impact assessment has identified four key problem areas that are addressed in the proposed initiative: i) the current market design is not fit for integrating an increasing share of variable, decentralised generation and for reaping the potential of technological developments; ii) uncertainty about sufficient future generation investments and uncoordinated capacity mechanisms; iii) Member States do not take sufficient account of what happens across their borders when preparing for and managing electricity crisis situations; and iv) as regards retail markets, there is a slow deployment and low levels of services and poor market performance are widespread in the EU”⁷⁹.

4.5. Disproportionality of the limitation

233. The Appellants allege that the loop flow limitation contained in Articles 10(5) and 16(3)(d)(vii) of Annex I to the Contested Decision (DA CCM) is not necessary to achieve the objective of avoiding undue discrimination between internal and cross-zonal exchanges, and that a reservation of a minRAM threshold for cross-zonal exchanges would have been sufficient.

234. As set out above, this reasoning is flawed given that the reservation of a minimum RAM for cross-zonal exchanges on a CNEC with limited capacity automatically caps the remaining capacity on the same CNEC available for other exchanges, including loop

⁷⁹ Impact Assessment, p. 6

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flows. Both a minRAM threshold and a loop flow limitation are necessary and proportionate to attain the pursued objective, i.e. avoiding undue discrimination between internal exchanges and cross-zonal exchanges. Such discrimination is prohibited by Article 21(1)(b)(ii) CACM and Point 1.7 Annex I to Regulation (EC) 714/2009.

235. As set out in Part 4(b) of the Second Plea, a minRAM threshold alone is not sufficient to avoid undue discrimination because the optimisation of remedial actions without cost could shift internal congestion into cross-border congestion and put an undue burden on TSOs that are not responsible for the initial internal congestion, by compelling them to take costly actions to remedy the shifted congestion.

236. Furthermore, as explained above in the Part 4.2 of the Second Plea, the loop flow limitations introduced by the Agency in the Core TSOs' methodology to coordinate remedial actions are also necessary and proportionate to attain the pursued objective (avoiding undue discrimination), because the Core TSOs' methodology is economically efficient but not capable of avoiding such discrimination.

237. Finally, the Board of Appeal wishes to stress that Article 10(5) of Annex I to the Contested Decision (DA CCM) contains an option, and not an obligation for the TSOs: *“In accordance with Article 25(4) of the CACM Regulation, a TSO **may** withhold only those remedial actions, which are needed to ensure operational security in real-time operation and for which no other (costly) remedial actions are available, or those offered to the day-ahead capacity calculation in other CCRs in which the concerned TSO also participates. The CCC shall monitor and report in the annual report on systematic withholdings, which were not essential to ensure operational security in real-time operation.”*

238. Consequently, the Contested Decision is necessary and proportionate to attain the objective of avoiding undue discrimination between internal trade and cross-zonal trade, which would be contrary to the CAMC and Regulation (EC) 714/2009.

239. It follows from the above that Part 4 of the Second Plea must be dismissed as unfounded.

Third Plea: Material unlawfulness of the ACER-Decision regarding the ID CCM

1. Unlawfulness according to DA CC

1.1. Effect of the minRAM specification in the DA CCM on the Intraday Frame

240. The Appellants allege that, given the fact that the 70% minRAM threshold is unlawful, the ensuing release in the ID timeframe (i.e. for use until shortly before real time) of these large amounts of DA leftover cross-zonal capacity based on an unlawful 70% minRAM is also unlawful. The Appellants therefore claim that Article 11 in conjunction with Article 4(2)(a) ID CCM are unlawful. At the Oral Hearing, the Appellants stated that *“leftover DA capacities cause a risk: providing unsafe ID capacity to the market is a huge risk for the TSOs, as told, this capacity can be traded up to 15 minutes close to real time. These 15 minutes are not enough to implement any remedial action”*⁸⁰. The Appellants add that the high level (70%) of reservation of capacity on CNECs for cross-zonal exchanges in DA CCM implies a high probability of large amounts of remaining capacity from these 70% (DA leftover capacity) being offered subsequently as ID capacity.

241. First of all, as has been set out in detail in Part 2 of the Second Plea, the 70% minRAM threshold has its legal basis in Article 21(1)(b)(ii) CACM and Point 1.7 of Annex I to Regulation (EC) 714/2009 and is, hence, lawful.

242. Secondly, irrespective of the fact that the Appellants' statements of the DA leftover cross-zonal capacity release for ID use is not fully accurate (see para 178 ACER's Defence), the Appellants' concern on the short timeframe to activate remedial actions

⁸⁰ Minutes of the oral hearing, p.12

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in the ID timeframe fails to correctly consider Article 11(2) of Annex II to the Contested Decision (ID CCM). This Article allows TSOs to offer only the leftover DA cross-zonal capacity in the ID timeframe that is not artificially increased and can be allocated to market participants without the need to activate remedial actions: *“For each CNEC, each TSO may reduce RAM_f to exclude the component AMR_{DA} and $LTA_{margin\ DA}$ as calculated pursuant to the day-ahead capacity allocation methodology such that the reduced RAM_f is between the day-ahead RAM_f calculated pursuant to Equation 3 and the same RAM_f decreased by AMR_{DA} and $LTA_{margin\ DA}$.”* This possibility to reduce the offer of leftover DA cross-zonal capacity in the ID timeframe ensures operational security and, hence, avoids emergency measures.

1.2. Determination of CNECs

243. The Appellants claim that Article 5 of Annex II to the Contested Decision (ID CCM) is unlawful, in the same fashion as Article 5 of Annex I to the Contested Decision (DA CCM).

244. As has been set out in detail in Part 3 of the Second Plea, the determination of CNECs in the Contested Decision has its legal basis in both the CACM (Articles 3, 21(1)(b)(ii), 29(3)(b), 27(4)(d) CACM) and Regulation (EC) 714/2009 (Article 16(1) and Point 1.7 of its Annex) and is, hence, lawful.

1.3. Loop flows

245. The Appellants claim that Article 17 of Annex II to the Contested Decision (ID CCM) is unlawful, in the same fashion as Article 16 of Annex I to the Contested Decision (DA CCM).

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246. As has been set out in detail in Part 4 of the Second Plea, loop flow limitations have their legal basis in Article 21(1)(b)(ii) CACM and Point 1.7 of Annex I to Regulation (EC) 714/2009 and are, hence, lawful.

247. It follows from the above that Part 1 of the Third Plea is unfounded and must be dismissed.

2. Threat to network security

248. The Appellants claim that Article 17 of Annex II to the Contested Decision (ID CCM) constitutes a threat to grid operation security, contrary to Article 3(c) CACM. The Appellants claim that the short reaction time for TSOs to use DA leftover capacity in the ID timeframe is restrictive and that such restriction should be an exception, used in emergency situations (when remedial action is not possible anymore). They allege that, by contrast, this short reaction time is the rule in Annex II to the Contested Decision (ID CCM), causing trading uncertainties for market participants and TSOs.

249. As set out above in Part 1(b) of the Third Plea 1(b), the possibility to reduce the offer of leftover DA cross-zonal capacity in the ID timeframe provided by Article 11(2) of Annex II to the Contested Decision (ID CCM) ensures operational security and, hence, avoids emergency measures.

250. TSOs have the possibility to stop the ID market if they are convinced that ID trading would endanger operational security. TSOs have sufficient instruments available to manage network problems. Furthermore, DA CCM leftover capacity does not generally apply to all network elements, but only to CNECs, i.e. critical network elements (defined on the basis of transparent and non-discriminatory efficiency considerations).

251. Finally, the ID CCM annexed to the Contested Decision is by its very nature a short-term solution to combat congestion, as opposed to mid-term solutions such as the

reconfiguration of bidding zones and long-term solutions such as network investments. As stressed in ACER's Defence, capacity calculation and allocation is one of the several congestion management solutions that are available to the TSOs⁸¹. CCMs are transitional measures until the enduring solutions are implemented: they ensure economically efficient DA capacity calculation to maximise cross-border trade in line with operational security and guarantee that the internal electricity market functions efficiently during transition phases. In so doing, they prevent the on-going situation where the internal electricity market and cross-border trade suffer from severe capacity limitations due to delayed (or failed) implementation of the enduring solutions. As correctly set out in ACER's Defence, congestions in electricity networks are very unstable and often frequently moving between different network elements, making it not always possible to design bidding zones such that internal congestions will never occur⁸². In its Recommendation 02/2016, ACER clearly states that "*the implementation of the short-run solutions serves as a back-up option and ensures that the functioning of the internal electricity market is not significantly hampered*" (Point 3.5). They function as a "*safety net in cases where the market situation calls for a new enduring solution, which requires significant implementation time*" (idem).

252. It follows from the above that Part 2 of the Third Plea is unfounded and must be dismissed.

⁸¹ Defence, para 11

⁸² Ibid, para 13

DECISION

On those grounds

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hereby dismisses the Appeals for annulment of the Contested Decision as unfounded.

This decision may be challenged pursuant to Article 263 of the Treaty on the Functioning of the European Union and Article 20 of Regulation (EC) No 713/2009 within two months of its publication on the Agency website or of its notification to the Appellant as the case may be.

SIGNED

Andris Piebalgs
Chairman
(signed by delegation)

SIGNED

Andras Szalay
Registrar