

DECISION OF THE BOARD OF APPEAL
OF THE EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY
REGULATORS
19 April 2021

*(Application for annulment – ACER Decision No. 25/2020 — FCA Regulation – Electricity
Regulation – duty to state reasons - Charter of Fundamental Rights of the EU)*

Case number	A-009-2020
Language of the case	English
Appellant	Polskie Sieci Elektroenergetyczne S.A. (“PSE”) Represented by: L. JESIEN
Defendant	European Union Agency for the Cooperation of Energy Regulators (“ACER” or “the Agency”) Represented by: C. ZINGLERSEN
Intervener	President of Energy Regulatory Office, Poland Al. Represented by: M. KOZAK (On behalf of the Appellant, granted)
Application for	Revision or annulment of Decision No. 25/2020 of 23 October 2020 adopted by ACER on sharing costs incurred to ensure firmness and remuneration of long-term transmission rights (“the Contested Decision”).

THE BOARD OF APPEAL

composed of A. PIEBALGS (Chairman), W. BOLTZ (Rapporteur), M. ASLANOGLU, Y.
FREDRIKSSON, J. OLLIER and M. SWORA (Members).

Deputy Registrar: S. VAONA

gives the following

DECISION

I. Legal background

1. Article 30 of Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation (the ‘FCA Regulation’) requires Transmission

Systems Operators ('TSOs') to issue long-term transmission rights ('LTTRs') in explicit auctions (auctions of capacity without a simultaneous matching of energy trade and capacity allocation). Market participants successfully bidding in these, held for each bidding zone border ('BZB'), acquire LTTRs. LTTRs are either physical LTTRs or financial LTTRs. Physical LTTRs allow their owners to nominate flow over them on a particular BZB or to return them back to TSOs. Financial LTTRs do not allow nomination and can only entitle their holders to a payment.

2. The FCA Regulation lays down a range of requirements concerning costs and cost recovery of establishing capacity calculation ('CC') mechanisms, the single allocation platform and particularly rules for ensuring firmness and remuneration of LTTRs. The FCA Regulation foresees a long-term capacity calculation methodology ('FCA CCM') within the respective Capacity Calculation Regions ('CCRs').
3. The income resulting from auctioning LTTRs constitutes long-term ('LT') congestion income ('CI') for the TSOs. Article 57 of the FCA Regulation foresees a methodology to share this LT CI among TSOs ('FCA CIDM').
4. For financial LTTRs or physical LTTRs which have not been nominated and have therefore been returned to TSOs, TSOs need to remunerate LTTR holders for their returns in the day-ahead ('DA') timeframe on the basis of rules specified in Article 35 of the FCA Regulation. Article 61(3) of the FCA Regulation foresees a methodology to share these LT remuneration costs among TSOs, namely the methodology for sharing costs incurred to ensure firmness and remuneration of LTTRs ('FRCM')¹.
5. The Contested Decision adopts this FRCM, which it joins as Annex I to the Contested Decision.
6. For fullness, pursuant to the return, TSOs reallocate the returned physical LTTRs to the DA market and obtain the DA CI, either (i) on the explicit market, where the remunerated CI consists of the auction price, or (ii) on the implicit market, where the remuneration consists of the price spread from the DA coupling. Article 73 of Regulation (EU) 2015/1222 ('CACM Regulation') foresees a methodology to share this DA CI among TSOs ('CACM CIDM').

¹ The FRCM does not apply to the return of LTTRs to the subsequent forward capacity allocation, but only applies to the return of LTTRs to the day-ahead capacity allocation.

Facts giving rise to the dispute

7. On 23 April 2020, i.e. within six months after the approval of the FCA CIDM, the European Network of Transmission System Operators ('ENTSO-E'), acting on behalf of All TSOs, submitted All TSOs' FRCM Proposal for a FRCM ('All TSOs' FRCM Proposal') to ACER for its regulatory approval pursuant to Articles 4(6)(g) and 61(3) of the FCA Regulation. All TSOs' FRCM Proposal was submitted to ACER for regulatory approval instead of All NRAs in accordance with Article 5(2)(b) of Regulation (EU) 2019/942 ('ACER Regulation').
8. On 22 June 2020, ACER launched a public consultation on All TSOs' FRCM Proposal. ACER joined the summary and evaluation of the responses received to the public consultation in Annex II to the Contested Decision.
9. On 31 August 2020, ACER started a hearing phase as described in ACER's Rules of Procedure with the national regulatory authorities ('NRAs') and TSOs.
10. From the beginning of May 2020 until mid-October 2020 ACER cooperated closely with all NRAs and TSOs and further consulted them on various amendments suggested by ACER during teleconferences and through exchanges of textual amendments via email. In this period, discussions were held within ACER's FCA Task Force and ACER's Electricity Working Group.
11. On 13 October 2020, the Board of Regulators gave its favourable opinion to the Agency's draft Contested Decision.
12. The Agency issued the Contested Decision on 23 October 2020. Annex I to the Contested Decision contains the FRCM.
13. Article 3 of the FRCM, entitled "Sharing of remuneration costs of eligible LTTRs among BZBs" reads as follows:
 1. *The remuneration of costs of eligible LTTRs on a given BZB and MTU constitutes an obligation of the relevant TSO(s) on that BZB to remunerate the LTTR holders in case the price difference is positive in the direction of the LTTR, in accordance with Article 35 of the FCA Regulation and the HAR. The remuneration of eligible LTTRs shall be covered in four consecutive steps determined in paragraphs 2 to 5 below.*

2. *In the first step², the remuneration costs of eligible LTTRs on a given BZB and MTU shall be covered by the day-ahead congestion income¹ assigned to that BZB and MTU. If the resulting day-ahead congestion income on a given BZB and MTU remains positive after this step, it constitutes the 'remaining income' for the purpose of paragraph (3).*
3. *In the second step, the remuneration costs of eligible LTTRs on a given BZB and MTU that were not covered by the day-ahead congestion income pursuant to paragraph (2) shall be covered as follows:*
 - (a) *In CCRs which apply the flow-based approach in the day-ahead capacity calculation, the remuneration costs on a given BZB and MTU, which were not covered by the day-ahead congestion income pursuant to paragraph (2), shall be covered by all BZBs in the respective CCR with the use of the remaining income and in proportion to the remaining income on these BZBs. If the costs to be shared in such a way exceed the total remaining income on all BZBs in a CCR, these shared costs on a given BZB and MTU shall be decreased proportionally to match the total remaining income on all BZBs in the CCR.*
 - (b) *In CCRs which apply the coordinated net transmission capacity approach in the day-ahead capacity calculation, the remuneration costs on an interdependent BZBs and MTU, which were not covered by the day-ahead congestion income pursuant to paragraph (2), shall be covered by all interdependent BZBs in the respective CCR with the use of the remaining income and in proportion to the remaining income on these interdependent BZBs. If the costs to be shared in such a way exceed the total remaining income on all interdependent BZBs in a CCR, these shared costs on a given interdependent BZB and MTU shall be decreased proportionally to match the total remaining income on all interdependent BZBs in the CCR. The list of interdependent BZBs and the TSOs (or related parties) of those BZBs for each CCR applying the coordinated net transmission capacity approach in the day-ahead capacity calculation shall be published in a common document by ENTSO-E on its web page for information purposes. The document shall be updated and published promptly as soon as any changes occur. Each publication shall be announced in an ENTSO-E's newsletter and on the website of the SAP.*

² Including the income resulting from day-ahead fallback procedures.

In this step, the BZBs, which do not issue LTTRs, shall not be considered in sharing of the remuneration costs.

- 4. In the third step, the remuneration costs of eligible LTTRs on a given BZB and MTU that were not covered pursuant to paragraphs 2 and 3 shall be covered by the long-term congestion income generated on that BZB and MTU.*
- 5. In the fourth step, the remuneration costs of eligible LTTRs on a given BZB and MTU that were not covered pursuant to paragraphs 2 to 4, shall be covered by any other congestion income (e.g. from other MTUs, intraday timeframe etc.) assigned to the TSOs on that BZB and, eventually, by any other financial resources of a TSO responsible for that BZB, in accordance with Article 4.*
- 6. In the case that the single day-ahead coupling process is unable to produce results, i.e. the fallback procedures are triggered, as approved in accordance with Article 44 of the CACM Regulation, the second step determined by paragraph 3 above does not apply on the decoupled BZBs.”*

Procedure

14. On 22 December 2020, the Appellant submitted an appeal to the Registry of the Board of Appeal against the Contested Decision in case A-009-2020.
15. On 4 January 2021, the announcement of appeal was published on the website of the Agency.
16. On 11 January 2021, the Registrar communicated the composition of the Board of Appeal to the Parties.
17. On 18 January 2021, the President of the Energy Regulatory Office of Poland filed its application to intervene with the Registry.
18. On 9 February 2021, ACER filed its Defence with the Registry, requesting the Board of Appeal to dismiss the appeal.
19. On 10 February 2021, the President of the Energy Regulatory Office of Poland was granted the right to intervene on behalf of the Appellant.
20. On 22 February 2021, the Appellant filed its Reply to the Defence with the Registry.
21. On 4 March 2021, the Registrar of the Board of Appeal informed the Appellant that, given that the correctness of the numerical evidence presented in paragraph 44 of the Appeal had not been questioned by the Defendant, the Chairperson of the Board of Appeal had decided,

in accordance with Articles 16, 18 and 20 of its Rules of Procedure, that it was not necessary to address the Appellant's request to seek an expert opinion to be provided by an independent expert.

22. On 4 March 2021 the Agency submitted its Rejoinder to the Registry.
23. On 9 March 2021, the Board of Appeal sent a request for information to the parties in accordance with Article 20 of its Rules of Procedure.
24. On 15 March 2021, the written part of the proceeding was closed.
25. The Board of Appeal held an oral hearing on 18 March 2021.

Main arguments of the Parties

26. The claims by the Appellant can be summarized as follows:
 - First Plea: the FRCM, adopted by the Contested Decision, in connection with rules prescribed in the FCA CIDM and CACM CIDM, reduces in certain cases the CI arising from the single DA coupling collected on a given BZB due to allocation of LTTRs on other BZBs. Since the aforementioned reduction in the CI arising from the single DA coupling on the BZB in question is not compensated by CI arising from the allocation of LTTRs on these other BZBs, the primary distribution of CI, i.e. from the single DA coupling, is distorted by the allocation (auction-based selection of FTR bids resulting in cross-zonal transmission capacity allocated as FTRs) of FTRs in quantities which are inadequate to the rules of guaranteeing FTRs' firmness in the context of LT CI distribution. The aforementioned distortion of CI distribution imposed by the Contested Decision infringes: (i) Article 61(3) of the FCA Regulation because it is not consistent with the FCA CIDM, (ii) Article 3(g) of the FCA Regulation as well as article 19(1) of Regulation (EU) 2019/943 ('ER') because the Contested Decision does not contribute to the efficient LT operation and development of the electricity transmission system and electricity sector in the EU and its Member States, as well as it provides a disincentive to reduce congestion.
 - Second Plea: the Contested Decision is not supported by a sufficient analysis of its correctness and consequences for affected parties and ACER did not provide an adequate statement of reasons, infringing the obligation of Article 14(7) of the ACER Regulation, the rights of the Appellant stemming from Article 41(2)(c) of the Charter

of Fundamental Rights ('the Charter'), as well as Article 296(2) of the Treaty on the Functioning of the European Union ('TFEU').

27. The Appellant requests the Board of Appeal to (i) annul Article 1 of the Contested Decision; (ii) annul Article 3 of the FRCM joined as Annex I to the Contested Decision, insofar as the remuneration costs of eligible LTTRs on a given BZB and market time unit ('MTU') that were not covered by the DA CI pursuant to Article 3(2) of the FRCM are covered (a) in CCRs which apply the flow-based ('FB') approach in the DA CC, by all BZBs issuing LTTRs in the respective CCR with the use of the remaining income and in proportion to the remaining income on these BZBs, or (b) in CCRs which apply the coordinated net transmission capacity ('cNTC') approach in the DA CC, by all interdependent BZBs issuing LTTRs in the respective CCR with the use of the remaining income and in proportion to the remaining income on these interdependent BZBs; and (iii) remit the case to the competent body of ACER to replace the Contested Decision with a new decision.
28. The Defendant requests the Board of Appeal to dismiss the Appeal in its entirety as unfounded.

II. Admissibility

Ratione temporis

29. Article 28(2) of the ACER Regulation provides that "[t]he appeal shall include a statement of the grounds for appeal and shall be filed in writing at ACER within two months of the notification of the decision to the person concerned, or, in the absence thereof, within two months of the date on which ACER published its decision".
30. The Appeal was submitted on 22 December 2020, challenging ACER Decision No. 25/2020, which was published on its website on 23 October 2020.
31. The Appeal was received by the Registry by e-mail on 22 December 2020 and it contained the statement of grounds.
32. Therefore, the Appeal is admissible *ratione temporis*.

Ratione materiae

33. Article 28(1) of the ACER Regulation provides that decisions referred to in Article 2(d) may be appealed before the Board of Appeal.

34. Decision No. 25/2020 was issued on the basis of Article 5(2)(b) of the ACER Regulation, following a public consultation and a consultation with the concerned NRAs and TSOs.
35. ACER alleges in its Defence³ that the Appeal is inadmissible because of the hypothetical nature of its interest. According to the Defence, the Appellant “*relied on a situation without demonstrating that it is possible at all (let alone certain); indeed such situation is impossible in the scope of Article 6(2) of the FRC Methodology.*”
36. The Appellant argues in its Reply that its Appeal is admissible and that an inadmissibility decision would deprive it of its right to an effective remedy⁴.
37. In its Rejoinder, ACER maintains that the Appeal is inadmissible because the Appellant argues an infringement in the event that specific circumstances will become true⁵.
38. The Board of Appeal finds that the Appeal is admissible.
39. The Board of Appeal observes that the Appellant’s First Plea relates to an alleged distortion of CI distribution imposed by the Contested Decision’s FRCM infringing, *inter alia*, Article 61(3) of the FCA Regulation.
40. Article 61(3) of the FCA Regulation requires the FRCM to be “*consistent with the methodology for sharing congestion income from forward capacity allocation as referred to in Article 57.*” In other terms, Article 61(3) of the FCA Regulation requires the FRCM to be consistent with the FCA CIDM under Article 57 of the FCA Regulation (which, in turn requires the FCA CIDM “*to take into account*” the CACM CIDM under Article 73 of the CACM).
41. The only FCA CIDM currently in place is the FCA CIDM of 22 May 2019, whereby All NRAs approved All TSOs’ Proposal of 15 March 2019, which has been implemented by All NRAs since July 2019. Said FCA CIDM is not applicable to a flow-based capacity calculation⁶.
42. This currently applicable FCA CIDM expressly provides in its Recital (3) that it will be amended when a FB approach will apply for LT CC by a CCR or if an amendment is required

³ Defence, paras 55-58.

⁴ Reply, paras 10-17 and 21-24.

⁵ Rejoinder, paras 15-18.

⁶ Recital (3) of All TSOs’ Proposal of 15 March 2019 approved by All NRAs on 22 May 2019: *The present CID-FCA methodology Proposal addresses congestion income distribution under a NTC and coordinated NTC approach as the flow-based approach is currently not applied for long-term capacity calculation by the capacity calculation regions (“CCR”). When a FB approach would be applied for long-term capacity calculation by a CCR, or if the implementation of a CCM based on the CNTC approach requires this, this CID-FCA methodology shall be amended and submitted on time for regulatory approval according to Article 4(12) of the FCA Regulation.*

due to the implementation of a CCM based on the cNTC approach. Recital (3) adds that such amendment shall be “*submitted on time for regulatory approval according to Article 4(12) of the FCA Regulation*”. Accordingly, Article 6 of the FCA CIDM provides that “*any change of existing rules or methodologies related to and affecting the CID-FCA methodology – in particular the implementation of the flow based approach for long-term capacity calculation in one of the capacity calculation regions – shall lead to an amendment of the present CID-FCA methodology in accordance with Article 4(9) of FCA Regulation in due time. The implementation of a CNTC approach in a CCR may lead to an amendment of the present CID-FCA methodology in accordance with Article 4(9) of FCA Regulation in due time.*”

43. The current wording of the Contested Decision’s FRCM states that the FRCM “*establishes a methodology (..) in accordance with Article 61 of Commission Regulation (EU) 2016/1719 establishing a guideline on forward capacity allocation (‘FCA Regulation’)*” (Recital (1) of the Contested Decision’s FRCM) and that “*in accordance with Article 61 of the FCA Regulation, this FRC methodology determines the sharing of costs incurred to ensure firmness and remuneration of eligible LTTRs on all BZBs where LTTRs are allocated*” (Article 1(1) of the FRCM).
44. Article 6(2) of the Contested Decision’s FRCM foresees that the FRCM will only be implemented at the date of implementation of (i) the FCA CCM within the respective CCR in accordance with Article 10 of the FCA Regulation and (ii) the FCA CIDM. This article is in line with All TSOs’ initially proposed Article 7(2). ENTSO-E’s Explanatory Note complementing All TSOs’ FRCM Proposal for the FRCM⁷ clearly explained in its Chapter V “*Implementation and revision of the FCA FRC Methodology*” that “*The FRC Methodology can only be implemented when two preconditions are met: - First, the capacity calculation methodology within the respective CCR in accordance with Article 10 of the FCA is implemented. - Second, FCA CID Methodology (Article 57) is ready to be implemented. The second of these prerequisites is needed in order to ensure coherence of the FCA CID Methodology and FRC Methodology.*
- The implementation requirements are clearly interlinked. There exists a link between the CACM and FCA capacity calculation methodologies in the CCR, the CACM CIDM, the FCA CID Methodology and FRC Methodology. It is commonly understood by all TSOs that a socialisation of the costs linked to the remuneration of LTTRs requires a coordinated*

⁷ Annex 2 to the Defence, ENTSO’s FCA-FRC Explanatory Note, 15 May 2020, p.8.

approach on the calculation of the volume of LT capacity. Hence, the implementation of the LT CCM in the respective CCRs is considered a prerequisite.”

45. The Core Region currently applies a non-coordinated NTC approach for its DA and FCA calculation⁸. However, All Core TSOs intend to implement the FB approach for their DA calculation in February 2022, whereas, at that time, LT calculation will continue to follow the non-coordinated NTC approach⁹. The Core FCA CCM will be approved in 2021/2022 and will be implemented not earlier than 2024/2025¹⁰.
46. The Defendant argues that the Appeal is inadmissible because the Appeal is hypothetical. In ACER’s opinion, on the one hand, the FRCM does not apply to a non-coordinated NTC approach during the transition period prior to the implementation of the Core FCA CCM, because the FRCM will only apply in 2024/2025 (when the Core FCA CCM will have been implemented) and, on the other hand, the application of the FRCM following the implementation of the Core FCA CCM is hypothetical because, by that time, the FCA CIDM will have been amended in order to adapt its sharing factors to the FB approach.
47. The Appellant considers that this interpretation amounts to considering the Contested Decision’s FRCM as an empty promise¹¹.
48. The Board of Appeal finds that the FCA Regulation requires that the Contested Decision’s FRCM should be consistent with the Core FCA CCM and the FCA CIDM. The Core FCA CCM has been proposed but will not be implemented until 2024/2025. The FCA CIDM does not apply to the FB approach that the Core CCR TSOs intend to adopt in February 2022 and which is required by its own terms to be amended in order to adapt to the FB approach. To this end, a new bottom-up decision-making process will be required whereby All TSOs will propose an amendment that will have to obtain regulatory approval.
49. According to the FCA Regulation, the FRCM consequently needs to ensure consistency with a methodology package that, due to an unfortunate regulatory timing in the Core region, does not exist at the time of the adoption of the FRCM.
50. The Board of Appeal finds that given that (i) there will be an FCA CIDM which will apply and which would, in the view of the Appellant, entail an alleged distortion if considered jointly with the Contested Decision’s FRCM, that (ii) there is no certainty about the sharing

⁸ Responses of both parties to the Board of Appeal’s Request for Information of 9 March 2021.

⁹ Responses of both parties to the Board of Appeal’s Request for Information of 9 March 2021.

¹⁰ Responses of both parties to the Questions posed at the Oral Hearing of 18 March 2021.

¹¹ Reply, para 17.

factors that will result from the decision-making process to amend the FCA CIDM to adjust it to the FB approach which will be the result of a separate bottom-up decision-making process, and that (iii) the Contested Decision's FRCM does not contain necessary contingencies to ensure a possibility to amend the FRCM's terms needed to ensure consistency with the future FCA CIDM amendments to adapt to the FB approach, the Appeal is not hypothetical.

51. Furthermore, the Defendant's inadmissibility plea only refers to the fact that the application of the FRCM to the Core CCR is hypothetical. Even if this were the case, *quod non*, the FRCM applies to all CCRs and the appeal is not limited to the Core CCR where the Defendant considers the appeal to be hypothetical. The appeal also stretches to other CCRs, including CCRs which apply the cNTC approach. This invalidates any alleged hypothetical nature of the Appeal.
52. In the light of the above, the Board of Appeal concludes that the Appeal is not hypothetical and that the Appeal is admissible.
53. Therefore, since the Appeal fulfils the criterion of Article 28(1) of the ACER Regulation, the Appeal is admissible *ratione materiae*.

Ratione personae

54. Article 28(1) of Regulation (EU) 2019/942 provides that “[a]ny natural or legal person, including the regulatory authorities, may appeal against a decision referred to in point (d) of Article 2 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.”
55. Article 2 of the Contested Decision contains a list of its addressees, all of them TSOs in the European Union, including the Appellant.
56. The Appeal is therefore admissible *ratione personae*.

III. Merits

Remedies sought by the Appellant

57. The Appellant requests the Board of Appeal to (i) annul Article 1 of the Contested Decision; (ii) annul Article 3 of the FRCM joined as Annex I to the Contested Decision, insofar as the remuneration costs of eligible LTTRs on a given BZB and MTU that were not covered by the DA CI pursuant to Article 3(2) of the FRCM are covered (a) in CCRs which apply the FB

approach in the DA CC, by all BZBs issuing LTTRs in the respective CCR with the use of the remaining income and in proportion to the remaining income on these BZBs, or (b) in CCRs which apply the cNTC approach in the DA CC, by all interdependent BZBs issuing LTTRs in the respective CCR with the use of the remaining income and in proportion to the remaining income on these interdependent BZBs; and (iii) remit the case to the competent body of ACER to replace the Contested Decision with a new decision.

Pleas and arguments of the Parties

First Plea - Infringement by the Contested Decision of Articles 61(3) and 3(g) of the FCA Regulation and Article 19(1) of the ER.

58. In its First Plea¹², the Appellant claims that the FRCM, adopted by the Contested Decision, in connection with the rules prescribed in the FCA CIDM and CACM CIDM, reduces in certain cases the CI arising from the single DA coupling collected on a given BZB due to allocation of LTTRs on other BZBs. Since the aforementioned reduction in the CI arising from the single DA coupling on the BZB in question is not compensated by CI arising from the allocation of LTTRs on these other BZBs, the primary distribution of CI, i.e. from the single DA coupling, is distorted by the allocation of FTRs in quantities which are inadequate to the rules of guaranteeing FTRs' firmness in the context of LT CI distribution. The Appellant claims that this leads to a distortion of CI distribution and that the Contested Decision, consequently, infringes (i) Article 61(3) of the FCA Regulation because the Contested Decision is not consistent with the FCA-CIDM, and (ii) Article 3(g) of the FCA Regulation as well as Article 19(1) of the ER because the Contested Decision does not contribute to the efficient LT operation and development of the electricity transmission system and electricity sector in the EU and its Member States, and because it provides a disincentive to reduce congestions.
59. The Appeal contains numerical evidence to demonstrate the alleged distortion in relation to the Core CCR.
60. In its Defence¹³, ACER responds (i) that the Contested Decision is consistent with Article 61(3) of the FCA Regulation, (ii) that the Appeal concerns a hypothetical situation incapable

¹² Appeal, paras 36-46.

¹³ Defence, paras 59-83.

of occurring in reality within the legal framework of the FRCM the FCA CIDM and the CACM CIDM and (iii) that the Contested Decision neither infringes Article 3(g) of the FCA Regulation nor Article 19(1) of the ER because the Appeal is based on incorrect assumptions. ACER also argues that the Appellant does not contest the defined individual steps of the FRCM as such but disagrees with the order in which the steps are taken¹⁴.

61. In its Defence, ACER does not challenge the correctness of the numerical evidence *per se*¹⁵ but holds that the numerical evidence is based on two erroneous assumptions¹⁶.
62. In its Reply, the Appellant highlights ACER's incorrect understanding of the Appeal and stresses that "*it contests not the order of coverage but the very idea that remuneration costs of eligible LTTRs on a given BZB and MTU which were not covered by the DA CI pursuant to Article 3(2) of the FRCM are to be covered by the income specified in paragraph 4 of the Notice of Appeal.*"¹⁷
63. The Board of Appeal observes that there is no disagreement between the parties on the correctness of the numerical evidence adduced by the Appellant to demonstrate the distortion that it alleges in its Appeal. The parties' disagreement lies in the underlying assumptions of the numerical evidence, which will be dealt with hereafter.
64. The Board of Appeal makes two preliminary observations.
65. First, the Appellant joined ACER Decision 25/2020 prior to the corrigendum of 22 December 2020 as Contested Decision in Annex 1 to its Appeal. However, on the same day as the Appellant lodged its Appeal, i.e. on 22 December 2020, ACER published a corrigendum to the Contested Decision¹⁸ which does, however, not affect the contents of the present proceedings.
66. Second, the FRCM is of European-wide scope, applying to all CCRs, some of which have adopted or will adopt the cNTC approach, whilst other (Core and Nordic) have adopted or will adopt the FB approach. Until such time, the CCRs use a non-coordinated NTC approach.

¹⁴ Defence, para 5.

¹⁵ Defence, para 68.

¹⁶ Defence, paras 69-73. ACER holds that the numerical evidence of the Appeal is based on the erroneous assumptions (i) that the allocation of LTTRs is based on a FB allocation for which there is no sharing of LT CI and (ii) that BZBs allocating zero LTTRs will need to spend part of the DA CI to contribute to the costs of remuneration of LTTRs.

¹⁷ Reply, para 2.

¹⁸

https://acer.europa.eu/Official_documents/Acts_of_the_Agency/Individual%20decisions%20Annexes/ACER%20Decision%20No%2025-2020_Annexes/Corrigendum%20to%20ACER%20Decision%2025-2020.pdf

67. According to Article 3(1) of the FRCM, the returned LTTRs on a given BZB create an obligation for the relevant TSOs on that BZB to remunerate the concerned LTTR holders on that BZB. Articles 3(2) to 3(5) of the FRCM specify four steps that determine how TSOs on the concerned BZB cover the remuneration costs that they need to pay to LTTR holders.
68. The first step uses the DA CI that was collected on an individual BZB to cover the cost of remuneration of LTTRs of that BZB. If the DA CI is not sufficient to cover the cost of remuneration of LTTRs on that BZB, the second step is used for such BZB to cover the remaining remuneration costs. If the DA CI on that border remains positive after deduction of remuneration costs on that BZB, the remaining DA income can be used for covering remuneration costs on BZB where the DA income was not sufficient.
69. In the second step, the remuneration costs not covered in the first step are summed for all BZBs in the CCR and this sum is covered by the remaining DA CI from the first step. Each BZB having remaining DA CI from the first step contributes to these costs in proportion to its remaining DA CI from the first step. If the second step still does not suffice to cover the cost of remuneration of LTTRs on a BZB, the third step is used for such BZB. The FRCM also specifies that the BZBs which do not allocate any LTTRs are excluded from this second step.
70. In the third step, TSOs on the concerned BZB use the LT CI collected on that individual BZB to cover the remaining cost of remuneration of LTTRs at that BZB.
71. In the fourth step, the remuneration costs of eligible LTTRs on a given BZB and MTU that were not covered pursuant to Article 3(2) to (4) of the FRCM are covered by any other CI (e.g. from other MTUs, intraday timeframe etc.) assigned to the TSOs on that BZB and, eventually, by any other financial resources of a TSO responsible for that BZB, in accordance with Article 4 of the FRCM.
72. The Appellant claims that Article 3 of the FRCM creates distortive effects when the remuneration costs of eligible LTTRs on a given BZB and MTU that were not covered by the DA CI pursuant to Article 3(2) of the FRCM are covered (a) in CCRs which apply the FB approach in the DA CC, by all BZBs issuing LTTRs in the respective CCR with the use of the remaining DA CI and in proportion to the remaining DA CI on these BZBs ('FB scenario'), or (b) in CCRs which apply the cNTC approach in the DA CC, by all interdependent BZBs issuing LTTRs in the respective CCR with the use of the remaining DA CI and in proportion to the remaining DA CI on these interdependent BZBs ('cNTC scenario'). There would be a reduction of the DA CI in both aforementioned scenarios

because part of this income would need to be used to cover the remuneration costs of LTTRs allocated on other BZBs and this reduction would not be compensated with the LT CI that TSOs receive on those BZBs.

73. In other words, the alleged distortion would consist of the fact that All TSOs need to contribute to the remuneration costs of LTTRs, whereas the CI from allocating these LTTRs is not shared among All TSOs, but instead retained by TSOs on the BZBs where LTTRs are issued. The Appellant presents numerical evidence to demonstrate the validity of its reasoning¹⁹. The Appellant also adduces that the alleged distortion of the primary distribution of CI disincentives congestion reduction²⁰.
74. At the Oral Hearing, the Appellant added that the alleged distortion creates wrong incentives by rewarding TSOs issuing excessive volumes of LTTRs at no financial risk (TSOs from countries with better developed grids or willing to accept a higher risk in the LT CC process) and detracts CI from TSOs with the most severe congestion, which will have less CI for grid development and the ensuring social welfare for market participants in their control area. The Appellant did, however, not identify any effect on the wider energy market beyond the distortive effect for certain TSOs, in particular related to the CI that they collect.
75. The Appeal is closely linked to the timing of all methodologies involved. The implementation of the FRCM cannot be considered in isolation from the implementation of the FCA CCM and the FCA CIDM.
76. When adopting the FRCM, ACER literally replicated All TSOs' FRCM Proposal as regards its implementation clause. Article 7(2) of All TSOs' FRCM Proposal stipulated that "*the TSOs of each capacity calculation region shall implement the methodology at the date of implementation of the long-term capacity calculation methodology within their respective capacity calculation region in accordance with Article 10 of the FCA Regulation and the Congestion income distribution methodology in accordance with Article 57 of the FCA Regulation.*"²¹ This implementation clause was maintained by ACER in Article 6(2) of the Contested Decision's FRCM in order to comply with the requirements of the FCA Regulation. According to Article 6(2) of the FRCM, "*the TSOs of each CCR shall implement*

¹⁹ Appeal, paras 4, 37 and 46.

²⁰ Appeal, para 44.

²¹ Annex 5 to the Appeal, p. 8; see also Annex 1 to the Appeal (containing Annex II to the Contested Decision), p. 37.

the FRC Methodology at the date of the implementation of the long-term capacity calculation methodology within their respective CCR in accordance with article 10 of the FCA Regulation and the FCA CIDM". ENTSO-E's Explanatory Note complementing All TSOs' FRCM Proposal²² - referred to above as regards the Appeal's admissibility - clearly sets out the intertwinement and consistency requirements between all methodologies.

77. In other terms, the FRCM will only apply when the CCR-specific FCA CCM and the FCA CIDM apply. The FRCM will never apply in isolation but when a full package of FCA methodologies will apply: the FRCM, the CCR-specific FCA CCM and the FCA CIDM constitute a legal regulatory package (referred to jointly as the 'FCA-Package'). Similarly to Article 6(2) of the FRCM, Article 5(2) of the FCA CIDM states that the TSOs of each CCR shall implement the FCA CIDM at the date of implementation of the FCA CCM within the respective CCR in accordance with Article 10 of the FCA Regulation or at the date of the implementation of the FRCM. The *raison d'être* of these provisions is that the FRCM can only operate within a legal framework where the FCA CCM and the FCA CIDM are fully coordinated and compliant with the FCA Regulation. This was expressly set out during the public consultation, where ACER held that "*the FRC methodology should be implemented at the date of implementation of the long-term capacity calculation methodology. The capacity calculation will be performed in a pre-defined and coordinated manner and that should prevent over-selling of capacity on individual BZBs*"²³.
78. The implementation of the FCA-package is also linked to the CACM CIDM. Indeed, Article 61(3) of the FCA Regulation requires that the FRCM be consistent with the FCA CIDM under Article 57 of the FCA Regulation. Article 57 of the FCA Regulation requires the FCA CIDM to take account of the CACM CIDM under Article 73 of the CACM.
79. Consequently, the Contested Decision's FRCM should not be considered in isolation from (i) the implementation of the FCA CIDM, which, as set out above, is in its current form only fully applicable to the cNTC approach, and (ii) the implementation of each CCR-specific FCA CCM. According to the Defendant, the FCA CCM will be implemented in the CCRs adopting the cNTC approach earlier than its implementation in the Core FCA CCM adopting

²² Annex 2 to the Defence, ENTSO's FCA-FRC Explanatory Note, 15 May 2020, p.8.

²³ Annex 1 to the Appeal (containing Annex II to the Contested Decision), p. 45,

- the FB approach (the latter being foreseen for 2024/2025)²⁴. In both cases, the Contested Decision's FRCM will only be applicable in future when the full FCA-Package will apply.
80. For the sake of clarity, the Board of Appeal deals with each scenario separately, starting with the cNTC scenario and continuing with FB scenario:
- (1) *CCRs applying the cNTC approach*
81. Article 61(3) of the FCA Regulation requires consistency of the Contested Decision's FRCM with the FCA CIDM, which, in turn, needs to take account of the CACM CIDM.
82. Article 61(3) of the FCA Regulation reads as follows:
“Within six months after the approval of the methodology for sharing congestion income referred to in Article 57, all TSOs shall jointly develop a methodology for sharing costs incurred to ensure firmness and remuneration of long-term transmission rights. This methodology shall be consistent with the methodology for sharing congestion income from forward capacity allocation as referred to in Article 57.”
83. Pursuant to the FCA CIDM, which is applicable to the cNTC approach, there is an upfront calculation of the volume of cross-zonal capacity ('CZC') between different BZBs linked to the volume of sold LTTRs. The CI collected from allocating LTTRs within a CCR is first shared among the BZB of the CCR (Title 2 of the FCA CIDM) and then distributed to the TSOs of the BZBs (Title 3 of the FCA CIDM). The cNTC approach is based on a consensus between All TSOs within a CCR as regards the calculated volume of CZC and the volume of LTTRs for sale on each BZB. This volume is fully co-ordinated and agreed among all TSOs of a CCR. Hence, none of the TSOs can decide to sell a volume of LTTRs on a BZB that the other TSOs in the same CCR would consider unacceptable. Given that sharing regional CI directly depends on the volume of CZC calculated, and that each BZB will receive the CI generated by the auctioning of LTTRs on that BZB, the consensus among all TSOs ensures that sharing LT CI in the CCR also abides by the same consensus among all TSOs of the CCR. Any differences in sharing implied by the volume of LTTRs sold will be decided upon in common agreement between All TSOs, with the ensuing consequences to the advantage of some TSOs and the disadvantage of other TSOs.
84. In the context of a cNTC approach, both the FRCM and the FCA CIDM provide for a sharing of LT CI on the basis of regional sharing and socialisation. As correctly set out by the

²⁴ Response of ACER to the Board of Appeal's Request for Information of 9 March 2021.

Defence, “*the FCA CIDM applies the implicit sharing of long term congestion income in case of the coordinated NTC approach (i.e. due to fully coordinated and consensually agreed long-term cross-zonal capacities)(..)*”²⁵.

85. Therefore, if one considers that the Contested Decision’s FRCM is implemented in conjunction with the full FCA-Package, the distortion alleged by the Appellant would not occur because both the volumes of CZC and the sharing factors would be consistent in the different allocation timeframes. In this context, BZBs would be unable to offer excessive amounts of LTTRs for sale without the consent of the other TSOs of the CCR.
86. The Board of Appeal finds, therefore, that, when the full FCA-Package applies, the alleged distortion identified by the Appeal would not occur in CCRs adopting a cNTC approach. The Contested Decisions’ FRCM ensures that it will only apply in conjunction with the full FCA-Package.
87. To conclude, as regards the cNTC approach, the Board of Appeal fails to find the alleged distortion, which, in the opinion of the Appellant, would infringe Articles 61(3) and Article 3(g) of the FCA Regulation, as well as Article 19(1) of the ER.

(2) *CCRs applying the FB approach*

88. Article 61(3) of the FCA Regulation requires consistency of the Contested Decision’s FRCM with the FCA CIDM, which, in turn, needs to take account of the CACM CIDM.
89. As set out above, the FCA CIDM is currently not applicable to the FB approach. The FCA CIDM currently only applies to the straight-forward cNTC approach, as set out in Recital 3 of All TSOs’ FRCM Proposal, approved by the NRAs on 22 May 2019²⁶:

“Furthermore, this CID-FCA methodology Proposal takes into account the general principles, goals and other methodologies set in the FCA Regulation. The goal of the FCA Regulation is the coordination and harmonisation of forward capacity calculation and allocation in the long-term capacity markets, and it sets requirements for the TSOs to cooperate on a pan-European level; on the level of capacity calculation regions, and across bidding zone borders. The FCA Regulation in Article 51 also sets rules for establishing European Harmonised Allocation Rules and regional/border specific annexes (hereafter referred to as “HAR”). In addition, the FCA Regulation in Articles 49 and 59 sets out rules

²⁵ Defence, para 65.

²⁶ Annex 3 to the Appeal , All TSOs’ Proposal for a CIDM in accordance with Article 57 of the FCA Regulation, 15 March 2019 (see also, Annex 1 to the Defence).

for the establishment, the functioning and the cost sharing of a Single Allocation Platform for long-term capacity allocation (hereafter referred to as “SAP”). The FCA Regulation sets out also rules for establishing capacity calculation methodologies based on either the flow-based approach (“FB approach”) or the coordinated net transmission capacity approach (“coordinated NTC approach”). The present CID-FCA methodology Proposal addresses congestion income distribution under a NTC and coordinated NTC approach as the flow-based approach is currently not applied for long-term capacity calculation by the capacity calculation regions (“CCR”). When a FB approach would be applied for long-term capacity calculation by a CCR, or if the implementation of a CCM based on the CNTC approach requires this, this CID-FCA methodology shall be amended and submitted on time for regulatory approval according to Article 4(12) of the FCA Regulation.” (emphasis added)

90. This is especially so for the Core CCR, in which the Appellant operates.
91. The Board of Appeal notes that in its First Plea, the Appellant does not allege any distortion that would occur during the transition period following the introduction of the FB approach for DA allocation (expected in February 2022) up until the implementation of the Core FCA CCM (expected in 2024/2025). The Defendant agrees that an application of the sharing factors of the FRCM as described in the Contested Decision could lead to a distortion as described by the Appellant in its Appeal²⁷. However, in its Reply, in its Response to the Board of Appeal’s Request for Information and at the Oral Hearing, the Appellant stressed that the Appeal did not relate to the said transition period²⁸.
92. In the FB approach, contrary to the cNTC approach, there is no upfront calculation of the volume of CZC between different BZBs. The volume of CZC is an output of an algorithm. In other words, the CZC allocation is left to the market.
93. As confirmed by both the Appellant and the Defendant in their responses to the Board of Appeal’s Request for Information, it is impossible under the current regulatory framework to have any certainty on the sharing factors that will be applied in the future FCA CIDM pursuant to its amendment to adjust it to the FB approach.
94. The Defendant held in its Defence that, given the distinctive features of the FB approach, it expected that when the FCA CIDM would be amended in order to integrate the FB approach,

²⁷ Defence, paras 39 and 51.

²⁸ Reply, para 30. Response of the Appellant to the Board of Appeal’s Request for Information of 9 March 2021. Oral Hearing of 18 March 2021.

the total CI would be collected from all allocated LTTRs in the whole CCR and shared among all BZBs, similarly to the DA CI distribution methodology applicable for the FB approach²⁹. In so doing, the Defendant referred to point 1.1.1 of Chapter VI of ENTSO-E's Explanatory Note complementing All TSOs' FRCM Proposal³⁰:

“Introduction:

- *In an allocation framework of explicit auctions congestion income can be set equal to the allocated capacities times the respective auction prices. In an ATC based market coupling basically the same logic applies, as the commercial flows resulting from market coupling times the market clearing price difference between respective adjacent BZs, in principle equals the received the congestion income.*
- *In both cases this is possible as it consists of a direct assignment of congestion income to bidding zone borders (BZB). This is **no longer the case in a flow-based allocation framework**, as the DA FB MC not only considers cross-border lines, but all grid elements that are significantly affected by the market coupling outcome, i.e. the so-called critical network elements (CNE).*
- *Implementing FB MC enables optimised allocation of available capacity determined by a flow-based domain for the CCR; on the other hand, this FB-method **no longer maintains a direct link between accepted bids and allocated XB-capacity**.*
- *The respective legal framework for this is already fixed (73 CACM + 57 FCA), but there are degrees of freedom in the details of how to apply the specific implementation based on a CCR level.” (emphasis added)*

95. However, in its Response to the Board of Appeal's Request for Information of 9 March 2021, the Defendant acknowledged that there is no legal framework that would guarantee or require that the FCA CIDM, following its integration of the FB approach, will be implemented with an equal sharing key to the CA CIDM but that it was *“in ACER's view the most likely outcome of the future proceedings”* and that *“ACER expects the principles to be the same”* because the common principles of the FCA CIDM and CACM CIDM ensure that, regardless of allocated capacities, all borders receive CI with regard to physical effect of allocated capacities³¹. The Defendant added that it expects that the FCA CIDM, following its

²⁹ Defence, para 48.

³⁰ Defence, para 39 and Annex 2 to the Defence, ENTSO's FCA-FRC Explanatory Note, 15 May 2020, p.9.

³¹ Response of the Defendant to the Board of Appeal's Request for Information of 9 March 2021.

integration of the FB approach, will apply regional cost sharing. It claimed that this is due to the random nature of capacity allocation in FB, which implies that there can be a lot of capacities allocated to a BZB with high price difference and zero capacity to a BZB with low price difference. In ACER's view, TSOs would not accept that CI would not be subject to regional sharing³². Indeed, according to ACER, one cannot imagine that future amendments to the FCA CIDM, in order to adapt to the FB approach, would share CI on the basis of the same principles as the cNTC approach, given that this is not currently the case for the CACM CIDM. The Defendant added, however, that *"the sharing key cannot be exactly equal, because FCA applies explicit auctions (capacities allocated in both directions on the border) and CACM applies implicit auctions (capacities allocated in one direction on the border), but the principles will be the same (i.e. sharing of income based on physical effect allocated capacities have on different borders)"*³³. The Defendant furthermore noted that *"most likely the FCA CIDM and the CACM CIDM will apply the same principles, but this will not result in the same factors (percentages). This is because percentages depend on the specific situation of how much capacity was allocated on each border and what is their physical impact on other borders"*³⁴ and that even if the sharing factors of the future FB FCA CIDM and CACM CIDM (i.e. the percentages received by each BZB) would be the same, the result would not be exactly the same, one factor causing the difference being the amount of revenue shared in LT and the amount shared in DA³⁵.

96. In addition, the Appellant held in its Response to the Board of Appeal's Request for Information of 9 March 2021 that *"the final CI sharing resulting from LTCI, DACI and FRCM depends not only on the sharing factors applied for the different allocation timeframes (FCA and CACM CIDM), but even more so on the volumes of offered cross-zonal capacities in the different timeframes, being yearly, monthly and daily"*³⁶. The Appellant also observed that *"the impact of the FRCM depends on whether the FCA and CACM CIDMs are consistent. However, this consistency is necessary, but not sufficient to ensure the avoidance of unintended consequences"*³⁷.

³² Response of the Defendant to the Board of Appeal's Request for Information of 9 March 2021.

³³ Response of the Defendant to the Board of Appeal's Request for Information of 9 March 2021.

³⁴ Response of the Defendant to the Board of Appeal's Request for Information of 9 March 2021.

³⁵ Response of the Defendant to the Board of Appeal's Request for Information of 9 March 2021.

³⁶ Response of the Appellant to the Board of Appeal's Request for Information of 9 March 2021.

³⁷ Response of the Appellant to the Board of Appeal's Request for Information of 9 March 2021.

97. The Board of Appeal finds that there is a reasonable level of uncertainty on the amendments expected to adjust the FCA CIDM to the FB approach. The principles according to which sharing factors are determined will be the output from a bottom-up decision making process that is inherently uncertain. Once the principles and method are set, the actual sharing factors will depend on a range of further factors, including TSO forecasts of network capability, market inputs to the algorithm etc. Both mean that the final content and implied outcome of the FCA CIDM cannot be known or guaranteed today.
98. The Board of Appeal consequently finds that, as regards the FB approach, the Contested Decision's FRCM does not guarantee consistency with the FCA CIDM as required by Article 61(3) of the FCA Regulation. Such consistency would have been attained by the insertion of a contingency in the Contested Decision's FRCM, ensuring that a new FRCM Decision be taken pursuant to the amendment of the FCA CIDM to adapt to the FB approach.
99. Indeed, the requirement of consistency with the amended FCA CIDM to integrate a FB approach, imposed by Article 61(3) of the FCA Regulation, can only be attained by the adoption of a new FRCM Decision, which would guarantee a right of appeal of its addressees in case any of inconsistency of any of its clauses.
100. The Board of Appeal notes that both the Contested Decision³⁸ and the Intervention³⁹ mention that the Intervener proposed, during the hearing phase, that a paragraph be introduced in the FRCM to trigger a re-evaluation of the FRCM once all methodologies are approved.
101. The Appellant also argues that the FRCM infringes Article 3(g) of the FCA Regulation and Article 19(1) of the ER.
102. Article 3(g) of the FCA Regulation reads as follows:
"This Regulation aims at (...) (g) contributing to the efficient long-term operation and development of the electricity transmission system and electricity sector in the Union."
103. Article 19(1) of the ER reads as follows:
"Congestion-management procedures associated with a pre-specified timeframe may generate revenue only in the event of congestion which arises for that timeframe, except in the case of new interconnectors which benefit from an exemption under Article 63 of this Regulation, Article 17 of Regulation (EC) No 714/2009 or Article 7 of Regulation (EC) No 1228/2003. The procedure for the distribution of those revenues shall be subject to review"

³⁸ Contested Decision, paras 59. See also URE's request in para 20.

³⁹ Intervention, para 3 of the Statement of Circumstances establishing the right to intervene.

by the regulatory authorities and shall neither distort the allocation process in favour of any party requesting capacity or energy nor provide a disincentive to reduce congestion.”

104. Appellant claims that the Contested Decision’s FRCM infringes Article 3(g) of the FCA Regulation and Article 19(1) of the ER “*because the Contested Decision does not contribute to the efficient long-term operation and development of the electricity transmission system and electricity sector in the Union and its Member States, as well as it provides a disincentive to reduce congestions*”⁴⁰. The Appellant adds that “*This disincentive stems from fact that the FRC methodology as adopted by ACER will result in transferring congestion income to bidding zone borders for which the long-term transmission rights are allocated, while there are other bidding zone borders physically used to conduct cross-border transactions associated with those rights.*”⁴¹.
105. The Board of Appeal finds that in the absence of certainty about the future shape of the FCA Package following its amendment to the FB approach, the Contested Decision’s FRCM, applicable to all CCRs, cannot properly be assessed on its compliance with Article 3(g) of the FCA Regulation and Article 19(1) of the ER as regards CCRs applying the FB approach.
106. The Defendant states in its Rejoinder that it invited All TSOs to integrate the FB approach in their All TSOs’ Proposal but that All TSOs refused to do so. The Defendant joins email correspondence to this end as Annex 3 to its Rejoinder.
107. The Board of Appeal finds, however, that in the FCA Regulation’s bottom-up decision-making process, ACER has the regulatory function to assess whether All TSOs’ proposal comply with the applicable regulatory framework, *in casu* the FCA Regulation, in order to subsequently grant regulatory approval. In exercising this regulatory function, it is ACER’s duty to ensure adequate compliance with the applicable regulatory framework.
108. To conclude, as regards the FB approach, the Board of Appeal finds that the absence of a necessary contingency in the Contested Decision to ensure consistency of the FRCM with the FCA CIDM infringes Articles 61(3) of the FCA Regulation, and cannot be tested as to its compliance with Article 3(g) of the FCA Regulation as well as Article 19(1) of the ER.
109. It follows that the First Plea must be upheld as founded. The Contested Decision must therefore be remitted to the Agency to ensure compliance with these findings.

⁴⁰ Appeal, para 37.

⁴¹ Appeal, para 46.

Second Plea – Failure to provide a due statement of reasons.

110. According to the Second Plea⁴², ACER infringed 14(7) of Regulation (EU) 2019/942 and Article 41(2)(c) of the Charter of Fundamental Rights, as well as Article 296(2) of the Treaty on the Functioning of the European Union because the Contested Decision (i) was not supported by a sufficient analysis of its correctness and consequences for the affected parties, and (ii) lacks an adequate statement of reasons.
111. In its Defence, the Agency argues that ACER did not infringe Article 14(7) of Regulation (EU) 2019/942, nor Article 41(2)(c) of the Charter, nor Article 296(2) of the TEU because the Contested Decision is sufficiently reasoned and did not have to contain any numerical evidence, as adduced by the Appellant.
112. The parties agree that the Agency has a duty to duly reason its decisions. This obligation is specifically foreseen in Article 14(7) of Regulation (EU) 2019/942 and also derives from Article 296 TFEU and the general principles of EU Law, including Article 41(2)(c) of the Charter and has been confirmed by consistent case-law of European Courts⁴³. Pursuant to this duty, the reasoning followed by the Agency must be disclosed in a clear and unequivocal fashion, firstly to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to verify whether or not the decision is well founded and, secondly, to permit the European Courts to exercise its power to review the lawfulness of the measure⁴⁴.
113. The discord of the parties is whether the Agency complied with this duty.
114. The Board of Appeal recalls its earlier decision-making practice⁴⁵, in which it stated that the Agency must comply with the fundamental rules of the TFEU and the general principles of EU law, and this includes the Charter.
115. The Board of Appeal also observes that the Charter's procedural rights are not absolute rights. Their purpose is not to create abstract procedural obstacles, but to protect the rights of the

⁴² Appeal, paras 47 to 63.

⁴³ Case T-700/14 *TVI v Commission* EU:T:2017:447, para 79.

⁴⁴ Case C-350/88 *Delacre and Others v Commission* ECLI:EU:C:1990:71, paras 15 and 16; Case T-217/01 *Forum des migrants v Commission* ECLI:EU:T:2003:106, para 68; and Case T-183/00 *Strabag Benelux v Council* EU:T:2003:36, para 55.

⁴⁵ Board of Appeal Decisions A-002-2018 paras 101, 128 and 131; A-006-2109 paras 106-142; A-001-2018 paras 112-118; A-001-2020 paras 249, 251 and 263-272; A-002-2020 paras 250, 252 and 264-273; A-007-2020, paras 66 and 99; A-003-2020, paras 206 and 235 and A-008-2020, paras 310 and 332.

addressees and other persons concerned by a decision, as provided for by the regulations applicable to such decision and by relevant case law⁴⁶. The obligation to duly reason decisions is meant to allow its addressees to understand the content and reasoning of the decision and to be able to challenge them, as well as to allow for the control of this reasoning in the context of judicial review.

116. The ACER Regulation mandates ACER to review and approve All TSOs' FRCM Proposal. In the FCA Regulation's step-wise, bottom-up network code on forward markets, ACER was not required to reiterate the entire process *ab initio* but to either approve All TSOs' FRCM Proposal or to bring amendments that were necessary to ensure compliance with the applicable regulatory framework. Accordingly, to the extent that ACER amended All TSOs' FRCM Proposal, the Agency had a duty to duly state the underlying reasons for these amendments. Furthermore, ACER did not only have the right but was under an obligation to make necessary amendments to ensure compliance with the applicable regulatory framework.
117. First, the Board of Appeal finds that ACER duly reasoned the amendments that it made to All TSOs' initial FRCM Proposal.
118. The Contested Decision explains in great detail the amendments made in the FRCM, which is joined as Annex I to the Contested Decision together with a marked-up version of All TSOs' FRCM Proposal for the sake of transparency (Annex Ia).
119. As regards the timing of the implementation of the FRCM, the Board of Appeal notes that the Agency did not have to amend All TSOs' FRCM Proposal given that this Proposal already contained an identical implementation schedule in its Article 7(2)⁴⁷ (see First Plea above). Article 6(2) of the Contested Decision's FRCM clearly replicates All TSOs' FRCM Proposal in that the FRCM will only be implemented when the FCA CCM and FCA CIDM will be implemented. The link between the FRCM and the FCA CIDM (and CACM CIDM) is also set out in Recital (7) of the FRCM:

“The remuneration of LTTRs is in the scope of this FRC methodology and includes situations where the remuneration of LTTRs exceeds the total congestion income generated in a respective MTU by day-ahead and long-term capacity allocation on bidding zone border level pursuant to the CACM CIDM and the FCA CIDM”.

⁴⁶ Board of Appeal Decision A-001-2017, para 124-126; A-001-2020 para 253; A-002-2020 para 254 and A-007-2020, paras 67 and 100 and A-008-2020, paras 311 and 334.

⁴⁷ Annex 5 to the Appeal, p. 8; see also Annex 1 to the Appeal (containing Annex II to the Contested Decision), p. 37,

120. As regards the sharing of remuneration costs, the Board of Appeal notes that the Agency merged Articles 3 and 4 of All TSOs' FRCM Proposal into a single provision (Article 3 of the Contested Decision's FRCM) and suppressed the distinction of All TSOs' FRCM Proposal provided between, on the one hand, cost remuneration of eligible LTTRs attributed to the implicit daily allocation process based on FB CC (Article 3 of All TSOs' FRCM Proposal) and, on the other hand, cost remuneration of eligible LTTRs attributed to the implicit daily allocation process based on cNTC CC (Article 4 of All TSOs' FRCM Proposal)⁴⁸. A clear and unequivocal reasoning was provided for this merger in paragraph 56 of the Contested Decision:

“To enhance readability and to improve the structure of the document, ACER merged Articles 3 and 4 and applied a common structure of the cost sharing principles, i.e. ACER structured the cost sharing principles in a sequence of steps to be followed during the process of sharing the cost. The amended structure applies the same sequence of step to both capacity calculation approaches, i.e. to the flow-based approach and the CNTC approach.”

121. Still on the sharing of remuneration costs, the Board of Appeal notes that the Agency reversed the second and third step of the sequence provided in Articles 3 and 4 of All TSOs' FRCM Proposal and added a fourth step to that sequence⁴⁹.
122. As regards the reversal of the second step and the third step in the sequence of Article 3 of the Contested Decision's FRCM, the Board of Appeal finds that the Contested Decision duly reasons, in a clear and unequivocal fashion, how ACER's amendments to All TSOs' FRCM Proposal comply with the applicable regulation. Section 6.3 of the Contested Decision, entitled “*Assessment of the compliance with the objectives of the FCA Regulation*” justifies in detail the underlying reasons to the reversal of steps 2 and 3 in the sequence of Article 3 of the FRCM. Far from being succinct, the explanation covers 2 pages to clarify ACER's amendment (paragraphs 43-47). In paragraph 43, ACER expressly sets out sequence that had been proposed by All TSO's FRCM Proposal. From paragraphs 44 to 47, ACER sets out in detail why steps 2 and 3 have been reversed in the Contested Decision's FRCM:

“(44) In order to promote effective long-term cross-zonal trade for market participants, to optimise the allocation of long-term cross-zonal capacity, to ensure fair and

⁴⁸ Annex 5 to the Appeal, p. 8; see also Annex 1 to the Appeal (containing Annex II to the Contested Decision), p. 37,

⁴⁹ Annex 5 to the Appeal, p. 8; see also Annex 1 to the Appeal (containing Annex II to the Contested Decision), p. 37,

nondiscriminatory treatment of TSOs and to contribute to the efficient long-term operation of the electricity transmission system in the Union, i.e. to comply with the objectives of the FCA Regulation, ACER amended the rules that apply for remuneration of the eligible LTTRs by switching the Second and the Third step from the Proposal, i.e. the long-term congestion income is to be used later in the process of sharing costs for remuneration of LTTRs.

(45) ACER is of the opinion that the Proposal, which uses the long-term congestion income before the day-ahead congestion income in a whole CCR is exhausted and questionable, because: (a) LTTR remuneration should be based on income generated during the reallocation of capacities in the single day-ahead market coupling, i.e. remuneration costs should equal the congestion income from day-ahead reallocation. In this sense, the remuneration costs and the day-ahead congestion income are fully correlated as they are driven by the same market fundamentals (allocated capacities multiplied by market spread in the day-ahead timeframe). (b) Long-term congestion income is not correlated with the remuneration costs since the LTTRs are considered as hedging tools and the long-term congestion income received by the TSOs is a hedging premium that represents the expected average positive market spread, but not the realised market spread in each MTU. (c) The early use of the long-term congestion income in the cost sharing process could also create a 'discrimination' between PTRs and FTRs. Some TSOs might start preferring PTRs, because the nominated PTRs would not represent a risk of depleting the long-term congestion income the TSOs collect in the long-term auctions (unlike the non-nominated PTRs and FTRs, which might require the long-term congestion income to cover the remuneration costs).

(46) Therefore, in ACER's view, for the reasons presented above, the day-ahead congestion income should be given priority in LTTR remuneration cost sharing process and the day-ahead congestion income of the whole CCR (of a particular MTU) should be spent completely before any long-term congestion income is used for remuneration of LTTRs.

(47) Moreover, the early use of long-term congestion income in the cost sharing process might also reduce (and change the allocation of) the resources gathered from long-term congestion income used on specific BZBs for potential compensation of the LTTRs' curtailment, in accordance with Article 54 of the FCA Regulation. The compensation cap is determined by the total congestion income collected in a calendar year on a BZB in all timeframes and different sharing keys have different impact on the total congestion income spent on remuneration and curtailment on each specific BZB."

More details on this reasoning were provided at the Oral Hearing. The Board of Appeal observes that the issue had been extensively debated during a public consultation, in which ACER provided an explanation as to why reversing the second and third step of the cost sharing sequence of the FRCM would be more efficient and non-discriminatory⁵⁰. ACER's comprehensive Response to the Public Consultation is joined as Annex II to the Contested Decision and demonstrates that the sequence of the FRCM's cost sharing was debated. It includes comments by Core TSOs, Ørsted, Terna, Austrian Power, Amprion, Elia, EFET, ENTSO-E, DUR, EDF, Market Parties Platform, Österreichs Energie, ElecLinc, Baltic Cable and comments by the Appellant⁵¹.

123. As regards the addition of a fourth step in the sequence of Article 3 of the Contested Decision's FRCM, the Contested Decision also duly clarifies why ACER added a fourth step to the remuneration of costs sequence in paragraph 49:

“Therefore, in order to comply with the objective of the FCA Regulation to promote effective hedging opportunities for market participants, ACER introduced one more paragraph (Article 3(5) of Annex I to this Decision), which follows after the last step of the cost sharing principles described above. This last step ensures that the holders of LTTRs are remunerated fully, because the FCA Regulation does not allow any application of caps. For that purpose, the TSOs should use any congestion income, which was not yet used in any previous steps of the cost sharing principles and if insufficient, any other income. ACER recognizes that the chance that this step will be applied is very low, nevertheless it deems it appropriate to introduce it for the sake of the completeness of the cost sharing principles.”

124. Furthermore, in Recitals (8) to (14) of the FRCM, a detailed explanation is given of how the FRCM contributes to the achievement of the objectives of Article 3 of the FCA Regulation and, according to 4(8) of the FCA Regulation, the expected impact of the FRCM on the particular objectives of the FCA Regulation:

(9) This FRC methodology fulfils the objectives of Article 3(a) of the FCA Regulation, because it serves the objective of promoting effective long-term cross-zonal trade with long-term cross-zonal hedging opportunities for market participants as it lays down objective criteria and solutions for the sharing of costs to be applied by all involved TSOs, thus creating a solid basis for European cost sharing principles applied at CCR level.

⁵⁰ Contested Decision, paras 6 and 15 to 17.

⁵¹ Annex 1 to the Appeal (containing Annex II to the Contested Decision).

(10) This FRC methodology fulfils the objectives of Article 3(b) of the FCA Regulation, i.e. the objectives of optimising the calculation and allocation of long-term cross-zonal capacity, because it takes into account the results of the long-term capacity calculation methodology in accordance with Article 10 of the FCA Regulation and Article 21 of the CACM Regulation which duly considers the provisions and limitations related to secure system operation.

(11) This FRC methodology fulfils the objectives of Article 3(c) and 3(e) of the FCA Regulation, i.e. the objectives of providing non-discriminatory access to long-term cross-zonal capacity and of respecting the need for a fair and orderly forward capacity allocation and orderly price formation because it ensures full remuneration and firmness of LTTRs as required by the FCA Regulation. Consequently, it is fully compliant with the HAR.

(12) The FRC methodology fulfils the objectives of Article 3(d) of the FCA Regulation, i.e. it ensures fair and non-discriminatory treatment of all affected parties, because it sets out cost sharing keys that are based on objective and fair principles and it secures full transparency and involvement of TSOs, ACER, regulatory authorities and market participants.

(13) The FRC methodology fulfils the objectives of Article 3(f) of the FCA Regulation, because it provides clear rules and a solid basis for cost sharing in a transparent and reliable way, since the FRC methodology, in common with the interrelated methodologies, will be published by TSOs.

(14) The FRC methodology fulfils the objectives of Article 3(g) of the FCA Regulation, i.e. contributing to the efficient long-term operation and development of the electricity transmission system and the electricity sector in the Union, because it maintains and guarantees the remuneration and firmness principles established by the FCA Regulation, which are facilitating efficient cross-zonal hedging that is needed for efficient market functioning and price signals.”

125. Finally, ACER conducted extensive consultations with All TSOs (including the Appellant) and All NRAs⁵², including a hearing phase⁵³, in which the subject-matter of the appeal i.e. a possible distortion in case of an excessive allocation of LTTRs, was tabled by the Danish and Polish NRAs (Intervener). The Contested Decision expressly includes the Danish NRA’s concerns about “*the possibility that the TSOs might sell more LTTRs than what is physically*

⁵² Contested Decision, paras 8 and 14.

⁵³ Contested Decision, paras 7 and 18 to 23.

realistic, if the socialization process of the day-ahead congestion income is used earlier in the sharing key for remuneration of LTTRs” and “the argument (..) that TSOs would receive higher revenues from the LTTRs, while their costs for remuneration would be socialized”⁵⁴, as well the Intervener’s concerns that “ACER will incentivise TSOs to oversell LTTRs”⁵⁵ and ENTSO-E’s reiterated request “to use the originally proposed sharing key for the remuneration of LTTRs” (without any additional arguments beyond the Explanatory Note of 15 May 2020)⁵⁶.

126. The Contested Decision provides ACER’s clear and unequivocal reasoning on the concern that TSOs would tend to over-sell LT CZC:

“(58) (...) On the specific issue raised by the Danish and Polish regulatory authorities that the TSOs would tend to over-sell long-term cross-zonal capacity, ACER believes that it should not constitute a critical issue concerning fairness and non-discriminatory principles as well as incentives for TSOs:

- (a) Firstly, because there is no direct linear relation between the amount of auctioned capacity and the total income from the auction.*
- (b) Secondly, because the TSOs cannot predict (e.g. a year or a month ahead of the day-ahead timeframe) that their concerned BZB would not be subject to negative income (day-ahead income lowered by remuneration of LTTRs) after the day-ahead market coupling.*
- (c) Thirdly, in the current European framework, only the Core CCR uses the flowbased approach (Nordic CCR is out of scope of this methodology as it does not issue LTTRs) and includes the long-term capacity in its flow-based domain, which should prevent overselling the long-term capacity, once the forward capacity calculation, in accordance with Article 10 of the FCA Regulation, is implemented (which corresponds with the timeline of implementation of the FRC methodology).”*

127. Taking account of the fact that the addressees of the Contested Decision are TSOs, which are sufficiently acquainted with the technicalities of the FRCM and in the light of the extensive consultations and hearing phase, the Contested Decision duly reasoned, in a clear and

⁵⁴ Contested Decision, para 19. Concern of the Danish NRA.

⁵⁵ Contested Decision, para 20. Concern of the Polish NRA, Intervener in the present case.

⁵⁶ Contested Decision, para 23. Concern of ENTSO-E.

unequivocal manner, all amendments that it made to All TSOs' FRCM Proposal on the FRCM's sharing of remuneration costs.

128. Regardless of its view on the exactitude of the reasoning, the Appellant was provided with an adequate reasoning in the Contested Decision.
129. The appeal is detailed and demonstrates that the Appellant clearly understood the underlying reasoning of the Contested Decision on the FRCM's sharing of remuneration costs in a clear and unequivocal fashion. The appeal provides a detailed reiteration of the arguments that the Appellant and Intervener provided throughout the proceedings leading-up to the Contested Decision and expresses its dissatisfaction with the duly stated reasons set out in the Contested Decision. This evidences that ACER provided the Appellant with a clear and unequivocal reasoning, which it was able to understand and is now able to rebut, even though it is dissatisfied with its content.
130. Second, the Board of Appeal finds that, notwithstanding the above, the Contested Decision's FRCM – which is applicable to all CCRs - fails to duly reason, in a clear and unequivocal manner, the fulfilment of the consistency requirement of Article 61(3) of the FCA Regulation in view of expected amendments triggered by the FB approach in some CCRs. This failure of due reasoning is, however, intrinsically linked to ACER's failure to ensure compliance with the applicable regulatory framework in the first place. As highlighted by the Appellant in its Appeal, on the future consequences of the regulatory entanglement of all methodologies on the Contested Decision's FRCM, ACER should have exercised "*a higher degree of precision*" because the FRCM is "*strongly interlinked with other methodologies governing the financial aspects of capacity allocation*"⁵⁷. It reiterated this in its Reply⁵⁸.
29. Even though the addressees of the Contested Decision are TSOs, which are sufficiently acquainted with the technicalities of forward markets and their related processes, the Contested Decision's lack of a necessary contingency to ensure consistency of the FRCM with the FCA CIDM, following its integration of the FB approach, amounts, at the same time, to a failure to provide due reasons in a clear and unequivocal fashion on the said regulatory consistency. The Contested Decision fails to guarantee the Appellant's full understanding of the content and reasoning of the Contested Decision regarding the future amendments of the FCA-Package to adapt to the FB approach and its impacts on the FRCM.

⁵⁷ Appeal, paras 53-59.

⁵⁸ Reply, paras 34 and 35.

30. It follows that the Second Plea must be upheld as founded. The Contested Decision must therefore be remitted to the Agency to ensure compliance with these findings.

DECISION

On those grounds,

THE BOARD OF APPEAL

Hereby remits the case to the Director of the Agency.

This decision may be challenged pursuant to Article 263 of the Treaty on the Functioning of the European Union and Article 29 of Regulation (EU) 2019/942 within two months of its publication on the Agency website or of its notification to the Appellant as the case may be.

For the Board of Appeal

The Chair

Andris PIEBALGS

For the Registry

The Deputy Registrar

Stefano VAONA