Board of Appeal

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-003-2019
Language of the case	English
Appellant	Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen ('BnetzA' or 'Appellant') Represented by: Jochen Homann, President
Defendant	Agency for the Cooperation of Energy Regulators ('the Agency' or 'ACER') Represented by: Alberto Pototschnig, Director *ad interim*
Interveners	Commission de Régulation de l'Énergie ('CRE') Represented by: Jean-François Carenco, President; Commission for Electricity and Gas Regulation ('CREG') Represented by: Koen Locquet, Acting President of Board of Directors (Both on behalf of Defendant);

ACER
Agency for the Cooperation of Energy Regulators

Board of Appeal

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) 2015/1222[1] ('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

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 06/2016[5], 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 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

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 occasions[7], 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, the Appellant filed an appeal with the Registry of the Board of Appeal. The appeal was registered under the case number A-003-2019.

10. On 25 April 2019, the Registrar invited the Appellant to regularize its submission (announcement of appeal). On 26 April 2019, the announcement of appeal was re-submitted in the required form and with the required content.

11. On 26 April 2019, along with the service of the notice of appeal, the Registrar of the Board of Appeal invited the Defendant to make observation to the Appellant's request to suspend the application of the Contested Decision. On 2 May 2019, the Defendant submitted its observations.

12. On 29 April, the announcement of appeal was published in the website of the Agency.

[7] See Article 14 of the Contested Decision

13. On 6 May 2019, in accordance with Article 1(5) 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.

14. 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 Appellant submitted its observations on 17 May 2019.

15. On 12 May 2019, in the form of a non-appealable reasoned order in compliance with Article 26 of the Rules of Procedure, the Board of Appeal dismissed the Appellant's request for the suspension of the application of the Contested Decision.

16. On 16 May 2019, the Defendant submitted its defence to the Registry. The Chairman of the Board of Appeal, in accordance with Article 16(2)-(3) of the Rules of Procedure, provided the Appellant with the opportunity to launch a second submission.

17. On 21 May 2019, the Board of Appeal sent a proposal to the Parties to extend the deadline of the appeal proceedings 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 written agreement to this procedural step. On 23 May 2019, the Appellant gave its consent to the extension and waived its right to challenge the Board of Appeal's final decision on the mere ground of the extension. 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 the

Appellant and instructed the Registrar that the confidential and non-confidential versions of the notice of appeal be handled separately in the Registry.

19. On 27 May 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.

20. On 28 May 2019, the Board of Appeal notified the main Parties and the Interveners, 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.

21. 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 written procedure.

22. On 11 June 2019, the Board of Appeal, by the request of the Appellant, held an oral hearing. At the hearing the Board of Appeal heard an expert-witness requested by the Appellant. On 18 June 2019, the draft summary minutes of the hearing was sent to the main Parties for their comments. After receiving comments on 25 June 2019 from both the Appellant and the Defendant, the summary minutes was finalized and sent to the Parties on 3 July 2019.

Main arguments of the Parties

23. The Appellant argues that the Agency infringed general principles of the Union law, notably, (i) principle of conferred powers (lack of a legal basis), (ii) principle of institutional balance, (iii) principle of sincere cooperation, (iv) principle of legal certainty, and (v) principle of proportionality. Furthermore, the Appellant claims (i) violation of the rights of the European Parliament and of the Council, (ii) violation of the rights of the Member States under the new Electricity Regulation to be adopted as a part of the 'Clean Energy Package', (iii) discrimination on the ground of

nationality, (iv) infringement of Regulation (EU) 2015/1222 and Regulation (EC) 714/2009, (v) violation of Articles 34 and 35 TFEU. Moreover, the Appellant claims infringement of its procedural rights by virtue of (i) amendment of the TSOs' proposal beyond the TSOs' and NRAs' request, (ii) imposition of additional amendment proposal obligations on Core TSOs, (iii) infringement of duty to issue the Contested Decision in the Appellant's and in the addressees' official language.

24. The Defendant contests each claims and arguments, claiming that the Appellant's arguments and pleas are based on fundamental misconceptions of the relevant legal rules and the relevant regulatory framework and on an erroneous interpretation of the law. As such, according to the Defendant, they are unfounded and the appeal should be dismissed in its entirety.

II. Admissibility

Admissibility of the appeal

Ratione temporis

25. 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."*

26. The notice of appeal was submitted on 23 April 2019, challenging ACER Decision No. 02/2019, which was published on the Agency's website on 25 February 2019.

27. The appeal was received by the Registry in writing, by e-mail, and it contained the statement of grounds.

28. Therefore, the appeal is admissible *ratione temporis*.

Ratione materiae

29. Article 19(1) of Regulation (EC) 713/2009 reads that decisions referred to in Article 7, 8 and 9 of this Regulation may be appealed before the Board of Appeal.

30. The Contested Decision was issued, among others, on the basis of Article 8(1) of Regulation (EC) 713/2009, which fact is explicitly mentioned in its introductory part.

31. Therefore, since the appeal fulfils the criterion of Article 19(1) of Regulation (EC) 713/2009, the appeal is admissible *ratione materiae.*

Ratione personae

32. 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*."

33. The Appellant is not an addressee of the Decision. However, being a national regulatory authority concerned in the Core region, it has a direct and individual interest in the outcome of the present case. The admissibility of the appeal was not contested by the Defendant.

34. The appeal is therefore admissible *ratione personae*.

III. Merits

Remedies sought by the Appellant

35. BNetzA requests the Board of Appeal to annul the following provisions of Decision No. 02/2019:
    a) Articles 5(5) to (9) of its Annex I;
    b) Article 10(4), second half sentence, and (5) of its Annex I;
    c) Article 16(2), second sentence, and (3)(d)(vii) of its Annex I;
    d) Article 5(5) of its Annex II;
    e) Article 17(3)(d)(vii) of its Annex II;
    f) All parts and clauses of its Annexes I and II, which make explicit reference to the paragraphs of the provisions mentioned above.

36. Alternatively, in the event the Board of Appeal does not annul the decision partially, BNetzA requests that the Contested Decision be annulled in its entirety.

First Plea: Substantive Provisions of the Core CCM Decision violating Union Law.

1. Definition of Critical Network Elements and Contingencies.

37. BNetzA argues that the Contested Decision infringes EU law in various aspects when establishing the definition of Critical Network Elements and Contingencies ('CNECs') in Article 5 of Annex I (DA CCM) and Article 5 of Annex II (ID CCM) to the Contested Decision[8]. In particular, the Appellant claims that these provisions of the Contested Decision (i) infringe the principle of conferred powers and the principle of legal certainty[9]; (ii) lack a legal basis in Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and

[8] section 3.4.1 of the Appeal
[9] section 3.4.1.1 of the Appeal

congestion management[10]; (iii) violate the principle of proportionality[11]; and (iv) contain a discrimination on grounds of nationality[12].

1.1 Infringement of the principle of conferred powers and the principle of legal certainty.

1.1.1 Relevance of the "Clean Energy Package"

38. BNetzA argues that "ACER has infringed the principle of conferred powers, the principle of institutional balance, the principle of sincere cooperation[13] and the principle of legal certainty, because the European Parliament and soon also the Council of the European Union have already exercised their powers under Article 194(2) TFEU by virtue of adopting the future Regulation on the internal market for electricity"[14]. To support this claim, BNetzA argues, in essence, that Recast Regulation (EC) 714/2009 (now 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"), part of the Clean Energy for All Europeans Package ('Clean Energy Package'), contains rules on capacity calculation that preclude the Agency from adopting article 5 of Annexes I (DA CCM) and II (ID CCM) to the Contested Decision which, in its opinion, conflict with the said Recast Regulation. As stated by the Appellant at the oral hearing, *"it breaches legal certainty that the long known new provisions of Articles 14-16 of the new Electricity Regulation were not taken into account"*.[15]

39. 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 (Regulation (EU) 2019/943) and a Recast Electricity Directive (EC) 2009/72/EC (now Directive (EU) 2019/944 of the European Parliament and of the Council of 5

[10] section 3.4.1.2 of the Appeal
[11] section 3.4.1.3 of the Appeal
[12] section 3.4.1.4 of the Appeal
[13] Article 13(2) TEU
[14] Appeal, para 45
[15] Minutes of the oral hearing, p.3

June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, hereinafter "Directive (EU) 2019/944"). 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.

40. Recast Regulation (EC) 714/2009 and Recast Electricity Directive (EC) 2009/72/EC have 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 be applicable as of 1 January 2020.

41. Given 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, 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.

1.1.2 Content of Article 14 to 16 of the new Electricity Regulation

42. BNetzA considers that Recast Regulation 714/2009 introduced by the Clean Energy Package (Regulation (EU) 2019/943) contains "procedural and substantive rules on the allocation of internal and cross border capacity for cross border trade, the

application of which would be devoid of purpose and futile" due to Article 5 of Annexes I (DA CCM) and II (ID CCM) of the Contested Decision[16].

43. However, and as is explained in section 1.1.3 of this Decision, the arguments of the Appellant about possible divergences or inconsistencies between the Contested Decision and Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943) are irrelevant because the said Recast Regulation did not apply at the time of the Contested Decision.

44. 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 the Recast Regulation´s stage in the legislative process, it is irrelevant for the purpose of this Appeal to rule upon the compatibility of the Agency´s Decision with the said Recast Regulation. 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 apply as of 1 January 2020. This will be earlier than the entry into force of the Contested Decision (not expected before December 2022[17]). 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".

[16] Appeal, paras 47 and 48
[17] 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.

1.1.3 Divergence from the "Clean Energy Package"

45. The Appellant argues that the Board of Appeal must annul the Contested Decision, given that the hierarchy of the legislative act introduced by the Clean Energy Package ("*lex superior*") over the Contested Decision ("*lex inferior*"), and the interplay of the "*lex posterior*" rule, determine that the Contested Decision will become inapplicable when the Clean Energy Package enters into force. Furthermore, the Appellant, based on the Judgment of the Court of Justice of the EU ("CJEU") in Case T-115/94[18], argues that the Board of Appeal will infringe the principle of legal certainty if the Contested Decision is not annulled. This is because the Board of Appeal would leave room for doubts by the Core TSOs and Core NRAs on the question as to whether the allegedly conflicting provisions of the Contested Decision remain applicable after the entry into force of the Clean Energy Package.

46. In other words, it is the Appellant´s understanding that the Agency, when adopting the Contested Decision, issued an act that contradicts and conflicts with a future higher-ranking regulation, producing two contrary rules of law, causing confusion among the addressees of the Contested Decision and the future Clean Energy Package regulation.

47. As has been set out above, the Agency did not rely upon the Clean Energy Package as the legal basis for its Decision. 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 are the legal basis for the Contested Decision, ACER logically also tests its Decision against the proposed Recast Regulation (EC) 714/2009 of the Clean Energy Package.

[18] *Opel Austria v. Council* (EU:T:1997:3)

48. The fact that a draft proposal existed of a future Recast Regulation (EC) 714/2009 at the time of the adoption of the Contested Decision is not sufficient to create legal uncertainty about the application of an already adopted legal act such as the Contested Decision.

49. Furthermore, Case T-115/94, *Opel Austria v. Council* cannot be relied upon by analogy because, in that case, the future higher-ranking legislative act or future *lex superior* had already been adopted and its entry into force was pending. The Board of Appeal quotes para. 125 of the said Case, which provides the following: "*By adopting the contested regulation on 20 December 1993 when it knew with certainty that the EEA Agreement would enter into force on 1 January 1994, the Council knowingly created a situation in which, with effect from January 1994, two contradictory rules of law would co-exist, namely the contested regulation, which is directly applicable in the national legal systems and re-establishes a 4.9% import duty on F-15 gearboxes produced by the applicant; and Article 10 of the EEA Agreement, which has direct effect and prohibits customs duties on imports and any charges having equivalent effect. Consequently, the contested regulation cannot be regarded as Community legislation which is certain, and its operation/application cannot be regarded as foreseeable by those subject to it. It follows that the Council also infringed the principle of legal certainty*".

50. In the present case, by contrast, Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943) had not yet been adopted when the Agency adopted the Contested Decision. Moreover, at the time of the Contested Decision, the proposed Recast Regulation (EC) 714/2009 was only at a stage of a provisional agreement proposed by a Parliamentary Committee (the Industry, Research and Energy Committee) on 23 January 2019[19]. Consequently, the draft Recast Regulation could have been amended during the remaining steps of the legislative process, and, in fact, textual changes occurred during the so-called lawyer-linguist review. Therefore, the Agency

[19] Document PE 634.488

had no certainty whatsoever about the date of entry into force of the proposal which had not been adopted yet.

51. With regard to the Recast Regulation´s legislative process, the Appellant claims that it was approved at the European Parliament's first reading "*without any changes in substance*"[20]. That claim cannot be taken into consideration to assess the level of certainty of the context in which the Contested Decision was adopted: even if a first reading were to create certainty, the first reading took place on 26 March 2019, i.e. after the adoption of the Contested Decision of 21 February 2019.

52. Finally, even though the Agency was obliged to adopt a decision within a six-month term, the Agency waited as long as possible and exhausted the six-month term conferred by Articles 8(1) and 8(3) of Regulation (EC) 713/2009 to take its Decision (which was taken on the last day of the six-month term). Given that Regulation (EC) 713/2009 does not foresee any extension of the six-month term, ACER was also not capable of extending the deadline to wait for the final text to have a legal screening to check the decision against the adopted Clean Energy Package.

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1.1.4 Lack of institutional competence of the Agency

53. The Appellant claims that the entry into force of the Clean Energy Package precludes the Agency´s competence to determine the Core TSOs´ obligations under the CACM Regulation, regardless of its entry into force. In this regard, BNetzA stresses that on 26 March 2019, the European Parliament adopted its position in a first reading of Recast Regulation (EC) 714/2009, and that, therefore, the institutional imbalance with respect to the European Parliament had already materialized. According to BNetzA, the principle of legal certainty would be infringed since the Agency adopted the Contested Decision in the period preceding the entry into force of the

[20] Para. 45 of the Appeal

Clean Energy Package, while knowing with certainty that it would conflict with the content of the new Regulation that was close to being approved.

54. As sufficiently set out above in section 1.1.3 of this Decision, given that the Recast Regulation (Regulation (EU) 2019/94) had not yet been adopted, the Agency did not infringe legal certainty when adopting its Decision on the basis of the existing legal order.

55. Contrary to what the Appellant argues in paras. 82 and 83 of its Appeal, this case is not an exception 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. In this regard, the Appellant claims that "*the General Court of the European Union makes an exception to* [that principle] *wherever a Union institution knew with certainty that in adopting a legal act in the period preceding the entry into force of a conflicting higher-ranking legal act, it would produce two contrary rules of law*"[21].

56. Furthermore, as set out above, 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 (which will be earlier than the entry into force of the Contested Decision). This is confirmed both by the Appellant[22] and by the Agency[23]. Furthermore, even if there were an inconsistency, the Contested Decision could, if and where appropriate, be amended reflecting the new legal framework.

1.1.5 Inaccurate decision-making powers

[21] Para 85 of the Appeal
[22] para 70 of the Appeal
[23] Para 36 of the Defence

57. With respect to the decision-making powers of the Agency, the Board of Appeal refers to the Second Plea (Infringement of Appellant´s Procedural Rights) below, which demonstrates that the Agency had the necessary powers to adopt the Contested Decision.

1.1.6 Decision as an impermissible instrument

58. The Appellant claims that, because it failed to take account of the future higher-ranking Recast Regulation (Regulation (EU) 2019/943), the Contested Decision was taken on an erroneous legal basis and is therefore unlawful.

59. This reasoning is flawed because the Contested Decision did not have to be taken on the basis of Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943), as shown above (sections 1.1.1-1.1.5 of this Plea), and was taken on a sufficient legal basis, as shown below (section 1.2 of this Plea).

60. In light of the above, Part 1.1 of this Plea on the infringement of the principle of conferred powers and the principle of legal certainty must be dismissed as unfounded.

1.2 Lack of a legal basis in CACM Regulation

1.2.1 Insufficient legal basis for "additional proposal obligation"

61. The Appellant claims that there is insufficient legal basis for the "*additional proposal obligation*" stipulated in article 5 of Annex I (DA CCM) and Article 5 of Annex II (ID CCM) to the Contested Decision[24].

[24] section 3.4.1.2.1 of the Appeal

62. Article 5(7) and 5(8) of Annex I (DA CCM) and Annex II (ID CCM) to the Contested Decision establishes 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;

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."

63. According to the Appellant, the CACM Regulation *"does not contain the possibility to oblige the TSOs to adopt an impact assessment of increasing the threshold of the maximum zone-to-zone PTDF for exclusion of internal CNECs from 5% to 10% or higher as stipulated under Article 5(7), (8)(a) and (b) of Annex I. Nor do the provisions referred to by ACER contain the power to oblige the TSOs to provide the said efficiency analysis as laid down in Article 5(8)(c) of Annex I"*[25]. BNetzA therefore alleges that Articles 5(7) and 5(8) of Annex I (DA CCM) and Annex II (ID CCM) to the Contested Decision have no legal basis in the CACM Regulation and infringe the CACM´s flow-based approach (defined as per article 2(9) CACM, a capacity calculation methodology in which energy exchanges between bidding zones are limited by power transfer distribution factors and available margins on critical network elements).

64. Even though the CACM Regulation does not establish a single, exhaustive list of criteria for determining CNECs for the purpose of capacity calculation, it contains elements to be observed in the determination of the CNECs as, for instance, (i) rules for avoiding undue discrimination between internal and cross-zonal exchanges[26], (ii) the exclusion criterion, excluding those critical elements that are not significantly influenced by the changes in biddings zone net positions[27], and (iii) calculation of flows on critical network elements and adjustment by assuming no cross-zonal power exchanges within the capacity calculation region, applying the rules for avoiding undue discrimination[28].

65. As the Contested Decision expressly explains and justifies[29], 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

[25] para. 91 of the Appeal
[26] Article 21(1)(b)(ii) CACM regulation
[27] Article 29(3)(b) ibid.
[28] Article 29(7)(d) ibid.
[29] Paras 112-118 of the Decision

Annex 1 to Regulation (EC) 714/2009 ("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 determination of CNECs must conform also to the overarching objectives of Article 3 of the CACM Regulation (optimal use of transmission infrastructure, the efficient long-term operation and development of the transmission system and non-discriminatory access to cross-zonal capacity). All those requirements established in the CACM Regulation support the view of the Agency according to which the determination of CNECs solely on the basis of significance does not suffice to comply with the legal framework stipulated in the CACM Regulation nor is it sufficient to 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. It, therefore, needs to be accompanied by other elements to be considered. 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.

66. 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) and Annex II (ID CCM) to the Contested Decision has a manifest legal basis in both the CACM[30] and Regulation (EC) 714/2009[31]. The Contested Decision is also in line with ACER´s Recommendation 02/2016 in which TSOs and NRAs are invited to follow when developing, approving, implementing and monitoring congestion management measures.

67. Finally, quoting the Board of Appeal´s Decision A-001-2017 of 17 March 2017, the Appellant holds that the alleged deviation of the flow-based approach is a "merely

[30] Articles 3, 21(1)(b)(ii), 29(3)(b), 27(4)(d) CACM regulation
[31] Article 16(1) and Point 1.7 Annex thereof

legal question" that has to be revised by the Board of Appeal as opposed to complex economic and technical issues.

68. The Board of Appeal hereby reaffirms its settled decision-making practice[32], 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.

69. In this sense, 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 framework[33].

70. The Board of Appeal considers that the reasoning followed in the above paragraphs gives complete answers to the arguments put forward by the Appellant on this issue. As a result of the review carried out by the Board of Appeal, the conclusion is that Article 5(7) and 5(8) of the Annexes of the Contested Decision have a sufficient legal basis in the CACM Regulation, read in conjunction with Regulation (EC) 714/2009.

71. It is worth noting that the requirement in Article 5 of the CCM to provide NRAs with new proposals and an assessment including cost considerations on issues which have a direct impact on the development of cross-border trade is an obligation that derives directly from Article 36 of Directive 2009/72/EC which lists the general objectives

[32] Case A-001-2017 (consolidated), para 108, Case A-001-2018, para 52, and Case A-002-2018, para 63
[33] See Case A-001-2017 (consolidated), para 69

of NRAs. They 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 these issues which require proposals from TSOs to continue working towards these objectives, is therefore fully in line with the applicable legislation.

1.2.2 De facto bidding zone review in violation of CACM Regulation

72. The Appellant further argues, in section 3.4.1.2.2 of the Appeal, that the efficiency analysis contained in Article 5 of Annex I (DA CCM) and Article 5 of Annex II (ID CCM) to the Contested Decision exceed the legal basis for a capacity calculation method conferred upon the NRAs and, hence, upon ACER under the CACM Regulation. In the Appellant´s opinion, the CACM Regulation "*do*[es] *not contain a power of the Agency to adopt a mechanism that would oblige the TSOs of a specific capacity calculation region to consider the different measures to address congestion by way of either applying remedial actions or reconfiguring existing bidding zones or investing in network infrastructure. Such an efficiency analysis is in fact nothing other than a factual bidding zone review and reconfiguration mechanism*"[34].

73. This argument rests on an erroneous assumption. A mechanism which requires an efficiency assessment taking into account various solutions - among others, the

[34] Para 96 of the Appeal

possibility of a reconfiguration of bidding zones - 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 reconfiguration of the bidding zones.

74. As stressed in ACER´s Defence, capacity calculation and allocation is one of the many congestion management solutions that are available to the TSOs. Indeed, if there were no congestions, there would be an unlimited trade of electricity and it would not be necessary to calculate and allocate capacities. CCMs 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. Therefore, CCMs constitute tools that aim to relieve, in the short-term, 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 to long-term solutions, such as investing in network infrastructure or reconfiguring existing bidding zones. 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 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"*[35]. They function as a *"safety net in cases where the market situation calls for a new enduring solution, which requires significant implementation time"*[36]. In other words, CCMs, depending on their design, can constitute a short-term solution to remedy congestion (whilst avoiding that congestion unduly discriminates between internal and cross-border exchanges), whereas the reconfiguration of bidding zones is one alternative solution to address the same problem in the longer run, similarly to investments in the network infrastructure. When a proposal of internal CNECs is made in the context of capacity calculation,

[35] Point 3.5 thereof
[36] idem

it should therefore be assessed whether the additional inclusion of an additional internal network element in this calculation is the most efficient solution to remedy to congestion or whether alternative solutions are more adequate. This is because 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 where justification and analysis is required.

75. In line with what ACER argues in its Defence, an analysis whether a bidding zone review could be a more efficient alternative to address congestion in the long-term than considering certain design features of capacity calculation does not amount to a decision on whether and how to implement such review. The bidding zone review process is governed by Article 32 *et seq.* CACM and the Contested Decision does not interfere with this process.

76. It follows from all the above that Article 5 of Annex I (DA CCM) and Article 5 of Annex II (ID CCM) to the Contested Decision have a sufficient legal basis in the CACM Regulation and in Regulation (EC) 714/2009. Consequently, Part 1.2 of this Plea must be dismissed as unfounded.

1.3 Violation of the principle of proportionality.

1.3.1 General remarks

1.3.2 System security in the Core Region at risk

77. The arguments of section 3.4.1.3.1 and 3.4.1.3.2 will be treated jointly.

78. The Appellant claims 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. According to the

Appellant, TSOs will be required to offer 100% or more of the technical capacity on internal network elements and will face more difficulty in ensuring stability of electricity transmission system due to the increase of remedial actions (the availability of which is limited). BNetzA claims that the flow-based approach of the CACM is only capable of avoiding congestions when cross-zonal trade is limited by all network elements significantly impacted by such trade and that internal network elements are not excluded from the capacity calculation.

79. Once again, BNetzA fails to acknowledge that a certain level of 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. 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 measures to remedy congestions. Other means are remedial actions (short-term), reconfiguration of bidding zones (medium to long-term) and network infrastructure (long-term). Also a short or mid-term adjustment of dispatching priorities and rules for generators would contribute to congestion management. Congestion management is aimed at finding an optimal balance between these short and long-term measures. In this context, the decision as to whether congestions on network elements will be managed by capacity calculation and/or other measures need to be done prior to the capacity calculation. In other terms, the biannual selection process of CNECs 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.

80. Also BNetzA fails to take into account that in Germany there is a first phase of capacity calculations performed t-2 (2 days ahead) only between the four German

TSOs with the objective to remove any congestion between these four German TSOs to be able to represent the German system without major internal congestions to the Core region calculation. This was confirmed by BNetzA at the oral hearing: *"The four German TSOs manage the national re-dispatch in a coordinated process mainly with national re-dispatching measures, in addition there are multinational contacts with international TSOs that German TSOs can rely on in specific cases. In the future, by the CACM regulation there will be a methodology to coordinate these efforts on regional level"*[37]. Subsequently, any required remedial action is planned only using these results prior to the capacity calculation in the Core region. This, in itself, amounts to a discrimination in favour of internal German CNECs.

81. 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.

82. Operational security is not at risk because TSOs have the possibility to correct cross-zonal capacities in the validation process[38] and because 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.

83. BNetzA also alleges that Article 5 of Annex I (DA CCM) and Article 5 of Annex II (ID CCM) to the Contested Decision are contrary to the possible derogations for

[37] Minutes of the oral hearing, p.13
[38] Article 20(1) of the Contested Decision

internal network elements in Article 16(9) of Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943) of the Clean Energy Package. As said above, the Agency had to take its Decision on the basis of the applicable legal order at the time of its adoption, which did not include the Clean Energy Package. The Clean Energy Package had not been adopted and was, hence, not applicable to the Contested Decision.

84. There is no need for the Board of Appeal to rule upon potential inconsistencies between the Contested Decision and Article 16(9) of Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943) as already set out above[39].

85. BNetzA´s additional allegation that Article 5(8)(b) of Annexes I (DA CCM) and II (ID CCM) to the Contested Decision exclude all internal network elements below a power transfer distribution factor ('PTDF') threshold of 10% from capacity calculation is erroneous because, as set out in detail above, TSOs are required to carry out an impact assessment on increasing the PTDF threshold from 5% to 10% or higher and further consequences would depend on the outcome of this impact assessment.

86. Finally, BNetzA adduces 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 Appellant fails 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. BNetzA narrowly focuses on an alleged negative impact of the Contested Decision on German consumers without taking account of the

[39] Section 1.1. of this Plea

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.

87. As stated by the Agency´s Director at the oral hearing, *"the Contested Decision established a framework to propose the most efficient solution to redress internal problems and to improve the overall functioning of the internal energy market for the benefit of EU consumers"*[40].

88. Upon the Appellant´s request, an expert-witness was heard at the oral hearing, who stated that the Consultancy he heads as director conducted a study which, *inter alia*, examined consequences of excluding internal network elements in capacity calculations for the Core Region in 2025[41]. However, the arguments presented in this regard were unpersuasive, unsupported by specific evidence, and the expert-witness was, by his own admission, not impartial.

89. In light of the above, the Contested Decision does not violate the principle of proportionality and Part 1.3 of this Plea must be dismissed as unfounded.

1.4 Discrimination on grounds of nationality

1.4.1 CNEC Selection under scope of principle of equal treatment

[40] Minutes of the oral hearing, p.6
[41] Minutes of the oral hearing, p.7

1.4.2 CNEC Selection discriminatory

90. Given that both the principle of equal treatment and the principle of non-discrimination require that comparable situations must not be treated differently and that different situations must not be treated equally, the arguments of section 3.4.1.4.1 and 3.4.1.4.2 will be treated jointly.

91. The Appellant claims that the Core TSOs´ obligation to propose a list of internal CNECs according to article 5 of Annexes I (DA CCM) and II (ID CCM) to the Contested Decision only imposes an impact assessment and efficiency analysis on internal CNECs (with the aim to exclude internal networks elements from capacity calculation) and not on cross-border CNECs. It follows, from the Appellant's perspective, that the mechanism foreseen in the Annexes institutionalises a privilege for cross-border trade in electricity in comparison to a merely internal use of the transmission system of a Member State for the purpose of trade in electricity within that Member State's bidding zone. In the Appellant's view, this mechanism discriminates against consumers and grid users in Germany compared to generators and traders from other Member States, as well as against market participants using the transmission system for intra-zonal trade compared to those using it for cross-zonal trade. It highlights that this will cause an undue financial burden on electricity consumers and grid users in Germany.

92. The Board of Appeal agrees with the Appellant´s general statements on the principle of equal treatment, the case law referred to and the so-called indirect discrimination, in the sense that the rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality, but also all covert forms of discrimination. In accordance with the case law of the Court of Justice of the EU, "*the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality (...) but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same*

result"[42]. Hence, in any situation governed by EU law, an EU institution must not discriminate, even indirectly, against nationals of one Member State to the benefit of the nationals of another Member State.

93. Discrimination occurs where one person is treated less favourably than another one in a comparable situation on account of a specific distinguishing characteristic or on account of another characteristic which, however, is strictly related to the specific distinguishing characteristic. In the case of discrimination on grounds of nationality, the distinguishing characteristic relates to nationality.

94. However, the Appellant fails to provide any evidence of a breach of equal treatment or discrimination. Moreover, the "*other criteria of differentiation*" mentioned in the applicable case-law of the CJEU are not present in the Contested Decision. This is because the mechanism within which the alleged discrimination would take place is -indirectly- applicable in identical terms to all Core consumers, grid users and other market participants regardless of whether they are located in Germany or another Member State.

95. It is not under discussion that the Contested Decision applies to all TSOs of the Core Region equally. In the Core Region, all internal exchanges are treated equally and all cross-zonal exchanges are treated equally. Given that Article 5 of Annexes I (DA CCM) and II (ID CCM) makes no difference between the possible internal trades, nor between the possible cross-zonal trades, it also does not give rise to any discrimination within the group of internal trades and within the group of cross-zonal trades. Therefore, Article 5 of the Annexes to the Contested Decision do 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. In particular, and as

[42] CJEU, Case 152/73 *Sotgiu*, EU:C:1974:13, para. 11; CJEU, Case C-330/91 *Commerzbank*, EU:C:1993:303, para. 14 and CJEU, Case C-115/08 *ČEZ*, EU:C:2009:660, para. 9

ACER's Defence points out[43], it does not treat trades within the German bidding zone differently from trades within other bidding zones in the Core Region, and does not treat cross-zonal trades involving the German bidding zone differently from other cross-zonal trades within the Core Region. The Contested Decision does not refer to nationality, nor imply or require an element of nationality.

96. Yet again, when alleging discrimination, what the Appeal really opposes is the zonal market design. As set out above, BNetzA fails to acknowledge that discrimination between internal and cross-zonal trade is inherent to zonal congestion management models. Indeed, internal trade enjoys privileged access to the scarce capacity of the congested network elements compared to the cross-zonal trade. For an equal treatment of all trade in the EU in a zonal model, an EU-wide bidding zone would need to be created. However, EU legislation has set-up a zonal model as a means of congestion management. The Appellant´s analogy with lemons is not valid because lemons are not traded in a zonal market model but in a single bidding zone. Moreover, 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[44]. Indeed, pushing internal congestion to the border is contrary to the EU Treaty.

97. What is more, the very argumentation of BNetzA amounts to a discrimination against cross-border trade: in case of congestion within Germany, priority would be given to trade within Germany, at the expense of cross-border trade, in order to protect market participants in Germany, particularly German consumers. This is patently contrary to the internal electricity market.

[43] para 109 thereof
[44] see also ACER´s Recommendation 02/2016

98. As stressed by ACER in its Defence[45], the compliance of the selection of CNECs needs to be assessed at regional or European level and not just at national level. As already set out above, BNetzA 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. 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 short-term solution to remedy German internal congestion issues, irrespective of other solution in the long run, e.g. a more efficient bidding zone configuration or faster investments in network infrastructure in Germany.

99. In any case, when referring to a financial burden for German consumers and grid users, BNetzA totally ignores 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.

100. Therefore, the Contested Decision does not discriminate. Part 1.4 of this Plea must be dismissed as unfounded.

2. Methodology for remedial actions in capacity calculation.

2.1 Lack of legal basis in the CACM Regulation.

101. The Appellant alleges that Articles 10 and 16 of Annex I to the Contested Decision (DA CCM) have no legal basis in Articles 20(2), 21(1)(a)(iv), 21(1)(b)(iv) and 25 of the CACM Regulation.

[45] para 10 thereof

102. The Appellant adds that the ability for TSOs to individually define the initial setting of their remedial actions before the start of the capacity calculation amounts to a loop flow limitation. This, according to the Appellant, is not expressly foreseen by Article 25 of the CACM Regulation and the Agency consequently acts *ultra vires.*

103. Article 10 of Annex I (DA CCM) to the Contested Decision establishes 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. Article 16 of its Annex I (DA CCM) establishes 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.

104. The Board of Appeal agrees with the Appellant that the limitation of loop lows provided by the above-mentioned provisions of the Contested Decision have no legal basis in Articles 20(2), 21(1)(a)(iv), 21(1)(b)(iv) and 25 of the CACM Regulation. Indeed, these provisions do not refer to the limitation of loop flows. The legal basis for the loop flow limitation is Article 21(1)(b)(ii) of the CACM Regulation read in conjunction with Point 1.7 of Annex I to the Regulation (EC) 714/2009. Those provisions of the CACM Regulation expressly mandate the avoidance of undue discrimination between internal and cross-zonal exchanges[46]. Hence, the Defendant did not act *ultra vires*, as claimed by the Appellant.

105. The Board of Appeal notes that BNetzA does not challenge the necessity of a 70% minRAM threshold to avoid undue discrimination between internal and cross-zonal exchanges and enhance the integration of the internal electricity, as foreseen by the Contested Decision. Given that the CNEC´s capacity is a limited resource, this minRAM threshold unavoidably implies a corollary maximum availability of 30% for the rest of the capacity (internal flows, loop flows and reliability margin). The

[46] Contested Decision, para 121

Board of Appeal also notes that BNetzA acknowledges that loop flows partially amount to remedial action due to their relieving effects[47].

106. By limiting loop flows, the Contested Decision duly complies with Article 21(1)(b)(ii) of the CACM Regulation and Point 1.7 of Annex I to Regulation (EC) 714/2009[48], 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 because their methodology to coordinate remedial actions[49] , albeit economically efficient, was not capable of fully removing potential undue discrimination[50].

107. 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 aims at (i) increasing the RAM on network elements with lower RAM values prior to the coordination of remedial actions and (ii) reducing the 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. The reason is that 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[51]. 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) of the CACM

[47] See also the statements made by the expert-witness heard upon request of the Appellant, Minutes of the oral hearing p.7
[48] Regulation (EC) 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003.
[49] Article 15 DA CCM and Article 14 ID CCM of the Amended Proposal
[50] Contested Decision, paras 145-147
[51] See ACER´s Defence, para 127, which illustrates this with histograms of RAM values of internal and cross-zonal CNECs in the CWE region

Regulation and Point 1.7 of Annex I to Regulation (EC) 714/2009. Indeed, this leads the Core TSOs to solve internal congestion problems by reducing cross-zonal capacity with other bidding zones. For the sake of completeness, the Board of Appeal notes that the amount of loop flows on interconnectors between Germany and neighbouring countries in Northern Europe by far exceed the levels found on other European borders, severely limiting electricity trading on these borders and significantly reducing available capacities (with flows in the same direction as commercial flows (from low to high price areas – from Germany to Belgium, Netherlands and Poland).

108. 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) establishes 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) establishes 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.

109. Furthermore, 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. In so doing, ACER limits loop flows in order to avoid undue discrimination between 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 *"Each SO shall take into account remedial actions without costs in capacity calculation"*.

110. 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 that 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.

111. The Contested Decision avoids this undue discrimination and violation of the CACM Regulation and Regulation (EC) 714/2009 by limiting loop flows when coordinating remedial actions. Hence, Part 2.1 of this Plea must be dismissed as unfounded.

2.2 Violation of the principle of proportionality

112. The Appellant alleges that the loop flow limitation contained in Articles 10 and 16 of Annex I to the Contested Decision (DA CCM) violates the principles of proportionality. In essence, BNetzA considers that these provisions are not appropriate to attain the sought objectives and exceed what is necessary to achieve these objectives.

113. As a preliminary remark, the Board of Appeal notes that the Appellant agrees with the Defendant that its Decision should pursue the legitimate objective of avoiding undue discrimination between internal and cross-zonal exchanges and limiting loop flows, in line with the CACM Regulation and Regulation (EC) 714/2009[52].

114. However, the Appellant claims that the Contested Decision does not contribute to the above-mentioned objectives but, instead, reduces cross-zonal trade capacity in the Core region, contrary to the CACM Regulation and the flow-based approach. In BNetzA´s opinion, the Contested Decision limits trading capacity in the opposite

[52] Appeal, para 137

direction of loop flows, removes the positive effects of relieving flows and predetermines the market outcome. It claims that the Non Costly Remedial Action ('NRAO') optimisation foreseen by the DA CCM and the flow-based optimisation through an algorithm are frustrated by, on the one hand, the fact that TSOs define the initial setting of the remedial actions without sufficient knowledge of the parameters for the initial setting and of the situation in other neighbouring transmission networks and, on the other hand, by the prohibition on adjustments to increase loop flows beyond a certain level. BNetzA claims that the use of a minRAM forces TSOs to overload lines to allow cross-border trade, but this overload cannot be relieved in the NRAO because of the artificial loop flow limitation. This, in its opinion, leads consumers in the Core region to face more and more costly remedial actions, as well as contradictory remedial actions that mutually neutralise their effect and leads to less trading capacity (insufficient remedial actions to ensure operational security) in the Core region, which reduces overall welfare.

115. Firstly, as stressed by ACER´s Defence[53], remedial actions are never applied to reduce relieving cross border loop flows and this implies that the TSOs´ forecasts of remedial actions to determine their initial settings (according to Article 10 of Annex I to the Contested Decision (DA CCM)) do not take them into account.

116. Secondly, BNetzA´s claim is incorrect because the Contested Decision only limits loop flows in the positive direction (i.e. burdening loop flows) and not in the negative direction (i.e. relieving loop flows): the optimisation does not prevent these loop flows from becoming even more negative.

117. Thirdly, BNetzA does not challenge the necessity to reserve a minRAM in order to avoid undue discrimination between internal exchanges and cross-border exchanges. Yet a minRAM for cross-zonal exchanges on a CNEC with limited capacity automatically caps the remaining capacity on the same CNEC available for other

[53] Para 136 thereof

exchanges, including loop 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) of the CACM Regulation and Point 1.7 Annex I to Regulation (EC) 714/2009.

118. Fourthly, as set out above, 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. Furthermore, 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.

119. As set out above, to avoid undue discrimination between internal exchanges and cross-zonal exchanges, the Agency´s methodology sets a cap on loop flows resulting from remedial actions through Article 10 of its Annex I (DA CCM) establishing a methodology to determine remedial actions and article 16 of its Annex I (DA CCM) establishing rules on adjustments of power flows. This methodology does not lead to an inefficient or uncoordinated application of remedial actions: capacity calculations merely take account of remedial actions as a means to increase or optimise cross-zonal capacity; however, this does not imply that these remedial actions will actually be needed and will be applied in real operation[54]. In real operation, remedial actions are coordinated through a separate process defined in Article 35 of the CACM Regulation and 76 of Commission Regulation (EU) 2017/1485.

[54] See Agency's Defence, paras 139 and 140

120. This loop flow limitation is not expected to have a negative impact on the offered cross-zonal capacities since TSOs operating the internal network elements affected by the constraint still need to offer a minRAM of 70% for cross-zonal exchanges. To be able to do so, the TSOs will need to apply remedial actions[55] .

121. When questioned by the Agency´s Director at the oral hearing, the expert-witness heard upon request of the Appellant did not deny that continuing to limit cross-border exchanges in order to solve internal congestions will keep the internal market segmented but, in his opinion, this is justified by reasons of operational security: *"it is important to understand that there is a trade-off between system security and capacity available for cross-border exchanges"*[56]. The Board of Appeal finds that the Contested Decision does not endanger operational security and that, consequently, there is no reason to limit cross-border exchanges to solve internal congestions and, in so doing, to segment the internal market.

122. Consequently, the Contested Decision is necessary and proportionate to attain the objective of avoiding undue discrimination between internal trade and cross-zonal trade, contrary to the of the CACM Regulation and Regulation (EC) 714/2009. Hence, Part 2.2 of this Plea should be dismissed.

2.3 Early consideration of remedial actions in violation of Articles 34 and 35 TFEU

123. The Appellant alleges that the loop flow limitations resulting from the early consideration of remedial actions remove the positive effect of relieving loop flows and consequently hinder the trade of electricity between Member States. BNetzA claims that the Contested Decision therefore violates Articles 34 and 35 TFEU, which prohibit quantitative restrictions on trade between Member States and

[55] See Agency´s Defence, para 142
[56] Minutes of the oral hearing, p.8

measures having equivalent effect. The Appellant additionally adduces that these loop flow limitations do not have to be assessed in the light of the CACM Regulation because, in its opinion, the latter does not constitute a legal basis for these limitations.

124. The Board of Appeal agrees that *"the free movement of goods between Member States is a fundamental principle of the Treaty which finds its expression in the prohibition set out in Article 34 TFEU"*[57]. *"According to settled case-law, the prohibition of quantitative restrictions and of measures having equivalent effect laid down in Article 34 TFEU applies not only to national measures but also to measures adopted by the institutions of the European Union"*[58]. The same case-law naturally extends to Article 35 TFEU (exports).

125. However, as set out above, Article 21(1)(b)(ii) of the CACM Regulation read in conjunction with Point 1.7 Annex I to Regulation (EC) 714/2009 constitutes the legal basis for the loop flow limitations of the Contested Decision. The CACM Regulation and Regulation (EC) 714/2009 - as well as Regulation (EC) 713/2009 - are harmonisation measures that were precisely adopted to ensure the functioning of the EU internal market.

126. Article 1 of Regulation (EC) 714/2009 reads as follows: *"Subject-matter and scope This Regulation aims at: (a) setting fair rules for cross-border exchanges in electricity, thus* ***enhancing competition within the internal market in electricity,*** *taking into account the particular characteristics of national and regional markets. This will involve the establishment of a compensation mechanism for cross-border flows of electricity and the setting of harmonised principles on cross-border transmission charges and the allocation of available capacities of interconnections between national transmission systems; (b) facilitating the emergence of a well-*

[57] Ålands Vindkraft, C-573/12, EU:C:2014:2037, paragraph 65.
[58] See, e.g.: Association Kokopelli, C-59/11, EU:C:2012:447, paragraph 80; Denkavit Nederland, 15/83, EU:C:1984:183, paragraph 15; Alliance for Natural Health, C-154/04, EU:C:2005:449, paragraph 47.

functioning and transparent wholesale market with a high level of security of supply in electricity. It provides for ***mechanisms to harmonise the rules for cross-border exchanges in electricity****."*

127. The Board of Appeal also refers to the Regulation (EC) 713/2009, Recital 5: "*An* ***Agency for the Cooperation of Energy Regulators (the Agency)*** *should be established in order to* ***fill the regulatory gap at Community level*** *and to contribute towards the* ***effective functioning of the internal markets in electricity and natural gas.****"* and Art.1(2): *"The* ***purpose of the Agency*** *shall be to assist the regulatory authorities referred to in Article 35 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the* ***internal market in electricity*** *and Article 39 of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the* ***internal market in natural gas****, in exercising, at Community level, the regulatory tasks performed in the Member States and, where necessary, to coordinate their action."*

128. Furthermore, the CACM Regulation states in its Recital 19: *"Power exchanges collect bids and offers within different time-frames which serve as a necessary input for capacity calculation in the single day-ahead and intraday coupling process. Hence, the rules for the trading of electricity provided for in this Regulation require an institutional framework for power exchanges. Common requirements for the designation of nominated electricity market operators (hereinafter NEMOs) and for their tasks should facilitate the achievement of the aims of Regulation (EC) No 714/2009 and allow single day-ahead and intraday coupling to take due account of the* ***internal market****".*

129. The Contested Decision concerns a harmonised area. The Court of Justice of the EU has consistently held that, *"where a matter has been the subject of exhaustive harmonisation at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not in the light of*

primary law"[59]. This applies by analogy to the Contested Decision, which has to be assessed in the light of the provisions of the harmonising secondary law measures – the CACM Regulation, Regulation (EC) 714/2009 and Regulation (EC) 713/2009 - and not in the light of primary law.

130. *Ad arguendum*, even if Articles 34 and 35 TFEU were to apply, loop flow limitations do not limit the positive effects of loop flows and cannot, therefore, hinder trade between Member States. As set out above, it is quite the opposite: loop flow limitations reduce the negative impact of loop flows on cross-border trade and hence foster trade between Member States.

131. The BoA also notes that the recent installation of phase shifters by German TSOs on the German-Polish and German-Czech borders have in practice resulted in a moderate increase of commercially available cross-border capacity while limiting physical flows (loop flows) to levels compatible with the operational security limitations in Poland and the Czech Republic.

132. Furthermore, BNetzA´s claim is unsubstantiated given that it does not provide any evidence that the effects of relieving loop flows outweigh those of burdening loop flows or that loop flow limitations otherwise negatively affect trade between Member States. And even if loop flow limitations were to remove the positive effect of relieving loop flows, *quod non*, this effect would only be on one flow direction, whilst trade would be fostered in the other direction.

133. Importantly, 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*

[59] Ålands Vindkraft, C-573/12, EU:C:2014:2037, paragraph 57. See also ANODE, C-121/15, EU:C:2016:637, paragraph 36 (because of the high degree of harmonisation, the Court did not apply the TFEU, but rather stated that the restrictive national measure *"may none the less be accepted within the framework of Directive 2009/73 if three conditions* [set out in the Directive] *are satisfied"*).

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."

134. Finally, the Contested Decision does not innovate when allowing an early consideration of remedial actions: TSOs are not excluded from applying remedial actions to limit loop flows prior to the capacity calculation under the CACM Regulation.

135. It follows from the above that Part 2.3 of this Plea must be dismissed as unfounded.

2.4 Loop flow limitation in violation of the principle of legal certainty.

136. The Appellant alleges that the Contested Decision frustrates Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943) of the Clean Energy Package, which only allows for remedial actions if the target to increase cross-zonal capacity is not reached (this target being ultimately in 2025 a 70% minRAM reserved for cross-zonal trade, with a gradual, linear transition phase until that date).

137. Firstly, the Board of Appeal notes that the European Commission has carried out an elaborate Impact Assessment in the context of the Clean Energy Package[60], 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: *"In an increasingly inter-connected electricity market, the lack of common approach and coordination can seriously*

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

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"[61].

138. However, the Board of Appeal reiterates what has been set out above in section 1 of this Plea. There is no need for the Board of Appeal to rule upon potential inconsistencies between the Contested Decision and Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943).

139. Finally, BNetzA claims that the limitation of loop flows included in the Contested Decision is contrary to Articles 15(2) and 16(8) of the Draft Recast Regulation (EC) 714/2009 given that these provisions grant TSOs the possibility to allow loop flows exceeding 30% of the maximum permissible power in a transitional phase in which they allow for a gradual, linear reduction of loop flows. Article 16(8) of the Draft Recast Regulation (EC) 714/2009 (which, in the meantime, has been adopted) allows, in BNetzA´s opinion, for a transparent picture of congested network

[61] Impact Assessment, p. 6

elements and hence efficient remedial actions, whereas the Contested Decision does not allow for such transparency and causes inefficient remedial actions ("blind parking" of re-dispatch potential). Article 15(2) Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943) provides for a gradual, linear transition phase before reaching a 70% minRAM threshold in 2025.

140. Even though there is no need for the Board of Appeal to rule upon potential inconsistencies between the Contested Decision and Recast Regulation (EC) 714/2009 (Regulation (EU) 2019/943), the Board of Appeal wishes to stress that Articles 10(5) and 17(9) of Annex I (DA CCM) to the Contested Decision duly introduce a transitional phase in which it allows for a gradual, linear reduction of loop flows in cases of action plans or derogations (they allow for a gradually decreasing minRAM above 70% and corollary gradually increasing portion of loop flows, reliability and internal flows.

141. It follows from the above that the Part 2.4 of this Plea is unfounded and must be dismissed.

Second Plea: Infringement of Appellant´s procedural rights

1. Amendment of TSOs´ Proposal beyond TSOs´ and NRAs´ request

142. BNetzA argues[62] that the Agency infringed EU Law, and, in particular, essential procedural requirements thereof, by adopting the Contested Decision *ultra petita* and in violation of the principle of conferred powers.

143. BNetzA argues, in particular, that, by altering the Core TSOs' DA and ID CCM proposals, the Agency went *"beyond and above what the Core TSOs and the Core NRAs have requested to be amended"*, i.e. only what the Core NRAs had

[62] Section 3.5.1 of the Appeal

"unanimously laid down in their Non-paper, dated 18 September 2018"[63]. According to BNetzA, the Contested Decision incorporates certain stipulations to which not all NRAs (including BNetzA) were favourable. This, it argues, constitutes an infringement of BNetzA's rights under, and of the procedure provided for in Article 9 of the CACM Regulation, as well of the principle of conferred powers, to the extent that the decision is *ultra petita*[64].

144. The argument of this first Part of the Second Plea[65] will be dealt with together with the argument of the second Part of the Second Plea[66], below.

2. *Imposition of additional proposal obligations*

145. BNetzA also argues that the Agency was not allowed to impose an additional proposal obligation on the Core TSOs under Article 5(5) to (9) of Annex I to the Contested Decision, since the procedure provided for in Article 9(11) and (12) of the CACM Regulation does not empower it to do so. According to BNetzA, the power to carry out or demand such amendments is an exclusive right of the TSOs responsible for developing a proposal on terms and conditions and the NRAs responsible for their adoption in accordance with Article 9(6), (7) and (8) of the CACM Regulation. It adds that NRAs only have the right to trigger an amendment procedure under Article 9(13), and that they have the exclusive, original competence to decide on the relevant methodology within the realm of their regulatory discretion. It believes that, if the Agency could trigger the amendment procedure in these circumstances, the NRAs´ regulatory discretion and prerogative would be frustrated in an enduring manner, and they would be impeded to use their right to trigger an

[63] Paras 156-157 of the Appeal
[64] Paras 158-159 of the Appeal
[65] Section 3.5.1 of the Appeal
[66] Section 3.5.2 of the Appeal

amendment of a specific methodology ever again, perpetuating the Agency's singular substitution competence[67].

146. The issues raised by the Appellant are, in part, similar to a broader issue already addressed by the Board of Appeal in Case A-001-2017 (consolidated), para 57 *et seq*.

147. 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.

148. Once the requisites for the adoption of a decision by the Agency are met, according to Article 9(11) and (12) of the CACM Regulation, together with Article 8(1) of Regulation (EC) 713/2009, 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 applicable Regulations.

149. 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 framework[68] see. The Agency's discretionary power is also limited by the general principles of EU Law, including the principle of proportionality.

[67] Para 160 of the Appeal
[68] Case A-001-2017 (consolidated), para 69

150. 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) of the CACM Regulation, which is available to NRAs. Neither Article 8(1) of Regulation (EC) 713/2009, nor Article 9(11) and (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 purposes[69].

151. 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"*[70].

152. The Contested Decision is based on the failure of the ordinary procedure to define 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) of the CACM Regulation 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 light of this objective[71].

[69] See Case A-001-2017 (consolidated), para 63
[70] See Case A-001-2017 (consolidated), para 64
[71] See Case A-001-2017 (consolidated), para 65

153. 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 stalemate[72].

154. It must also be held that the Agency's competence to adopt a decision under Article 9(11) or (12) of the CACM Regulation, 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.

155. Firstly, no such limitation is imposed by the letter of those provisions or of Article 8(1) of Regulation (EC) 713/2009.

156. Secondly, it may not be possible to effectively decide on a given (disagreed upon) aspect without revising another (agreed upon) aspect, given the potential interaction and cross-effects between the various aspects.

157. Thirdly, and more importantly, such a limitation would run 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, and 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

[72] See Case A-001-2017 (consolidated), para 67

interpretation which, in the Agency's view, is contrary to EU Law. The Appellant's approach could lead to such a result.

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

159. In the present case, the NRAs requested amendments to the TSOs' proposed draft. Subsequently, the NRAs were unable to reach an agreement on the amended draft submitted by the TSOs.

160. 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) of the CACM Regulation, 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"*[73].

161. The letter attached to this email[74] states that the *"Core NRAs could not agree on their view on several substantial points"*, and describes as follows the points of disagreement:

> *"(a) 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"*;

[73] Agency's Defence, Annex 1
[74] Agency's Defence, Annex 2

"(b) 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."

"(c) 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."

"(d) 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".

162. 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".

163. 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 Proposals submitted by the Core 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…"*.

164. The 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)

165. Accordingly, BNetzA's arguments, in this regard, rest on an erroneous assumption. It is true that Article 9(11) and (12) of the CACM Regulation, 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.

166. In the case at hand, there was no 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 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.

167. The success of BNetzA's 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, BNetzA failed to indicate which specific points of the Contested Decision, in its view, do not fall within the scope of disagreement between the NRAs. The burden of allegation in this regard rests on the Appellant. It is not for the Board of Appeal to identify, of its own initiative, on which specific points of the Contested Decision the NRAs had 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.

168. BNetzA also objected to the fact that the Contested Decision incorporated certain stipulations to which not all NRAs (including BNetzA) were favourable, and argues that this somehow infringed BNetzA's rights under Article 9 of the CACM Regulation. This argument overlooks the reason for, and nature of, the Agency's intervention, under Article 9(11) and (12) CACM. The Agency is called to act precisely because NRAs are not able to reach an agreement. As noted by the Agency[75], if its powers to act were limited to stipulations to which all NRAs agreed, there would be no point to its intervention, as it would not be capable of breaking the impasse reached in the talks between the NRAs. When decisions have to be taken by more than one NRA, all the powers granted to NRAs under the procedure provided for in Article 9 of the CACM Regulation are subject to their unanimous agreement. When they are unable to reach such an agreement within the deadline, the relevant provisions deprive them of the power to act, and transfer that power to the Agency. The exercise of this power by the Agency, in these circumstances, cannot be deemed to infringe NRAs' rights under Article 9 of the CACM Regulation.

169. The Agency is not empowered to trigger the amendment procedure foreseen in Article 9(12) of the CACM Regulation. However, just like the NRAs are entitled, and indeed required, to alter a proposed methodology to ensure that it complies with the applicable legal framework, if the TSOs fail to submit the necessary amendments, so too is the Agency empowered, when acting under Article 9(11) and (12) of the CACM Regulation and Article 8(1) of Regulation (EC) 713/2009, to adopt a decision which complies with EU Law, which may require amending some of the terms of the methodology proposed by the TSOs.

170. It does not follow from the above that the adoption of the Contested Decision by the Agency, as argued by BNetzA, would deprive the mechanism of Article 9(13) of its effectiveness, frustrating the right of BNetzA to request amendments and perpetuating the Agency's competence. As argued by the Agency[76], Article 5(5) to

[75] Agency´s Defence, paras 174-175
[76] Agency´s Defence, paras 183-187

(9) of Annex I (DA CCM) and Annex II (ID CCM) to the Contested Decision does not deprive the NRAs, including BNetzA, either *de jure* or *de facto*, of the possibility of requesting amendments.

171. Finally, while it is true that Article 9 of the CACM Regulation does not explicitly provide for the Agency's power, when adopting the DA CCM and ID CCM, to require TSOs to submit future amendments and updates, the Agency is empowered and required by Article 9(11) and (12) of the CACM Regulation to determine the DA CCM and ID CCM, and to impose obligations on the TSOs associated thereto, in a manner which complies with the limits and is adequate to the accomplishment of the goals of EU Law in this regard. The Agency considered that the obligations for amendments and updates were necessary to ensure the continued effectiveness of the mechanisms it adopted. On the other hand, BNetzA has not argued that the obligations in question were unnecessary in the present case.

172. The Board of Appeal highlights that the NRAs are obliged to work towards the integration of the internal market and the elimination of restrictions on the trade of electricity under Article 36 of Directive (EC) 2009/72/EC. This article 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…*"

173. It follows from the above that the Agency was duly empowered to adopt the Contested Decision and cannot be held to have decided *ultra petita* or in violation of the principle of conferred powers. Hence, Parts 1 and 2 of this Plea must be dismissed as unfounded.

3. *Infringement of duty to issue Decision in Appellant´s official language*

174. BNetzA argues[77] that the Agency infringed EU Law by issuing the Contested Decision only in English, rendering the decision inexistent or null and void. BNetzA considers that the decision is a document of general application which should have been issued in the 24 official languages of the EU, under Art. 4 of Regulation No. 1[78].

175. The argument of this third Part of the Second Plea[79] will be dealt with together with the argument of the fourth Part of the Second Plea[80] below.

4. *Infringement of duty to issue Decision in the addressee´s official language*

176. BNetzA also considers[81] that the decision should have been addressed to the German Core TSOs in German, under Article 2 of Regulation No. 1, and that this could not be dispensed through a waiver but, even if this were possible, the TSOs did not provide the Agency with waivers in this case[82].

[77] Section 3.5.3 of the Appeal
[78] Regulation No. 1, determining the languages to be used by the European Economic Community (OJ 17/385, 06/10/1958), last revised by Council Regulation 517/2013, of 13 May 2013 (OJ L 158/1, 10/06/2013), para 161 of the Appeal
[79] Section 3.5.3 of the Appeal
[80] Section 3.5.4 of the Appeal
[81] Section 3.5.4 of the Appeal
[82] Paras 162-163 of the Appeal

177. Regulation No. 1 is applicable to the acts of the Agency in general, and to the Contested Decision specifically, via Article 33(1) of Regulation (EC) 713/2009. It should be noted that Article 4 of Regulation No. 1 only requires the drafting and publication in all official languages of *"regulations and other documents of general application"*. It is understandably so, since the availability of documents in all official languages is only justified when these documents have general and abstract effects felt throughout the EU. Differently, documents addressed by EU bodies to specific persons subject to the jurisdiction of a Member State are governed by Article 3 of Regulation No. 1.

178. Contrary to what is argued by BNetzA, the Contested Decision is not governed by Article 2 of Regulation No. 1, since this only applies to documents supplied by a Member State or person to EU bodies, or to replies from EU bodies to such documents. In adopting the Contested Decision, in this case, the Agency acted under the competence conferred to it by Article 9(12) of the CACM Regulation, together with Article 8(1) of Regulation (EC) 713/2009 due to the expiry of the deadline for an agreement between the NRAs. The Contested Decision is, thus, not a reply to the Core NRAs. It is a decision adopted under, and in accordance with a competence conferred by the CACM Regulation (addressed to the Core TSOs, which does not reply to a request or to documents submitted by the Core TSOs). In any case, it must be stressed that, were Article 2 *in fine* of Regulation No. 1 applicable, the Agency would have been, in the present case, in the position of replying to documents which were submitted to it in English, reason for which BNetzA's argument would be without merit.

179. In what concerns Article 4 of Regulation No. 1, the Contested Decision is not a regulation, nor a document of general application. It is settled case-law that *"a measure is of general application if it applies to objectively determined situations*

and produces legal effects with respect to categories of persons envisaged generally and in the abstract"[83].

180. In this regard, BNetzA's argument is limited to stating: *"Although it is addressed only to the Core TSOs, it individually concerns all market participants and is therefore generally applicable".*

181. Firstly, this statement confuses the issue of whether a decision is of individual concern to non-addressees, which could be relevant for the purposes of Article 263(4) TFEU, with the issue of knowing whether the act is a document of general application masquerading as a decision. The latter is clearly not the case of the Contested Decision.

182. Secondly, BNetzA provides no argument or clarification to explain how and why the Contested Decision individually concerns all other market participants.

183. Thirdly, it seems manifest, as argued by the Agency[84] that it cannot be held that the Contested Decision individually concerns market participants beyond those to whom it is addressed, much less that it individually concerns all other market participants. It follows that Article 4 of Regulation No. 1 is not applicable to the Contested Decision.

184. In what concerns the argument that the decision should have (also) been issued in German, because it was addressed to German TSOs, it is true that Article 3 of Regulation No. 1 states that EU acts sent to a person subject to the jurisdiction of a Member State should be drafted in the language of the respective State. However, this is not an absolute right, nor an end in itself.

[83] Case T-640/14 *Carsten René Beul v EP and Council* EU:T:2015:907, para 32
[84] Agency´s Defence, para 199

185. It is settled case-law that *"references in the Treaties to the use of languages within the European Union cannot be regarded as evidencing a general principle of EU law to the effect that anything that might affect the interests of a European Union citizen should be drawn up in his language in all circumstances"*.[85] Indeed, even general acts can, in certain cases, not be provided in all official languages of the EU if this is justified by a legitimate objective and passes the test of proportionality.[86] Examples of such legitimate objectives are procedural simplicity, efficiency and cost-effectiveness, ensuring legal certainty and, generally, promoting the objectives of sector specific EU norms.[87] The Court has also emphasized that a necessary balance must be maintained between the interests of economic operators and the public interests which may, in certain cases, be in conflict in what concerns the language regime.[88]

186. More importantly, the Court has clarified that the notification of a decision by an EU body to an addressee, under Article 297(2) TFEU, without the use of the language of its respective Member State, is an irregularity, but not one which necessarily entails the nullity of the decision, or of its notification. Indeed, the supply of the document in the language of the respective Member State is not an end in itself, but a requirement meant to ensure that the addressee is duly informed and able to exercise its rights of defence. It is settled case-law that, as long as the addressee was able in due time to acquaint itself with the contents of the decision and to exercise the right of appeal and defence in an adequate and timely fashion, the decision cannot be deemed to be vitiated by the simple fact of the language in which it was notified to the addressee.[89] It is also settled case-law that an undertaking cannot claim that the protection of its rights were impaired by the use of a given language when that

[85] Case C-147/13 *Spain v Council* EU:C:2015:299, para 31.
[86] Case C-147/13 *Spain v Council* EU:C:2015:299, para 33.
[87] Case C-147/13 *Spain v Council* EU:C:2015:299, paras 34-35.
[88] Case C-147/13 *Spain v Council* EU:C:2015:299, para 41.
[89] See, e.g.: Case 41/69 *ACF Chemiefarma* EU:C:1970:71, paras 49-52. Case T-293/11 *Holcim* EU:T:2014:127, para 35. The same is true even for other irregularities, such as the procedure used for notification of the decision – see, e.g.: Case T-138/07 *Schindler Holding* EU:T:2011:362, para 61.

undertaking, itself, used that language in the administrative proceedings before the EU body in question.[90]

187. In the present case, two German TSOs appealed the Contested Decision and duly exercised their rights of defence, without having raised the argument that the language of the document created any obstacle to this exercise. No other TSO raised any issue concerning the language in which the decision was adopted. It is clear from the contents of their applications for annulment that they were, indeed, capable of duly and fully understanding the contents of the Contested Decision and of presenting their timely and reasoned requests for review by the Board of Appeal. Furthermore, the administrative proceedings that led to the adoption of the Contested Decision, and in which the addressees took part, were conducted entirely in English, without any of the addressees having opposed this and with all of them being able to exercise their rights of participation in the procedure in that language. Accordingly, it is unnecessary, in the present case, to ascertain whether the Contested Decision should have (also) been drafted and notified in German, as this would not affect the validity thereof.

188. It should also be noted that the only precedent invoked by BNetzA in support of its argument on this point is the *Skoma-Lux* case.[91] However, this case merely affirms that general rules of EU Law cannot be enforced in a new Member State as long as that EU legislation has not been published in the official language of that Member State. There is no analogy with the present case and this case-law cannot be extrapolated to conclude that it also applies to decisions which were duly known and understood by their addressees. This case-law did not contradict the case-law mentioned above.

189. It follows from the above that it is not necessary, in the present case, to decide whether the Contested Decision should have been notified to the German TSOs in

[90] Case T-144/07 *ThyssenKrupp Liften Ascenseurs* EU:T:2011:364, para 86.
[91] Case C-161/06 *Skoma-Lux* EU:C:2007:773.

German as, in any case, this would not have affected its validity, in the specific circumstances of the present case.

190. Furthermore, for the sake of completeness, it must also be stressed that, contrary to what is argued by BNetzA, the German Core TSOs did submit a language waiver to the Agency, authorizing their notification in English, subject to translation to German within two months[92]. It follows from the case-law mentioned above that the right of addressees to be notified in the language of their Member State is not absolute. Following an *ad majoris* reasoning, if a decision is not valid when notified to an addressee in a different language, if the addressee was able to fully understand it and exercise its rights of defence, the addressee must also be entitled to authorize, during the administrative proceeding, the use of a different language. The use of a language waiver system is common practice in several areas of EU administrative activity. It relies on the fact that the language requirement is not an end in itself, but a tool for the protection of the rights of the addressees, which they can waive (*droit disponible*). Waivers are also a fundamental tool in procedures such as those in question, which are subject to relatively short deadlines, involve addressees from various Member States, and deal with very complex technical matters.

191. For this reason too, the Agency duly complied with its legal obligations by notifying the Contested Decision to the addressees in English.

192. It follows from the above that Parts 3 and 4 of this Plea must be dismissed as unfounded.

[92] Agency´s Defence, para 207 and Annexes 6 to 9

DECISION

On those grounds

THE BOARD OF APPEAL

hereby dismisses the Appeal 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