

DECISION No 15/2022
OF THE EUROPEAN UNION AGENCY
FOR THE COOPERATION OF ENERGY REGULATORS
of 30 September 2022

on the Amendment to the Implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation

THE EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY REGULATORS,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators¹, and, in particular, Article 5(2)(b) and Article 5(6) thereof,

Having regard to Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing², and, in particular, Article 5(1), Article 5(2)(a), Article 6(3) and Article 21 thereof,

Having regard to the outcome of the consultation with the concerned national regulatory authorities and transmission system operators ('TSOs') and the European Network of Transmission System Operators for Electricity ('ENTSO-E'),

Having regard to the outcome of the consultation with ACER's Electricity Working Group ('AEWG'),

Having regard to the favourable opinion of the Board of Regulators of 21 September 2022, delivered pursuant to Article 22(5)(a) of Regulation (EU) 2019/942,

Whereas:

¹ OJ L 158, 14.6.2019, p. 22.

² OJ L 312, 23.11.2017, p. 6.

1. INTRODUCTION

- (1) Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing (the ‘EB Regulation’) laid down a range of requirements for electricity balancing platforms for the exchange of balancing energy, as well as pricing and settlement of balancing energy. In particular, Article 5(2)(a) and Article 21 of the EB Regulation require all TSOs to develop an implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation (‘aFRRIF’).
- (2) All TSOs developed a proposal for the aFRRIF, and submitted it to all regulatory authorities, which, due to a lack of agreement between them, ultimately referred it to ACER for decision. On 24 January 2020, ACER approved the aFRRIF.³
- (3) Article 4(6) of the approved aFRRIF requires TSOs to implement a capacity management function (‘CMF’) no later than two years after the deadline to implement the aFRR-Platform and Article 12(2) of the approved aFRRIF requires TSOs to propose the designation of the entity to perform it.⁴ This is linked to the other European platforms for balancing energy exchange from frequency restoration reserves with manual activation (hereafter referred to as ‘mFRR’) and for operating the imbalance netting process (hereafter referred to as ‘INP’) (all three platforms are hereafter collectively referred to as ‘European balancing platforms’) having a CMF.
- (4) Accordingly, on 31 March 2022, ENTSO-E, on behalf of all TSOs, submitted to ACER a proposal for amendment of the aFRRIF (hereafter referred to as ‘Proposal’).
- (5) This Decision is issued following ACER’s review and amendment of the Proposal, and includes the following annexes:

Annex I sets out the amendment to the aFRRIF, as amended and approved by ACER.

Annex Ia provides a track-changed version of the Proposal, reflecting ACER’s amendments, for information.

³ Decision No 02/2020 of 24 January 2020:

https://documents.acer.europa.eu/Official_documents/Acts_of_the_Agency/Pages/Annexes-to-the-DECISION-OF-THE-AGENCY-FOR-THE-COOPERATION-OF-ENERGY-REGULATORS-No-02-2020.aspx

⁴ The nature of the CMF as a required function pursuant to Article 12(2) of ACER Decision 02/2020 is currently the subject matter of actions for annulments in case T-606/20 pending before the General Court. In that regard the TSOs mentioned that their submission in the present proceedings is without prejudice to their position, recorded in their final proposal of 18 December 2019 underlying Decision No 02/2020 of 24 January 2020, that the CMF is not a required platform function and does not fall within the scope of Articles 20, 21 and 22 of the EB Regulation.

Annex II sets out the consolidated version of the aFRRIF, as amended and approved by ACER, for information.

Annex IIa provides a track-changed version of the consolidated aFRRIF, reflecting ACER's amendments, for information.

Annex III Public consultation, summary of responses and evaluation.

2. PROCEDURE

- (6) On 19 October 2021, the TSOs published for public consultation the draft 'Proposal for Amendment of mFRR, aFRR, IN Implementation Framework'⁵ in accordance with Articles 20, 21 and 22 of the EB Regulation. The consultation on all four draft amendment proposals lasted until 19 December 2021.
- (7) On 31 March 2022, ENTSO-E, on behalf of all TSOs, submitted to ACER the Proposal as described in Recital (4). The Proposal was part of a common submission package for the aFRRIF as well as for the implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with manual activation in accordance with Article 20 of the EB Regulation (hereafter referred to as 'mFRRIF') and the implementation framework for a European platform for imbalance netting process in accordance with Article 22 of the EB Regulation (hereafter referred to as 'INIF').
- (8) On 16 May 2022, ACER launched a public consultation⁶ on the Proposal⁷, inviting all market participants to submit their comments by 12 June 2022. On 31 May 2022, ACER also organised a public workshop for stakeholders to present the Proposal and gather information (see Section 5.2). The summary and evaluation of the responses received are presented in Annex III to this Decision.
- (9) Between 29 April 2022 and 22 June 2022, ACER engaged in discussions with the TSOs, ENTSO-E and regulatory authorities. These discussions concerned ACER's assessment described in Section 6 and involved numerous conference calls and exchanges of documents, including amended drafts of the Proposal by ACER, allowing ACER to gather information and form its preliminary position on the Proposal.
- (10) Between 27 June 2022 and 8 July 2022, ACER consulted all TSOs, ENTSO-E and the regulatory authorities on its preliminary position, by sharing an updated version of the Proposal setting out its suggested amendments and reasoning for these amendments.

⁵ https://consultations.entsoe.eu/markets/mfrr_afrr_in_if_amendment/

⁶ [PC 2022 E 03 - Public Consultation on the implementation frameworks for the European balancing platforms \(europa.eu\)](https://ec.europa.eu/europa.eu/pc/2022/E/03-Public%20Consultation%20on%20the%20implementation%20frameworks%20for%20the%20European%20balancing%20platforms)

⁷ ACER's public consultation covered the three implementation frameworks, i.e. the mFRRIF, the aFRRIF and the INIF.

On 8 July, ACER held an oral hearing. The written and oral comments are summarised in Section 5.3.

- (11) Between 19 August 2022 and 2 September 2022, ACER consulted the AEWG, which provided its advice on 2 September 2022 (see Section 5.4).
- (12) On 21 September 2022, the Board of Regulators adopted an amendment and issued a favourable opinion pursuant to Article 22(5)(a) of Regulation (EU) 2019/942, on the draft decision as revised by its amendment.

3. ACER'S COMPETENCE TO DECIDE ON THE PROPOSAL

- (13) Pursuant to Article 5(2)(b) of Regulation (EU) 2019/942, ACER shall revise and approve proposals for common terms and conditions or methodologies for the implementation of those network codes and guidelines adopted before 4 July 2019 and which require the approval of all regulatory authorities.
- (14) Pursuant to Articles 5(1) and 5(2)(a) of the EB Regulation as initially adopted, namely as a guideline before 4 July 2019, the proposal for the aFRRIF in accordance with Article 21(1) of the EB Regulation, was subject to approval by all regulatory authorities. Following the amendment of these provisions by Commission Implementing Regulation (EU) 2021/280⁸, the proposal for the aFRRIF and any amendments thereof have been explicitly subjected to approval by ACER.
- (15) Pursuant to the second sentence of Article 6(3) in joint reading with Article 4(1), Article 5(2)(a) and Article 21(1) of the EB Regulation, TSOs responsible for developing the proposal for the aFRRIF (i.e. all TSOs) may propose amendments to the methodology and submit them to ACER for approval.
- (16) Pursuant to Article 5(6) of Regulation (EU) 2019/942 and Article 5(1) of the EB Regulation, ACER, before approving the proposal for amendment, shall revise it where necessary, after consulting the respective TSOs and ENTSO-E, in order to ensure that it is in line with the purpose of the EB Regulation and contribute to market integration, non-discrimination, effective competition and the proper functioning of the market.
- (17) ENTSO-E, on behalf of all TSOs, submitted the Proposal to ACER for approval. The Proposal aims to amend the aFRRIF approved by Decision No 02/2020 of 24 January 2020. As such the Proposal is an amendment on which ACER decides according to Article 6(3) of the EB Regulation.

⁸ OJ L 62, 23.2.2021, p. 24.

- (18) Therefore, ACER is competent to decide on the Proposal based on Article 5(2)(b) of Regulation (EU) 2019/942 as well as Article 5(1) and 5(2)(a) in joint reading with Article 6(3) of the EB Regulation.

4. SUMMARY OF THE SUBMISSION

- (19) The submission of 31 March 2022 concerning the aFRRIF consisted of a letter from ENTSO-E and the following attachments⁹:

Attachment II	‘Proposal’	First amendment of the Implementation framework for the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation in accordance with Article 21 of Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing (addressing changes due to the CMF implementation)
Attachment V	‘Explanatory document 1’	Explanatory document of proposals for amendment of the implementation frameworks for the European balancing platforms in accordance with Articles 20(1), 21(1) and 22(1) of Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing (addressing changes due to the CMF implementation)
Attachment VII	‘External report’	External report ‘Efficiency assessment of the TSOs’ platforms’ performed by a third party
Attachment VIII	‘Public consultation’	Outcome of the public consultation held by TSOs
Attachment IX		List of the TSOs on behalf of which ENTSO-E submitted the Proposals

- (20) The Proposal consists of the following:
- (a) ‘Whereas’ section;
 - (b) Article 1, which describes the amendments to Article 12 of the aFRRIF specifying the proposed designation of entities to perform the functions of the aFRR-Platform;

⁹As the submission was part of a wider package, the numbering refers to the initial number chosen by TSOs meaning that it is not continuous.

- (c) Article 2, which describes the amendments to Article 13 of the FRRIF specifying the transparency and reporting provisions;
- (d) Article 3, which describes the amendments to Article 14 of the aFRRIF specifying the governance and decision-making process;
- (e) Article 4, which describes a new Article 14B of the aFRRIF specifying the contractual framework of the aFRR-Platform;
- (f) Article 5, which specifies the implementation timeline;
- (g) Article 6, which specifies the publication of the amendment; and
- (h) Article 7, which includes provisions on language.

5. SUMMARY OF THE OBSERVATIONS RECEIVED BY ACER

5.1. Consultation of all TSOs, ENTSO-E and regulatory authorities

- (21) ACER closely cooperated with the TSOs, ENTSO-E and the regulatory authorities in assessing the merits of the Proposal. In particular, ACER:
 - (a) discussed with TSOs, ENTSO-E and all regulatory authorities the comments received during the public consultation (see Section 5.2) and the views expressed by all regulatory authorities; and
 - (b) discussed with TSOs, ENTSO-E and all regulatory authorities the requirements of the EB Regulation for the proposed designation of the entities to perform the functions of the aFRR-Platform, namely where more than one entity is designated as explained in Sections 6.2.2 to 6.2.6.
- (22) Since the submission of 31 March 2022 included not only amendments to the aFRRIF, but also similar ones to the mFRRIF and INIF, and since the related additional documents, such as the Explanatory document 1 and the External report, are the same for those three amendment proposals, discussions as well as meetings were held together for those three procedures. A summary of the observations received during the consultation on ACER's preliminary position is provided in Section 5.3.

5.2. Public consultation

- (23) The consultation document asked stakeholders to provide views on the topics, which were deemed as the most relevant: (i) the multiple-entity setup to operate the European balancing platforms proposed by TSOs, (ii) the technical changes to the standard mFRR balancing energy product¹⁰, and (iii) any other topics.

¹⁰ This amendment is only relevant for the mFRRIF.

- (24) The summary and evaluation of the responses received are presented in Annex III to this Decision.

5.3. Consultation on ACER's preliminary position

- (25) All TSOs, Bundesnetzagentur (BNetzA) and the Institut Luxembourgeois de Régulation (ILR) provided written comments. The TSOs presented their views also at the oral hearing of 8 July 2022. Section 6.2 further describes the concerns raised and explains how ACER has taken them into account.

- (26) In their written response, the TSOs stated that in general they welcome ACER's approach to work on the multiple-entity setup as proposed. They again explained why, in their view, the Proposal fulfils the requirements of the EB Regulation and, in particular, raised concerns about changes proposed by ACER, such as the additional back-up mechanism, the designation of entities and the requirements applicable to them, the governance structure (joint steering committee), the high-level principles to the cooperation framework as well as some additional transparency obligations including the reporting on effectiveness and efficiency.

- (27) In the oral hearing, TSOs presented essentially their views as already expressed in their written response. Furthermore, they answered ACER's questions and explained their responses. With regard to the implementation timeline of amendments as included in ACER's preliminary position, TSOs explained that they could not provide any concrete proposal, but asked ACER to take into account that at least for the following two years the TSOs would need to focus on extending the European balancing platforms and to make all member TSOs operational. Moreover, they would already envisage another subsequent work package to improve the platforms for market participants.

- (28) ILR asked for further clarifications on specific topics such as the joint steering committee, the designation of the entities to perform the functions by all TSOs, the definition of member TSOs, the fall-back and the governance of the IT solutions.

- (29) BNetzA expressed concerns with regard to the governance structure (joint steering committee) and the additional back-up mechanism. They proposed not to include those two amendments and to revert to the TSOs' proposals.

5.4. Consultation of the AEWG

- (30) The AEWG has broadly endorsed the draft ACER Decision advising that:
- (a) the remaining concerns of some regulatory authorities are mainly focussed on three issues: (i) the request for a joint steering committee compared to separate steering committees for each platform, (ii) the need for and arrangement of the back-up function, and (iii) the necessity of formal annual work programmes and reporting duties; and

(b) the AEWG suggest to carefully evaluate the strict necessity of all the amendments introduced by ACER and take into account the comments expressed by regulatory authorities.

(31) ACER has considered AEWG's advice and the individual comments in finalising this Decision.

5.5. Amendment of the Board of Regulators

(32) The Board of Regulators adopted an amendment with regard to the draft decision to the effect that a comprehensive back-up capability for the designated entity should not be required.

(33) ACER took this amendment into account and revised the draft decision accordingly.

6. ASSESSMENT OF THE PROPOSAL

6.1. Legal framework

(34) Article 21 of the EB Regulation sets out the requirements for the development of a proposal for the aFRR-Platform and its implementation.

(35) Pursuant to the second sentence of Article 6(3) in joint reading with Article 5(2)(a) and Article 21(1) of the EB Regulation, all TSOs may propose amendments to the aFRRIF to ACER. Pursuant to the third sentence of Article 6(3) of the EB Regulation, the proposals for amendments shall be submitted to consultation in accordance with the procedure set out in Article 10 of the EB Regulation, and approved in accordance with Article 4 and Article 5 of the EB Regulation.

(36) Pursuant to Article 10(1), Article 10(2) and Article 10(3), in joint reading with Article 5(2)(a), Article 6(3) and Article 21(1) of the EB Regulation, all TSOs shall publicly consult with stakeholders, including the relevant authorities of each Member State, at European level for a period of not less than two months.

(37) Pursuant to Article 10(6) in joint reading with Article 5(2)(a), Article 6(3) and Article 21(1) of the EB Regulation, all TSOs shall duly consider the views of stakeholders resulting from the consultation on the draft proposal before its submission to ACER. In all cases, a sound justification for including or not including the views resulting from the consultation shall be provided together with the submission to ACER and published in a timely manner before or simultaneously with the publication of the proposal.

(38) The first sentence of Article 21(2) of the EB Regulation requires that the aFRR-Platform, operated by TSOs or by means of an entity the TSOs would create themselves, shall be based on common governance principles and business processes and shall consist of at least the activation optimisation function ('AOF') and the TSO-TSO settlement function.

- (39) Article 21(3)(d) of the EB Regulation requires that the proposed rules concerning the governance and operation of the European platform are based on the principle of non-discrimination and ensuring equitable treatment of all member TSOs and that no TSO benefits from unjustified economic advantages through the participation in the functions of the European platform.
- (40) Article 21(3)(e) of the EB Regulation requires that the proposal shall include the proposed designation of the entity or entities that will perform the functions defined in the proposal. Where the TSOs propose to designate more than one entity, the proposal shall demonstrate and ensure:
- (a) a coherent allocation of the functions to the entities operating the European platform including the need to coordinate different functions allocated to the entities operating the European platform;
 - (b) that the proposed setup of the European platform and allocation of the functions ensures efficient and effective governance, operation and regulatory oversight as well as supports the objectives of the EB Regulation; and
 - (c) that there is an effective coordination and decision making process to resolve any conflicting positions between entities operating the European platform.
- (41) Article 21(4) of the EB Regulation requires that by six months after the approval of the aFRRIF, all TSOs shall designate the proposed entity or entities entrusted with operating the aFRR-Platform.
- (42) Article 23 of the EB Regulation sets out the reporting and sharing of costs for the establishing, amending and operating of the European balancing platforms.
- (43) Article 59 sets out the requirements for ENTSO-E to publish a European report focusing on monitoring, describing and analysing the implementation of the EB Regulation, as well as reporting on the progress made concerning the integration of balancing markets in Europe.
- (44) As a general requirement, Article 5(5) in conjunction with Article 6(3) of the EB Regulation requires that all proposals, including proposals for amendments, must include a proposed timescale for their implementation and a description of their impact on the objectives of the same Regulation.

6.2. Assessment of the legal requirements

6.2.1. Requirements for the development and for the content of the Proposal

6.2.1.1. Development of the Proposal

- (45) The Proposal complies with the requirements of Articles 6(3) and 5(2)(a) of the EB Regulation, as all TSOs jointly developed the proposal for the amendment of the aFRRIF and submitted it for approval to ACER.

- (46) In developing the Proposal, all TSOs complied with the consultation requirements set out in Article 10 of the EB Regulation. ENTSO-E, on behalf of all TSOs, publicly consulted on the draft Proposal (together with the mFRRIF and INIF) at the European level for a period of two months, between 19 October 2021 and 19 December 2021.¹¹ In addition, ACER and all regulatory authorities were regularly informed about the development of the Proposal.
- (47) All TSOs considered the views of stakeholders resulting from the consultation on the draft Proposal before their submission to ACER on 31 March 2022. All TSOs' responses to the comments received during the public consultation were included in the submission (as Attachment VIII). In this document, they provided justification for including or not including the views resulting from the public consultation. A non-confidential version of this document was published on ENTSO-E's website on 31 March 2022, after the publication of the Proposal.¹²

6.2.1.2. *Proposed timescale for implementation*

- (48) The Proposal complies with the requirements of Article 5(5) of the EB Regulation as it provides a timeline for its implementation in Article 5 of the Proposal. The implementation deadline as proposed by TSOs is linked to the publication of ACER's decision on the Proposal (15 days after publication). Since the implementation deadlines of the aFRR-Platform's functions are already set and defined in Article 5 of Annex I of ACER Decision 02/2020 and still remain valid, the timeline proposed by the TSOs was redundant and ACER therefore removed it from the Proposal as approved.
- (49) After consulting with TSOs and taking into account TSOs' concerns on having an implementation timeline of the amendments additionally included by ACER as described in the following sections that is too short, ACER deemed a longer implementation period appropriate for the amendments linked to the CMF implementation. On other amendments by ACER, already proposed by TSOs, easier to apply or even already in place, ACER considers that they can be implemented earlier. Therefore, ACER's amendments to the Proposal (cf. in Article 12(2) of Annex I), either
- (a) include a specific timeline for implementation (6.2.5.5); or

¹¹ https://consultations.entsoe.eu/markets/mfrr_afrr_in_if_amendment/

¹² https://eepublicdownloads.entsoe.eu/clean-documents/nc-tasks/220331_EB%20Reg_IF%20amendments_answers%20to%20public%20consultation.pdf

- (b) are linked to the implementation of the CMF¹³ and are therefore subject to the implementation timeline already defined for the CMF (6.2.5.2, , 6.2.5.7 and 6.2.5.8); or
- (c) are independent of the implementation of the CMF and are therefore subject to the implementation timeline otherwise applicable for the aFRRIF (6.2.5.1, 6.2.5.3, 6.2.5.4, (109), 6.2.5.6 and 6.2.6).

6.2.1.3. *Expected impact on the objectives of the EB Regulation*

- (50) The Proposal does not include any assessment of the expected impact on the objectives of the EB Regulation.
- (51) ACER has substantially revised the amendments initially proposed by the TSOs in the Proposal in order to make them compliant with the applicable legal framework as described in the following sections. Therefore, ACER considers that the amendments, as revised and approved by ACER, have no negative impact on the objectives of the EB Regulation and the market operation principles laid down in the Electricity Regulation. To reflect this in the approved Proposal, ACER mentioned the amendments and their impacts on the objectives of the EB Regulation, where necessary, in the Whereas section of Annex I.

6.2.2. Requirements of Article 21(2) of the EB Regulation

- (52) Pursuant to the first sentence of Article 21(2) of the EB Regulation, the aFRR-Platform shall be operated by TSOs or by means of an entity the TSOs would create themselves.
- (53) The TSOs propose that the aFRR-Platform shall be operated by multiple entities. More specifically, Article 1(a) of the Proposal specifies that “*TSOs shall designate:*
 - (a) *one TSO for operation of the activation optimisation function and TSO-TSO settlement function;*
 - (b) *and a different TSO for operation of the capacity management function.”*
- (54) This means that the TSOs proposed to designate TSOs to operate the aFRR-Platform, *i.e.*, one TSO for the AOF and the TSO-TSO settlement function and another TSO for the CMF. According to the TSOs, designating a TSO as an entity operating the platform’s functions enables the utilization of current TSOs’ technical and operational

¹³ The wording in Annex I is “in case other balancing platforms have a function such as the CMF” and refers to the actual “go-live” (except for the fall-back of the CMF which is only relevant if the CMF is implemented).

infrastructures.¹⁴ ACER considers that the Proposal fulfils the requirement of the first sentence of Article 21(2) of the EB Regulation.

6.2.3. Requirements of Article 21(3)(e) of the EB Regulation

(55) Article 21(3)(e) of the EB Regulation requires the proposal to include “*the proposed designation of the entity or entities that will perform the functions defined in the proposal. Where the TSOs propose to designate more than one entity, the proposal shall demonstrate and ensure:*

(i) *a coherent allocation of the functions to the entities operating the European platform. The proposal shall take full account of the need to coordinate the different functions allocated to the entities operating the European platform;*

(ii) *that the proposed setup of the European platform and allocation of functions ensures efficient and effective governance, operation and regulatory oversight of the European platform as well as supports the objectives of this Regulation;*

(iii) *an effective coordination and decision making process to resolve any conflicting positions between entities operating the European platform;”.*

(56) ACER understands that this requirement consists of two separate requirements: (i) the first sentence of Article 21(3)(e) of the EB Regulation which requires the proposal to include the proposed designation of the entity or entities to perform the platform function, and (ii) the second sentence of Article 21(3)(e) of the EB Regulation which includes additional requirements if more than one entity is designated for performing the platform’s functions.

(57) With respect to the first sentence of Article 21(3)(e) of the EB Regulation, ACER considers that the Proposal partially fulfils the relevant requirement for the following reasons.

(58) On 20 June 2022, TSOs shared a document commenting on ACER’s first draft proposal of Annex I¹⁵ which was shared by ACER during the discussions. In this document, TSOs included comments on the designation of entities, thereby amending not only ACER’s draft but also the TSOs’ initial wording in Article 1 of the Proposal. The TSOs proposed to include that the member TSOs shall operate each platform jointly and “*shall designate certain member TSOs, meaning those TSOs shall be mandated to act in all member TSOs’ name and on their behalf to support their operation of the functions of the mFRR-Platform”*. Furthermore, the TSOs explained in the hearing response, in which they referred to those comments, that they propose

¹⁴ External Report, Attachment VII, p. 13.

¹⁵ The discussions were exemplary based on the mFRRIF and the respective Annex I but also applicable to the aFRRIF and INIF, as also explained by TSOs in their hearing response.

to link the aFRRIF further to the contractual framework and that their setup is based on the principle that all TSOs implement each platform together, but for practical reasons, appoint one TSO per platform to perform both the AOF¹⁶ and the TSO-TSO settlement function, and a different TSO to operate the CMF of all platforms.

- (59) Pursuant to Article 21(1) of the EB Regulation, all TSOs implement (and make operational) the aFRR-Platform and are responsible for their compliance with the EB Regulation. However, it follows from Article 21(2) of the EB Regulation that the aFRR-Platform is “operated by TSOs or by means of an entity the TSOs would create themselves”. Therefore the entity/ies designated to operate the platform (or equivalently to perform the platform’s functions) is/are responsible for performing these functions. Consequently, ACER understands that the designation of the entity/ies is not merely for “practical reasons” but rather for legal ones. The requirement that the entity/ies bear(s) legal responsibilities stems not solely from the contractual frameworks signed with and by the TSOs, but also from the EB Regulation and the aFRRIF. Therefore, ACER did not follow the TSOs’ wording proposal and instead kept the wording of the EB Regulation referring to a “designation by TSOs” (Article 4(a) of Annex I¹⁷).
- (60) ACER understands that the first sentence of Article 21(3)(e) of the EB Regulation requires to include not only the proposed setup to designate those entities but also the “**proposed designation of the entity or entities**” (emphasis added). The designation involves naming the entity or the entities.¹⁸ Therefore, in compliance with Article 21(3)(e) of the EB Regulation, the TSOs’ proposal should specify also the identity of the proposed entity or entities. The lack of any designation of the entity or entities would render the proposal incomplete, in violation of Article 21(3)(e) of the EB Regulation. This is further confirmed by Article 21(4) of the EB Regulation which provides that “*all TSOs shall designate the proposed entity or entities*”, i.e. the actual designation of the proposed entity or entities. The actual designation under Article 21(4) of the EB Regulation takes place after the designation of the entity or entities in the proposal. In that regard, it should be recalled that the EB Regulation aims at enhancing efficiency of balancing as well as efficiency of European and national balancing markets (Article 3(1)(b)). Hence, the process described by Article 21(3)(e) of the EB Regulation first requires TSOs to propose the entity or entities that are to be designated, while the actual designation itself follows the adoption of the respective ACER decision in accordance with Article 21(4) of the EB Regulation. This ensures that any change of the entity/entities performing the functions of the aFRR-Platform is also subject to regulatory scrutiny, i.e. an amendment to the aFRRIF and its approval by ACER, pursuant to Article 6(3) of the EB Regulation. Such a process enables

¹⁶ For the IN-Platform, this is not the AOF but the imbalance netting process function.

¹⁷ Article 12(2) of the amended aFRRIF.

¹⁸ According to the Oxford Dictionary, to designate means: “to say officially that someone or something has a particular character or name; to describe someone or something in a particular way”.

ACER to assess whether or not any change of the entity or entities proposed for designation meets the requirements prescribed in the EB Regulation, specifically its Article 21(3) and the objectives of its Article 3(1)(b).¹⁹

- (61) The TSOs expressed concerns that such specification within the aFRRIF limits flexibility and possibilities to change the entities designated, as it would always require an amendment to the aFRRIF. Furthermore, they argued in their hearing response that the designation process in accordance with Article 21(4) of the EB Regulation is “independent from the aFRRIF approval” and explained that they would inform and provide the regulatory authorities and ACER with the names of the designated entities. ACER agrees that following the specification of the entity or entities in the aFRRIF every change of the entity or the entities would indeed require an amendment to the aFRRIF based on Article 6(3) of the EB Regulation. However, ACER considers that only such specification gives full effect to the requirements of Article 21(3) of the EB Regulation and the objectives of its Article 3(1)(b). Therefore, ACER included the specific entities to be designated to perform the functions of the aFRR-Platform within Article 5(b) of Annex I²⁰, as named by the TSOs in the Explanatory document 1.
- (62) With regard to the second sentence of Article 21(3)(e) of the EB Regulation, the Proposal must fulfil the additional requirements listed in points (i), (ii) and (iii) of Article 21(3)(e), which go beyond those for a single entity set-up, as it includes a setup involving multiple entities.²¹
- (63) With the Proposal, the TSOs intended to complement the aFRRIF also with respect to the additional requirements of Article 21(3)(e) of the EB Regulation. To support their view that these changes ensure compliance with those additional requirements, the TSOs also submitted a report performed by a third party (External report, Attachment VII to the TSOs’ submission).
- (64) After analysing the Proposal and asking for further information from the TSOs, ACER concluded that some of the amendments proposed in the Proposal partly lack sufficient details while some others lack legal clarity, thereby not allowing ACER to assess and conclude whether the additional requirements under points (i), (ii) and (iii) of Article 21(3)(e) of the EB Regulation are fulfilled. The problems identified by ACER were expressed in several meetings with TSOs. ACER’s changes to the aFRRIF addressing these problems together with their reasoning were presented and discussed in the meetings (see Section 5 above). The TSOs expressed concerns on the proposals made by ACER but did not provide the additional information required by ACER to complete the Proposal and to verify that it is addressing the risks and problems

¹⁹ Therefore, ACER considers it necessary to deviate from the approach followed by its Decision 02/2020 for the approval of the aFRRIF.

²⁰ Article 12(3) of the amended aFRRIF.

²¹ Decision of the Board of Appeal of the European Agency for the Cooperation of Energy Regulators of 16 July 2020 in case A-002-2020, para. 160.

identified by ACER; nor did the TSOs provide alternative proposals to address those risks and problems. Therefore, ACER amended the Proposal where necessary to make it compliant with the requirements specified in points (i), (ii) and (iii) of Article 21(3)(e) of the EB Regulation. Those amendments are described in the following sections referring to each of the specific requirements.

6.2.4. Requirements of Article 21(3)(e)(i) of the EB Regulation

(65) The first additional requirement provided under Article 21(3)(e)(i) of the EB Regulation is the following: “*Where the TSOs propose to designate more than one entity, the proposal shall demonstrate and ensure:*

(i) a coherent allocation of the functions to the entities operating the European platform. The proposal shall take full account of the need to coordinate the different functions allocated to the entities operating the European platform;”.

(66) The first sentence of Article 21(3)(e)(i) of the EB Regulation requires that the Proposal demonstrates and ensures a coherent allocation of the functions to the entities operating the European platform.

(67) The TSOs proposed to designate one TSO to operate the AOF and the TSO-TSO settlement function and a different TSO to operate the CMF.

(68) ACER considers that such allocation of functions is coherent with the definition of functions in the aFRRIF in general as the allocation creates a reasonable and consistent setup with clearly assigned tasks and responsibilities in relation to the aFRR-Platform’s functions. Considering that the CMF is a required cross-platform function, as outlined in Article 4(6) of Annex I of ACER Decision 02/2020 (“*In case other balancing platforms have such function, the CMF shall be the same across these platforms, if the same obligation is imposed in the relevant implementation framework of each platform.*”), the proposed allocation of functions also complies with the previously approved aFRRIF requiring the CMF to be operated by one entity for all European platforms for the exchange of balancing energy and imbalance netting process, as it results from a joint reading of Article 4(6) and Article 12(2) of Annex I of ACER Decision 02/2020 (“*[...] all TSOs shall develop a proposal for amendment of this aFRRIF, which shall designate the entity performing the capacity management function in accordance with Article 21(3)(e) of the EB Regulation [...]*”). Therefore, ACER considers that the Proposal complies with the first sentence of Article 21(3)(e)(i) of the EB Regulation.

(69) The second sentence of Article 21(3)(e)(i) of the EB Regulation requires the Proposal to take full account of the need to coordinate the different functions allocated to entities operating the European platform. In ACER’s view, this requirement relates to any aspects dealing with coordination and communication between different functions performed by different entities.

- (70) The TSOs tried to address this requirement implicitly in different parts of the Proposal, in particular in the proposed governance setup (Article 3(2)(a) of the Proposal together with its recital 14(e)) and the principles for the contractual framework applicable between TSOs (Article 4 of the Proposal).
- (71) ACER understands that the coordination of the different functions comprises different levels, including the governance regarding the decision-making process for topics related to the coordination of the functions, as well as the operation of the different functions in a coordinated way to operate the aFRR-Platform. The Proposal lacks however clarity and sufficient details on how the different functions are coordinated, especially with regard to the governance and the operations of the aFRR-Platform. Due to this lack of clarity and sufficient details, ACER considers the Proposal as not satisfying the second sentence of the requirement of Article 21(3)(e)(i) of the EB Regulation. To ensure the required coordination, ACER added the requirement for a joint steering committee and an annual work programme (as further explained in Section 6.2.5.2 and Section 6.2.5.4 respectively) and more details on the coordination for the actual operation of the aFRR-Platform in the cooperation framework (as outlined in Section 6.2.5.6) and the back-up and fall-back principles (as further explained in Section 6.2.5.7 and Section 6.2.5.8 respectively).

6.2.5. Requirements of Article 21(3)(e)(ii) of the EB Regulation

- (72) The second additional requirement provided under Article 21(3)(e)(ii) of the EB Regulation is the following: “*Where the TSOs propose to designate more than one entity, the proposal shall demonstrate and ensure: [...]*

(ii) that the proposed setup of the European platform and allocation of functions ensures efficient and effective governance, operation and regulatory oversight of the European platform as well as supports the objectives of this Regulation;”.

- (73) To support the objectives of the EB Regulation specified in Article 3 thereof, ACER defined high-level objectives and criteria for each aspect (governance, operation, and regulatory oversight) to be able to assess the Proposal’s compliance and to amend it where the information provided was incomplete or lacked sufficient clarity to conclude on the fulfilment of those objectives.²² The interpretation of the EB Regulation and consequently the high-level objectives and the criteria as described below were presented at the very beginning of the consultation process with the regulatory authorities and the TSOs. They were neither questioned during the consultation process nor during the hearing phase by any of the parties. Therefore, they constituted the basis for discussing and assessing the fulfilment of the respective

²² Moreover, ACER has always been clear on the missing content of the Proposal, even at the level of its development before being submitted to ACER, where ACER and regulatory authorities already provided a so-called “shadow opinion”.

requirements of the EB Regulation and of ACER's proposed amendments to the Proposal.

(74) In the following, first the relevant high-level objectives and criteria are set out, and then the specific amendments are assessed in view of those objectives and criteria.

(75) **Efficient and effective governance**

(a) Ensure efficient and effective decision-making, including for cross-platform functions and cross-platform issues

A well-defined management structure with well-defined decision-making procedures is key for efficient and effective governance. Such structure and procedures need to take into account interdependencies between different entities and/or functions as well as the fact that there are cross-platform issues and arising synergies to be addressed. This is also linked to the requirement under Article 21(3)(e)(i) of the EB Regulation of taking into account the need to coordinate the different functions.

(b) Ensure project management

Efficient and effective governance needs to cover project management. The latter enables the parties involved to follow a clear work plan with clear responsibilities and allows the regulatory authorities and ACER to monitor the implementation of the aFRR-Platform. Furthermore, the project management needs to take into account the need to coordinate the different functions in accordance with Article 21(3)(e)(i) of the EB Regulation.

(c) Ensure ownership of platform-related intellectual property and infrastructure by all member TSOs

To ensure efficient and effective governance, but also non-discrimination between the involved parties, i.e. the TSOs (see below), the proposed setup needs to safeguard that the TSOs designated to perform the functions do not take any undue advantage of their designation compared to non-designated TSOs and that in case of change of any of the designated TSOs the necessary tools can be smoothly and timely transferred to the newly designated entity or entities. To that end, the ownership of the platform-related intellectual property and infrastructure should be shared among relevant TSOs and relevant TSOs should have the right to use the relevant software and hardware and to transfer this right where appropriate.

(d) Ensure equal treatment for all TSOs, transparency and equal access to information by all TSOs (including auditing possibilities for all member TSOs)

In line with Article 3(1)(a) of the EB Regulation, aiming at competition, non-discrimination and transparency in balancing markets, as well as with Article 21(3)(d) of the EB Regulation, requiring the governance of the aFRR-Platform to be based on the principle of non-discrimination and to ensure equitable treatment of all member TSOs, any governance setup has to ensure equal treatment of all

TSOs as well as equal access to information. This includes that each member TSO should be able to audit the designated TSOs and their activities.

(e) Ensure independence of entities designated to perform the functions

As the setup designates specific TSOs with existing national obligations to also perform tasks of common European interest, meaning that these TSOs are both operators and participants of the aFRR-Platform, the designated TSOs may have conflicting interests. For effective competition and non-discrimination, it is therefore important that the designated TSOs operate the aFRR-Platform independently from their interests as participating TSOs. The governance of the aFRR-Platform is only efficient and effective if it ensures such independence.

(f) Ensure continuity of functions (prevent lock-in in case of need to switch provider)

Efficient and effective governance needs to ensure the continuity of the functions (and consequently the operations of the platform) at all times. This means that in the event that the designated TSO is (needs to be) changed the governance setup has to allow for a sufficiently smooth and easy change, not affecting the continuity of the functions.

(76) **Efficient and effective operation**

(a) Ensure efficient and effective operation on day-to-day basis as well as in the long-run

Efficient and effective operation covers not only day-to-day operations but also operations in the long-run in line with the objectives of Article 3(1)(b), (c) and (d) of the EB Regulation.

(b) Ensure coordination and communication between different functions and/or different designated entities

Efficient and effective operation (aside governance) is also relevant for the requirement under Article 21(3)(e)(i) of the EB Regulation to coordinate the different functions.

(c) Ensure back-up and fall-back mechanisms

Effective and efficient operation not only relates to normal situations but also needs to take into account irregularities and include mechanisms to ensure operations in case of failure of different functions or entities designated to perform those functions. This is also linked to the coordination requirement of Article 21(3)(e)(i) of the EB Regulation.

(d) Ensure smooth operations in case of hand-over or change of entities designated to perform the functions

Efficient and effective operation needs to ensure the continuity of the functions of the platform at all times. This means that in the event that the designated entity is (needs to be) changed, the operation setup has to allow for a sufficiently smooth and easy hand-over, not affecting the continuity of the functions.

(77) Efficient and effective regulatory oversight

(a) Ensure clear and coherent assignment of tasks and responsibilities

Clearly and coherently assigned tasks and responsibilities provide the necessary basis for any efficient and effective regulatory oversight and monitoring. This is not only true for following up on implementation deadlines or the operation of the platform, but also for longer-term and forward-looking planning. It also allows to better assess the costs incurred and their efficiency.

(b) Ensure transparency towards regulatory authorities and ACER

As for the above, the necessary basis for any efficient and effective regulatory oversight and monitoring is transparency towards regulatory authorities and ACER.

6.2.5.1. Requirements for the entities designated to perform the functions of the aFRR-Platform

(78) Article 1(c) and Article 4(4) of the Proposal list requirements which the entities designated to perform the functions²³ shall be obliged to comply with by the contractual framework established by the TSOs.²⁴ Those requirements relate to the TSOs' general obligations, transparency towards member TSOs, keeping records of activities performed to allow for auditing by one or more member TSOs, coordination obligations, in particular in case of dispute or hand-over to another entity newly designated to perform the platform's functions. They aim to address the requirements of Article 21(3)(e)(ii) of the EB Regulation, namely to ensure equal treatment, transparency and equal access to information to all TSOs as well as coordination and communication between different functions performed by different entities.

(79) ACER followed Article 1(c) of the Proposal and included the general requirement of the entities designated to act for the benefit and on behalf of all TSOs and in line with the applicable legal framework in Article 4(c) of Annex I.²⁵ To ensure equal treatment and access for each TSO, ACER also followed the requirement to keep records to enable each member TSO to audit the designated entities' activities in Article 4(d) of Annex I.²⁶ For transparency and coherence reasons and to ensure compliance with the EB Regulation, ACER merged all requirements concerning the designation of the entities in a new paragraph in Article 4(d) of Annex I, summarizing all high-level requirements based partly on Article 4(4) of the Proposal and partly on amendments

²³ As explained in Section 6.2.7, ACER changed the wording of TSOs referring to 'common service provider' to 'entities designated to perform the functions' and uses this throughout the document. Furthermore, as these entities are TSOs, some parts of the document may refer to 'TSOs designated to perform the function(s)'.
²⁴ The relevant contractual framework was not included in the TSOs' submission of the Proposal to ACER. ACER did not review this contractual framework.

²⁵ Article 12(4) of the amended aFRRIF.

²⁶ Article 12(5)(e) of the amended aFRRIF.

introduced by ACER, as described in Recitals (80) to (91) below. Moreover, after discussions with TSOs, ACER introduced three requirements in Article 4(d) of Annex I, not yet included by the Proposal, to ensure compliance with the EB Regulation. These are cost efficiency, separate internal accounts and confidentiality of information, as described below:

- (80) **Cost efficiency:** Article 21(3)(e)(ii) of the EB Regulation requires the proposed setup and the allocation of functions to ensure efficient and effective operation of the platform. Furthermore, Article 3(1)(b) of the EB Regulation aims at “*enhancing efficiency of balancing as well as efficiency of European and national balancing markets*”.
- (81) Entities designated to perform the functions of the platforms are tasked with operations of parts of the European balancing markets and in that regard are acting in the interest of the whole EU energy market. Costs related to those tasks are shared based on EU-wide mechanisms pursuant to Article 23 of the EB Regulation. To ensure that these operations are effectively and efficiently provided as well as to enhance efficiency of balancing markets overall, as required by the EB Regulation, ACER considers it necessary that the designated entities perform their tasks in a cost-efficient way. The Proposal did not address this need.
- (82) Therefore, ACER clarified that the designated entities need to perform the functions of the aFRR-Platform cost-efficiently and to comply with the above-mentioned objectives.²⁷ This is also in line with the responses to the public consultation held by ACER, stressing that increased complexity should not lead to avoidable costs.
- (83) **Keeping separate internal accounts for all activities related to the European platforms:** Article 21(3)(e)(ii) of the EB Regulation requires efficient and effective governance as well as efficient and effective regulatory oversight. In addition, the objectives of the EB Regulation, namely in Article 3(1)(a) and (b), aim at “*fostering effective competition, non-discrimination and transparency in balancing markets*” and “*enhancing efficiency of balancing as well as efficiency of European and national balancing markets*”. In ACER’s view, this requires on the one hand the equal treatment of all TSOs, including transparency and equal access to information, and the independence of the TSOs designated to perform the functions, and on the other hand the clear assignment of tasks and responsibilities, and transparency towards regulatory authorities and ACER.
- (84) A non-discriminatory and efficient functioning of the European balancing platforms will be possible only if the internal accounts for all activities related to the European platform are made transparent. Such transparency will enable to make a clear distinction between the operation of the platform's functions and the other tasks performed as a national TSO. Where a TSO is designated to perform the platform or

²⁷ Article 12(5)(a) of the amended aFRRIF.

performs a function thereof, there is the risk that the platform-related costs are not separated from the costs related to the TSO's national obligations and cannot be clearly established. Moreover, there might be the risk that the designated TSOs enjoy cross-subsidisation and thereby non-designated TSOs are discriminated. In addition, all member TSOs as well as the regulatory authorities will have difficulty to monitor and audit the platform-related costs, and to assess whether they have been appropriately attributed to the platform and separated from other costs of the designated TSO if those costs are not specified and accordingly not visible in the financial sheets of the designated TSO.

- (85) As the incurred platform-related costs relate to European tasks and are recovered via dedicated processes and ultimately paid by end-consumers, they should be fully transparent. In view of the requirements of efficient and effective governance as well as efficient and effective regulatory oversight provided in Article 21(3)(e)(ii) of the EB Regulation and in view of the objectives of Article 3(1)(a) and (b) of the EB Regulation, those costs need to be fully distinguishable from any other costs incurred by the TSOs designated and also distinguishable by function and platform between the different TSOs designated.
- (86) TSOs argued that there is no risk for cross-subsidisation or discrimination as the budget and cost categorization would be transparent and auditing possibilities would be available. Furthermore, they deemed the possibility for auditing sufficient to incentivise designated entities to keep accurate and complete records.
- (87) However, as explained above, in ACER's view, full transparency and auditing possibilities can only be achieved if the underlying cost structure related to the European balancing platform is well-defined and separately accessible so that it can also constitute a viable basis for effective monitoring and prevention of cross-subsidisation. Moreover, TSOs are already under an obligation to maintain separate accounts for each activity, with a view to avoiding discrimination, cross-subsidisation and distortion of competition.²⁸
- (88) Therefore, ACER specified that the designated TSOs performing functions of the European balancing platforms have to establish separate internal accounts for all activities related to the European platforms and to keep them where already established.²⁹ This requirement enhances non-discrimination among TSOs, transparency for all TSOs, the regulatory authorities as well as ACER, and efficiency of balancing markets. It ensures that the multiple-entity setup complies with efficient and effective governance, in particular that the same information is available for all TSOs, and allow for efficient and effective regulatory oversight, in particular of transparent and traceable costs.

²⁸ Article 56(3) of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, *O.J. L* 158, p. 125

²⁹ Article 12(5)(b) of the amended aFRRIF.

- (89) **Confidentiality of information gained through the operation of the European platforms:** Article 21(3)(e)(ii) of the EB Regulation requires efficient and effective governance of aFRR-Platform. Article 3(1)(a) of the EB Regulation further provides that the EB Regulation aims at “*fostering effective competition, non-discrimination and transparency in balancing markets*”. Furthermore, Article 21(3)(d) of the EB Regulation sets out the principle of “*non-discrimination and equitable treatment of all member TSOs*”. As explained, this implies the independence of the entities designated to perform the functions of the aFRR-Platform.
- (90) Designated TSOs act both as operators and participants of the platforms with possible access to more information than TSOs not designated to operate the platform’s functions. To still ensure non-discrimination and equal treatment of all TSOs, the designated TSOs must not use information gained via the operation of a platform to their economic advantage. Similarly, preventing such use of information is also necessary to preserve the independence between the designated TSOs’ tasks related to the European platforms and those related to their national balancing markets.³⁰ TSOs agreed with these objectives as they deemed that the contractual framework has already been set up in a way that designated entities cannot gain additional information or economic advantage. This was also supported by regulatory authorities.
- (91) Therefore, to clarify that the information gained by designated entities through their specific tasks needs to be always confidential and not used for the TSOs’ economic advantage, ACER included a specific requirement in this respect.³¹
- (92) Overall, ACER considers that the above three requirements should apply directly after the adoption of this Decision, as they are basic principles, already applied and independent of any implementation such as the one of the CMF (cf. Section 6.2.1.2). In particular, ACER considers that separate accounts must already be in place as costs were already reported for those activities and recovered via the specific mechanisms. This would not have been possible without a clear delineation between national costs and costs incurred for the tasks related to the aFRR-Platform.

6.2.5.2. *Establishment of a joint steering committee*

- (93) The Proposal is based on the already existing two-level governance with a steering committee and an expert group for the aFRR-Platform. Additionally, given the fact that several platforms co-exist with a joint CMF and with issues impacting or being relevant for all of them, TSOs proposed in Article 3(2) of the Proposal (together with its recital 14(e)) that all cross-platform issues³² are dealt with within the steering

³⁰ The obligation to maintain confidentiality of the information obtained in the course of the TSOs’ activities is further provided in Article 41(1) of Directive (EU) 2019/944 (hereafter: ‘Directive (EU) 2019/944’).

³¹ Article 12(5)(c) of the amended aFRRIF.

³² ACER understands that ‘cross-platform issue’ means any matter relevant to, affecting or otherwise involving at least two European platforms for the exchange of balancing energy and/or for operating the imbalance netting process.

committee of the mFRR-Platform in joint sessions which are organised “if and when relevant” (cf. hearing response). In this steering committee all member TSOs of both the aFRR-Platform and the mFRR- and IN-Platforms are represented.

- (94) Article 21(3)(e)(ii) of the EB Regulation requires the multiple-entities setup to ensure efficient and effective governance, operation and regulatory oversight. As explained above, this implies, in particular, that the setup needs to ensure efficient and effective decision-making, equitable treatment of all TSOs, efficient and effective operations and coordination and communication between different functions and entities, clear and coherent assignment of tasks and responsibilities, and transparency towards regulatory authorities and ACER. Furthermore, the objectives of the EB Regulation, specifically in Article 3(1)(a) to (d) focusing on the enhancement of efficiency and integration of the European balancing markets and the fostering of non-discrimination, are to be supported. Finally, these requirements need to be fulfilled in the light of Article 21(3)(e)(i) of the EB Regulation requiring to take into account the need to coordinate the different functions allocated to the entities operating the aFRR-Platform.
- (95) The multiple-entities setup proposed by the TSOs brings together different entities with a high need for coordination and communication. Furthermore, ACER considers the European balancing platforms pursuant to Articles 20, 21 and 22 of the EB Regulation to be linked as they serve the same technical process, i.e. the frequency restoration process.³³ In addition, all of them include the cross-platform CMF. The cross-platform nature of the CMF intrinsically implies the existence of issues impacting or being relevant to all European balancing platforms, which, in turn, necessarily requires coordination and communication among them. This link between the platforms is becoming more and more important and joint topics and decisions are increasing³⁴, as the platforms are starting to be operational. Based on the information provided by the TSOs, the development of different parts of the platforms are finalised (e.g. algorithms) and the CMF, being a cross-platform function, is to be implemented in the near future. Furthermore, the tasks are moving from the pure development of the platforms to their operation for which the different platforms feed into the same overall process of frequency restoration in a very short amount of time. This requires managing and monitoring the further development and especially the operation of the platforms collectively, in order to identify inefficiencies at the interfaces between the platforms, especially with respect to balancing responsible parties’ behaviour, liquidity issues and priority issues regarding access to cross-zonal capacity. Therefore, ACER concluded that the proposed setup entails a high interdependency within and between platforms, namely between the decision-making of different functions of one

³³ As defined in Article 3(42) of Commission Regulation (EU) 2017/1485 establishing a guideline on electricity transmission system operation.

³⁴ This is visible when looking at the evolvement of the decision-making as presented by TSOs in the regular EB IG meetings. For example, in the EB IG meeting of 30 June 2022 TSOs explained the need to establish a common security plan addressing also IT-security topics in a joint TF for mFRR and aFRR.

platform as well as between the different European platforms having a cross-platform function such as the CMF and other common cross-platform issues.

- (96) Although TSOs acknowledged that due to the coexistence of several platforms, issues impacting or being relevant to all of them would arise,³⁵ the Proposal does not address this interdependency entirely but rather tries to artificially limit any interaction between the steering committees as the overarching hierarchy of the different platforms to the minimal extent, even though TSOs' expert level more and more merges discussions. In the Explanatory document 1, TSOs explained that for the aFRR- and IN-Platform they have decided to create a joint operational steering committee. The latest developments presented and discussed at the regular meetings between TSOs, regulatory authorities and ACER on the implementation of the European platforms ('EB IG meetings') and the way TSOs are currently handling the coordination of the platforms' implementations (e.g. the stepwise merging of different processes or even expert groups for different platforms³⁶) show that TSOs acknowledge the existing overlaps and take account of the need to coordinate. In fact, many processes and issues such as the affected TSOs procedure pursuant to Article 150 of Commission Regulation (EU) 2017/1485 establishing a guideline on electricity transmission system operation (red button approach), invoicing of TSO-TSO settlement, reporting and transparency obligations are already streamlined or discussed together (e.g. IT security), as communicated by the TSOs in the EB IG meetings. Furthermore, ACER was not able to assess whether the process to organise joint sessions is efficient and effective as TSOs did not provide any further explanations. ACER discussed with the TSOs and highlighted the risk that such structure could lead to synergies being lost, because issues are first discussed separately and only handed on to the steering committee of the mFRR-Platform, dealing with common issues once (and if) decided so in the separate committees. Indeed, such a decision-making process could lead to important common (cross-platform) issues either being addressed individually by each platform at different points in time and in different ways, or being referred to a joint level with delay. Such a decision-making process is not compliant with the requirements mentioned in Recital (94) above. On the other hand, a centralised process whereby cross-platform functions and other cross-platform issues are directly and regularly discussed at a joint level ensures efficient and effective governance, operation and regulatory oversight in accordance with Article 21(3)(e)(ii) of the EB Regulation (and in particular the requirements mentioned in Recital (94) above). Furthermore, such a centralised process will ensure compliance with the requirement to coordinate the different functions in accordance with Article 21(3)(e)(i) of the EB Regulation. This is

³⁵ Explanatory document 1, p. 8.

³⁶ The merging of the expert groups of aFRR and IN was announced in the EB IG meeting on 30 June 2022.

particularly important in the light of the TSOs designated to perform the different functions of the platforms³⁷ and the interdependencies resulting from such a setup.³⁸

- (97) The TSOs did not agree as they deem that any further centralisation would require additional effort, though TSOs did not elaborate on the extent that such an effort may imply, and would introduce inefficiencies in their existing setup processes while they currently need to dedicate their focus on the successful connection of all TSOs to the different platforms. The TSOs argued that their timely implementation of the different platforms so far has proven that their proposed and currently used setup is efficient and effective. Furthermore, they deemed the topics of common interest to be very limited and proposed to only formalise the possibility to have an ad-hoc alignment in joint meetings, if needed.
- (98) ACER explained that a one-off effort to switch to a more centralised approach may indeed be required, but deems it necessary to ensure the efficiency of the management of balancing markets and considers it, in particular, necessary to achieve the objectives and requirements of the EB Regulation. In that regard, ACER also provided examples of best practice in other areas of the electricity market, further confirming the need for and the benefits of a more centralised approach in situations involving a multiple entity set-up. Furthermore, ACER considers the fact that the platforms are operational not as valid proof for the governance setup to be efficient but is of the opinion that the EB Regulation requires TSOs to assess and address those aspects within the aFRRIF. The TSOs did not demonstrate how directly managing cross-platform functions and issues at a joint level would lead to introducing inefficiencies to their processes compared to a situation where those same cross-platform issues are discussed by the (same) TSOs multiple times in the context of the separate meetings individually held for each platform, and which may, in a second step, be discussed again by all TSOs together if those issues are eventually referred to a joint level. ACER considers that inefficiencies rather occur in the latter case, thereby not complying with Article

³⁷ Namely, (i) the same TSO to perform the CMF for all the European balancing platforms, whereas (ii) the AOF and the TSO-TSO settlement function are performed by another TSO for the mFRR-Platform, and (iii) a third TSO performs the AOF/imbalance netting process function and the TSO-TSO settlement function for both the aFRR- and IN-Platform (Explanatory Document 1, p. 5).

³⁸ E.g. (i) the need for the designated TSO to perform and coordinate the CMF for all European balancing platforms, in cooperation with all member TSOs of these platforms; (ii) the need for the designated TSO to coordinate the CMF with the other functions of the aFRR-Platform together with the other designated TSO and in cooperation with the other member TSOs, but also to coordinate the CMF with the other functions of the mFRR-Platform and the IN-Platform together with the third designated TSO and in cooperation with the other member TSOs of these platforms; (iii) given that both mFRR- and aFRR-Platforms have an AOF, common cross-platform issues will arise as regards this function that will need to be managed by the designated TSOs as well as the other member TSOs of these platforms; (iv) given that all European balancing platforms have a TSO-TSO settlement function, common cross-platform issues will arise as regards this function that will need to be managed by the designated TSOs as well as the other member TSOs of these platforms; and (vi) given that the same TSO performs the functions other than the CMF for the aFRR- and IN-Platforms, this will require further coordination of these functions within and between platforms as well as between the other member TSOs of these platforms.

21(3)(e)(i) and (ii) of the EB Regulation. Moreover, ACER understands from past discussions that some topics were referred to further joint discussion for two or all platforms rather late or only were discussed jointly due to ACER's or regulatory authorities' interventions (such as the red button approach or the reporting obligations under the REMIT).

- (99) Consequently, and after further discussions with regulatory authorities, ACER included in Article 6(e) and (f) of Annex I³⁹ the establishment of a joint steering committee as a joint decision-making body and superior governance structure for all European balancing platforms having a cross-platform function such as the CMF and for all cross-platform issues, to ensure that the synergies between the different functions and platforms are realised. The joint steering committee is superior to expert groups (e.g. for different platforms) with representatives of all respective member TSOs.⁴⁰ The expert groups on specific topics – being the expert bodies preparing materials, evaluating and proposing concepts – feed information to the joint decision-making body on each implementation project. Thereby the structure allows for taking account of possible remaining technical differences of the functions (e.g. the AOF of mFRR and aFRR platform being designed differently) as described by TSOs during the hearing phase. The joint steering committee shall take binding decisions on any matter related to the cross-platform functions and cross-platform issues by voting of all member TSOs of all involved European balancing platforms. The joint steering committee shall also take binding decisions on any matter related to the AOF and the TSO-TSO settlement function of the aFRR-Platform. With regard to the latter decisions, depending on the concerned subject-matter of such a decision and in accordance with the decision-making principles referred to in Article 6(f) of Annex I,⁴¹ these decisions are voted by all TSOs, all member TSOs of the aFRR-Platform or the member TSOs of the aFRR-Platform of a concerned geographical area as already applicable under ACER Decision 02/2020. This is to ensure that in case member TSOs are concerned only the member TSOs of the aFRR-Platform are voting on aFRR-Platform issues which have no cross-platform relevance. ACER's amendment further clarifies the tasks of the (joint) steering committee including both the management of the implementation of the platforms (including operational procedures) as well as the organisation of an operational committee deciding on day-to-day situations and supervising incident management. Finally, ACER also specified that the (joint) steering committee will be in charge of coordinating the establishment of the annual work programme to be provided by all member TSOs to all regulatory authorities and ACER (see Section 6.2.5.4 below) and the report on efficiency and effectiveness to

³⁹ Article 14(5) and (6) of the amended aFRRIF.

⁴⁰ As well as some minor changes to merge all provision related to governance. In particular, paragraph 18 of Article 3 of the aFRRIF was moved to Article 14 of the aFRRIF to merge all provision related to governance there (cf. Article 6(b) of Annex I being Article 14(2) of the amended aFRRIF).

⁴¹ See also Article 14(6) of the amended aFRRIF.

be provided by all member TSOs to all regulatory authorities and ACER (see Section 6.2.5.5 below).

- (100) The need for this amendment is further confirmed by the current practice used for the governance of another multiple-entity setup in the electricity market, namely the context of market coupling pursuant to the CACM Regulation.⁴² In this case, experience gained and lessons learnt over the past years, led TSOs and nominated electricity market operators ('NEMOs'), which are jointly organising the different parts of the market coupling, to voluntarily establish a joint 'market coupling steering committee' superior to different subgroups mainly for the day-ahead and intraday coupling as well as an operational committee. TSOs and NEMOs, even though the current CACM Regulation does not require this explicitly, worked on this achievement as they are of the opinion that it will ensure further coordination, foster efficiency and create faster decision-making mechanisms.⁴³ In particular, TSOs and NEMOs deemed such a joint structure necessary to provide improved governance, operational developments and greater collaboration with all stakeholders. Regulatory authorities agree and support this development, as this was also included in ACER's reasoned amendments to the CACM Regulation.⁴⁴ ACER therefore considers that given that TSOs (and NEMOs) voluntarily deemed such a joint structure approach appropriate to provide efficient governance, operation and collaboration, the establishment of the joint steering committee for the European balancing platforms is equally appropriate to ensure compliance with the requirements under Article 21(3)(e)(ii) and (i) of the EB Regulation, which specifically mandate efficient and effective governance, operation and regulatory oversight as well as coordination of the different functions, as explained above.
- (101) A more centralised governance structure as described above ensures efficient and effective governance and decision-making complying with the requirements set by Article 21(3)(e)(ii) of the EB Regulation, as well as sharing of information between involved parties. It also complies with the requirement set by Article 21(3)(e)(i) of the EB Regulation on the need to coordinate the different functions. Finally, it enhances efficiency and integration of the European balancing markets and fosters non-discrimination and equal treatment of involved parties ensuring equal access to information for all TSOs, thereby accomplishing the objectives of the EB Regulation.

6.2.5.3. *Transparency of meetings of the (joint) steering committee*

⁴² Regulation (EU) 1222/2015 of 24 July 2015 establishing a guideline on capacity allocation and congestion management

⁴³ <https://www.entsoe.eu/news/2022/02/07/tsos-and-nemos-significantly-enhance-their-cooperation-around-market-coupling-in-the-day-ahead-and-intraday-timeframe/>

⁴⁴ <https://www.acer.europa.eu/events-and-engagement/news/acer-provides-recommendation-reasoned-amendments-capacity-allocation-and>

- (102) Recital (12) of the Proposal explains that regulatory authorities can address inquiries directly and in a centralised manner to the steering committee of the mFRR-Platform acting as central point of contact for not only the mFRR-Platform but also any cross-platform topics (instead of addressing individual TSOs).
- (103) Article 21(3)(e)(ii) of the EB Regulation requires efficient and effective regulatory oversight of the multiple-entity setup, in particular one objective identified is to ensure necessary transparency towards regulatory authorities and ACER. To that end, ACER understands that Article 21(3)(e)(ii) of the EB Regulation requires to build on already existing legal requirements related to regulatory oversight and to include those together with necessary specifications within the aFRRIF in case of a multiple-entity setup. ACER understands that the steering committee of any platform, and even more so a joint steering committee as the decision-making body for all European balancing platforms having a cross-platform function such as the CMF and other cross-platform issues to manage, is of high importance for the European electricity market, for its functioning and its development. ACER understands that continuous transparency (and not just ad-hoc transparency following specific requests of regulatory authorities or ACER) with regard to the decisions made in such a forum is crucial for the proper monitoring by ACER and the regulatory authorities and, therefore, for efficient and effective regulatory oversight.
- (104) TSOs explained that the currently established interaction via the quarterly EB IG meetings already addresses regulatory authorities' and ACER's need for information (and could be improved if needed) and raised the concern that expanding the scope of such steering committee meetings to regulatory authorities or ACER would impact its efficiency. However, as the EB IG meetings are not formally established in the aFRRIF or in any other legal provision, ACER considers that they do not provide the necessary certainty for ensuring transparency and for enabling efficient and effective regulatory oversight.
- (105) ACER elaborated on different options to address this risk of lack of transparency. Following the approach taken under the CACM Regulation as described in Recital (100), ACER first proposed that a limited representation of regulatory authorities and ACER would be invited to the (joint) steering committee meetings as observers (access to information without delay, but not expressing positions). TSOs, as also presented in their response to the hearing, deemed any such addition not necessary and proposed to rather formalise the EB IG meetings, if needed. ACER, taking into account the TSOs' view, amended the Proposal by providing for the possibility for TSOs to voluntarily invite regulatory authorities and ACER as observers to the (joint) steering committee meetings, or to provide regulatory authorities and ACER with the conclusions and findings of these meetings within two weeks in case they did not attend them (cf. Article 6(d) and (f) of Annex I⁴⁵). ACER considers that the implementation by TSOs of either option guarantees efficient and effective regulatory

⁴⁵ Article 14(4)(f) and Article 14(6) of the amended aFRRIF.

oversight as required by Article 21(3)(e)(ii) of the EB Regulation, and that a voluntary approach to invite regulatory authorities and ACER may show full cooperation as well as a pro-active approach by the TSOs to that end. In any event, this is without prejudice to the right of the regulatory authorities and ACER to request information to TSOs on the (joint) steering committee meetings for the purposes of fulfilling their regulatory oversight duties.

6.2.5.4. *Establishment of an annual work programme*

- (106) The Proposal does not include any project management provisions and especially lacks the coordination of the functions and multiple entities to this end.
- (107) Article 21(3)(e)(ii) of the EB Regulation requires efficient and effective governance, and Article 21(3)(e)(i) of the EB Regulation requires to coordinate the different functions. In ACER's understanding, these provisions thus include the establishment of project management. As multiple entities are working together with a high need to coordinate, a common work programme is also necessary to ensure efficient and effective operations in accordance with Article 21(3)(e)(ii) of the EB Regulation in joint reading with Article 21(3)(e)(i) of the EB Regulation. In particular, ACER understands that coordination and communications between different functions and entities is required. Furthermore, the clear assignment of tasks and responsibilities is the basis for efficient and effective regulatory oversight as. These requirements are not only related to one platform being operated by different entities but also to several platforms for which a cross-platform function such as the CMF is operated by the same entity. For instance, a change to the CMF would affect all platforms, testing for one platform needs to be considered also in the planning for another platform. The requirements also relate to several platforms being operated by various entities but having common cross-platform issues. ACER deems the project planning of all related platforms to be highly interdependent.⁴⁶ The lack of any provision requiring the necessary coordination also in the project management poses a risk to the timely implementation of the platforms and a risk of unrealised synergies.
- (108) TSOs explained that information on the project management and work programme applied by TSOs is already provided through interactions with regulatory authorities and ACER via the EB IG meetings or other reports on the balancing markets, such as the cost report in accordance with Article 23 of the EB Regulation or the balancing market report in accordance with Article 59 of the same Regulation. ACER understands from the discussions and information received from the TSOs that there is indeed project management and coordination between the TSOs already in place to ensure the timely implementation of the platforms. However, this is not formalised within the Proposal. Furthermore, ACER does not agree with TSOs that reporting on

⁴⁶ For a more detailed description of the interdependencies and joint topics, also refer to Section 6.2.5.2. As an example, in the latest EB IG meeting on 30 June 2022, TSOs presented that the go-live approach for mFRR- and aFRR-Platform are aligned within the project management.

historic years and quarterly updates on their indicative planning provide the same information as a forward-looking work programme. Thus, the Proposal does not fulfil the requirements of efficient and effective governance, operation and regulatory oversight as well as of coordinating the different functions as indicated in Recital (107) above.

- (109) Therefore, ACER included Article 7 of Annex I⁴⁷ requiring the submission by all member TSOs of an annual work programme for the aFRR-Platform (including the already existing project management plan) to regulatory authorities and ACER, including the interdependency with other European balancing platforms as regards cross-platform functions such as the CMF and other cross-platform issues. It should include details on projects, timelines, related budget, responsibilities of entities and member TSOs, risks and mitigation measures. The establishment of the annual work programme will be coordinated by the (joint) steering committee as it is the decision-making body of the aFRR-Platform and given that cross-platform functions and issues will be included in the annual work programme. The annual work programme constitutes a longer-term and forward-looking planning and a specific and formal document with clearly defined content in addition to the current provision of information, e.g. through the EB IG meetings where rather short-term updates are communicated. In addition, such an overview with clearly assigned responsibilities and tasks provides the basis for efficient and effective regulatory oversight and for the assessment of cost efficiency. This also allows TSOs which are not designated but rely on the performance of the designated entities to better assess the entities' compliance with the applicable legal and regulatory framework, contractual agreements and agreed deadlines, thereby ensuring equitable treatment and non-discrimination. The implementation of such an annual work programme also supports the objectives of the EB Regulation, and in particular Article 3(1)(a) and (d) thereof by fostering transparency in balancing markets and by contributing to the efficient long-term operation and development of the electricity transmission system and electricity sector in the Union while facilitating the efficient and consistent functioning of the balancing markets.

6.2.5.5. *Reporting on effectiveness and efficiency*

- (110) Article 21(3)(e)(ii) of the EB Regulation expressly provides that “*the proposed setup of the European platform and allocation of functions ensures efficient and effective governance, operation and regulatory oversight of the European platform as well as, supports the objectives of this Regulation*”. Article 3(1)(b) thereof specifies that the EB Regulation aims at “*enhancing efficiency of balancing as well as efficiency of European and national balancing markets*”.
- (111) According to ACER's understanding, the multiple-entity setup proposed by TSOs is based on already existing infrastructure and expertise gained by the respective entities

⁴⁷ Article 15 of the amended aFRRIF.

designated as described further in the External Report. The chosen setup, as explained by TSOs, leads to less costs in the short-term implementation of the aFRR-Platform as well as the other European balancing platforms. Furthermore, TSOs stated that setting up a new entity designated for all platforms (i.e. a single entity) would lead to delays in the implementation of the platforms. ACER agrees that in the short run, the chosen setup seems to be the best fit for a timely and cost-efficient implementation of the platforms. However, based on the information available, ACER is not able to assess the future costs and benefits of the multiple-entity setup after this initial phase. Hence, ACER cannot conclude that the Proposal does support the requirement of efficient and effective operations in accordance with Article 21(3)(e)(ii) of the EB Regulation, in particular its importance also in the long-run, and, in general, the objectives of the EB Regulation, in particular Article 3(1)(b) and (d) of the EB Regulation aiming at enhancing the efficiency of European balancing markets.

- (112) TSOs explained that in their view the assessment of efficiency and effectiveness is not a continuous process, but a one-time assessment for establishing or amending the proposed setup, and therefore out of scope of the aFRRIF. Furthermore, TSOs are of the opinion that any addition to already existing reporting under Article 59 of the EB Regulation is not possible within the aFRRIF only being an implementing act and therefore only having limited scope of application.
- (113) ACER does not agree with these views as it understands, as described above, the efficiency of balancing markets is a general objective of the EB Regulation (Article 3(1)(b) thereof), further provided in its Article 21(3)(e)(ii). Any implementation and setup chosen to perform common European tasks, such as the operation of the aFRR-Platform, should strive for efficiency not only for the first establishment but also in the long-run to finally reduce costs for end-consumers. In addition, a continuous evaluation is intended for any methodology in the EB Regulation as Article 6(3) thereof gives TSOs and ACER or regulatory authorities the possibility to request amendments.
- (114) Consequently, based on Article 21(3)(e)(ii) of the EB Regulation, ACER added a new provision (Article 5(b) and (c) of Annex I⁴⁸), requiring a reporting on the effectiveness and efficiency of the currently applied setup including multiple entities. Reporting on effectiveness and efficiency will enable ACER to perform its functions of regulatory oversight in compliance with Article 21(3)(e)(ii) of the EB Regulation. The establishment of the reporting on the effectiveness and efficiency will be coordinated by the (joint) steering committee as it is the decision-making body of the aFRR-Platform and given that cross-platform functions and issues will be included in the report on the effectiveness and efficiency. After the implementation of the CMF, the report shall be submitted every second year and shall be compiled for all European balancing platforms having a cross-platform function such as the CMF. It can be

⁴⁸ Article 13(8) and (9) of the amended aFRRIF.

submitted together with the already existing report under Article 59 of the EB Regulation. The assessment should at least⁴⁹ include indicators reflecting the availability of the platforms, the incidents in operations with a specific focus on interoperability incidents between the different entities performing the functions and the identification of problems and recommendations for further developments of the platforms in order to allow assessing the compliance with the requirement of effective and efficient operation under Article 21(3)(e)(ii) of the EB Regulation. In order to minimise the additional efforts of TSOs, this assessment could be included in the report (and the respective processes) made in accordance with Article 59 of the EB Regulation after the implementation of the CMF as e.g. the performance indicators of Article 59(4)(e) and (f)⁵⁰ of the EB Regulation and the objectives of the report pursuant to Article 59(3)(a) and (c)⁵¹ in joint reading with the definition in Article 2(2) of the EB Regulation of “*balancing market*” being “*the entirety of institutional, commercial and operational arrangements that establish market-based management of balancing*” address similar topics. With regard to the implementation timeline of this specific amendment, ACER clarified that this is only to apply after the CMF has been implemented because only then the setup can be assessed properly.

6.2.5.6. Cooperation framework

- (115) The Proposal includes in its Article 4 new provisions on the contractual framework⁵² to be set up for the TSOs to operate the aFRR-Platform: First, TSOs define the high-level principles which the member TSOs shall adhere to (paragraph 1) and secondly the need to clearly allocate responsibilities and obligations (paragraph 2). ACER agrees in principle to those amendment proposals, and only improved the wording and included an explicit reference to the designated entities (cf. Article 9 of Annex I⁵³).
- (116) Article 4(3)(a) of the Proposal was moved to and addressed in Article 6 of Annex I⁵⁴ on governance as outlined in Section 6.2.5.2, while Article 4(3)(b) was moved to a separate Article on dispute resolution as described further in Section 6.2.6.
- (117) Article 4(3)(c) of the Proposal addresses the cooperation of TSOs in case of requests by regulatory authorities to comply with TSOs’ obligations towards their national

⁴⁹ If member TSOs also deem other indicators appropriate to assess the effectiveness and efficiency of the current setup, these can be added.

⁵⁰ Article 59(4)(e) of the EB Regulation: ‘*the economic efficiency and reliability of the balancing markets*’; Article 59(4)(f) of the EB Regulation: ‘*the possible inefficiencies and distortions on balancing markets*’.

⁵¹ Article 59(3)(a) of the EB Regulation: ‘*describe and analyse the harmonisation and integration process as well as the progress made in terms of harmonisation and integration of balancing markets through the application of this Regulation*’; Article 59(3)(c) of the EB Regulation: ‘*assess the compatibility between the implementation projects and investigate any possible developments that pose a risk for future integration*’.

⁵² In general, ACER changed the name of this Article to ‘cooperation framework’ to better reflect the content of it and not to confuse its intention, as ACER is not approving any contracts of TSOs but rather principles for their cooperation.

⁵³ Article 17(1) of the amended aFRRIF.

⁵⁴ Article 14 of the amended aFRRIF.

regulatory authority. As described also in Section 6.2.5.5, Article 21(3)(e)(ii) of the EB Regulation requires efficient and effective regulatory oversight of the multiple-entity setup. This also includes that not only regulatory authorities but also ACER has access to all information necessary to properly monitor the aFRR-Platform and their setup as described in Recital (77)(b). TSOs consider that each TSO remains subject to the competence of its regulatory authority meaning that ACER and regulatory authorities receive from TSOs joint reporting, while each TSO delivers to its respective regulatory authorities a reporting that complies with the requirements of the national legislation. ACER agrees that TSOs are subject to their respective national regulatory authority. Regulatory authorities' competences towards TSOs are neither undermined nor limited. Nevertheless, Regulation (EU) 2019/942 expressly entrusted ACER with the competences to request from TSOs to provide information. Specifically, following Article 3(2) of Regulation (EU) 2019/942, TSOs shall provide to ACER information necessary for the purpose of carrying out its tasks under the same Regulation, including but not limited to the monitoring and analysing of the implementation of the network codes and guidelines pursuant to Articles 5(1)(e) and 15(1) of Regulation (EU) 2019/942. Consequently, and after consultation with regulatory authorities, ACER included in Article 9 of Annex I⁵⁵ that the proposed Article on the cooperation of TSOs in case of information requests shall also apply for requests issued by ACER (without prejudice to Article 11 of the EB Regulation). However, TSOs can disclose to other TSOs requests for information submitted by regulatory authorities provided that this is allowed under the applicable national law or laws.

- (118) Furthermore, Article 4(3)(d) of the Proposal requires TSOs to define day-to-day operational procedures including at least the incident resolution, fall-back and back-up procedures, data processing and validation, as well as how all member TSOs coordinate to that end. To fully address the requirements of Articles 21(3)(e)(ii) of the EB Regulation, ACER understands that the aFRRIF needs to ensure efficient and effective decision-making and coordination between different functions (cf. Recital (75)(a)) as well as efficient and effective operations on day-to-day basis including back-up situations and necessary communications (cf. Recitals (76)(a) and (b)). This is to also ensure the objectives of Article 3(1)(b) and (c) of the EB Regulation, as well as the efficient and effective operations including in case of back-up or fall-back situations as described in Recital (76)(c). After discussions with TSOs, ACER therefore amended the provisions on the establishment of the day-to-day operational procedures in Article 9 of Annex I⁵⁶ given that efficient and effective governance, including necessary information exchange and coordination, can be ensured by defining the respective body to be deciding on such procedures. Therefore, ACER clarified that operational procedures shall be approved by the (joint) steering committee and that they shall take proper account of the coordination need due to the

⁵⁵ Article 17(7) of the amended aFRRIF.

⁵⁶ Article 17(6) of the amended aFRRIF.

multiple-entity setup. The topics to be covered were also further specified by adding ordinary operations and communication procedures in case of back-up and fall-back.

- (119) In addition, Article 4(3)(e) of the Proposal requires the contractual framework of TSOs to include a liability regime and conditions on renewal and termination of contracts but does not specify any further details or high-level principles. ACER understands that efficient and effective operation of the platform needs to incentivise the continuous operation of the platform by setting up a well-defined and detailed liability regime and efficient and effective governance requires that TSOs have contractual measures at hand to ensure this continuity (cf. Recital (75)(f) and (76)(a)). Any management failure to implement the decisions or requests from all TSOs or a disagreement between all TSOs and the TSOs designated as the entities performing the functions of the aFRR-Platform may create significant risk for interruption of the implementation or operation of the aFRR-Platform and thereby may endanger the security of operations and further on the integration of EU balancing markets envisaged by Article 3(1)(c) of the EB Regulation. The TSOs consider that liabilities are to be defined without restrictions (contractual freedom) which cannot be limited without justified reasons. ACER agrees but considers that TSOs are bound by the EB Regulation. ACER, not having insight into the TSOs' contractual agreements, has not assessed the compliance with the EB Regulation's objectives and provisions on the multiple-entity setup in accordance with Articles 21(3)(e)(ii) of the EB Regulation. Therefore, ACER added high-level principles to be covered by the liability regime as provided for in Article 9 of Annex I.⁵⁷ These principles ensure that the agreements (i) define liabilities arising from any actions or omissions of TSOs or designated entities, especially in case of failure of those entities to comply with the deadlines, (ii) include obligations to ensure smooth transition, and (iii) include clear deadlines to this end which can be linked to the liability regime. By this, ACER allows for the TSOs to decide in detail on the contractual agreements and to restrict the contractual freedom only as much as necessary to ensure the compliance with the EB Regulation.
- (120) Article 4(3)(f) of the Proposal requires that the IT solutions shall be owned and governed by all member TSOs. ACER agrees to this, having this outlined also in the objectives as described in Recital (75)(c), and after consulting with TSOs further clarified the ambiguous term 'IT solutions' by describing it with the intellectual property to operate the functions, in line with TSOs' approach and as communicated during the discussions with them (cf. Article 9 of Annex I⁵⁸).

6.2.5.7. *Back-up principles*

- (121) The Proposal does not include any provisions on back-up principles apart from the provisions referred to in Section 6.2.5.6 requiring TSOs to define necessary procedures including back-up situations (Article 4(3)(d) of the Proposal). However,

⁵⁷ Article 17(2) and (3) of the amended aFRRIF.

⁵⁸ Article 17(5) of the amended aFRRIF.

TSOs explained in the Explanatory document 1 and in their responses in the hearing phase that immediate back-up measures such as redundant data centres and communication channels are envisaged for each designated entity.

- (122) Efficient and effective operations according to Article 21(3)(e)(ii) of the EB Regulation requires the aFRRIF to ensure continuity of the platform's operations with regard to the aspects described in Recitals (76)(a) to (c), in particular in case of irregularities and failure of different functions or entities designated to perform those functions, thereby taking into account also back-up situations. Moreover, the EB Regulation expressly aims at enhancing efficiency and ensuring operational security (Article 3(1)(b) and (c)). The EB Regulation also requires TSOs to ensure system security (Article 3(2)(f)). ACER deems this especially important for a multiple-entity setup as this requires well-defined coordination and communication of the different entities performing different functions of each platform as well as the link between the platforms due to the CMF being operated by one entity for several European balancing platforms. This is also acknowledged by Article 21(3)(e)(i) of the EB Regulation stating that the proposal shall take full account of the need to coordinate the different functions allocated to entities operating the aFRR-Platform.
- (123) Therefore, after consulting with TSOs and following also the responses to ACER's public consultation highlighting the importance of system security, ACER included in Article 10 of Annex I⁵⁹ high-level principles for immediate back-up measures such as the requirement that the hosting and communication infrastructure of the entities designated to perform the functions of the aFRR-Platform needs to be equipped with back-up solutions to address short-term risks for the secure operations of the aFRR-Platform.
- (124) Despite those amendments and the additions as described in Section 6.2.5.6 to ensure continuity of operations of the aFRR-Platform at all times, one major risk identified by ACER remains: the setup proposed by TSOs does not prevent a lock-in (e.g. in case of switch of the designated entity due to renewal, changes in the ownership, non-compliance of the designated entities) with one entity designated to perform the functions of the aFRR-Platform. This is due to the fact that the entities designated to perform the functions are owning the infrastructure to perform their obligations (instead of member TSOs which are however sharing the respective costs) and are gaining further specific knowledge while performing the functions. This makes it difficult for alternative setups to compete with the entities initially designated and makes a switch of designated entity more and more unlikely as it becomes burdensome. The overarching objective to aim for would therefore be that all member TSOs own the infrastructure necessary to host the functions to ensure joint ownership of the intellectual property and infrastructure, ensure equitable treatment of all TSOs, continuity of the functions as well as smooth operations in case of hand-over to

⁵⁹ Article 18(1) and (2) of the amended aFRRIF.

another designated entity as defined in Recitals (75)(c), (d) and (f) as well as Recital (76)(d).

- (125) During the consultation phase, TSOs stated that such lock-in risk is already addressed by means of contractual provisions which allow for changing the entity designated earliest after 5 years or earlier in case of serious breaches by this entity. Furthermore, TSOs argued that as the designated entity itself is a TSO, it is in its interest to keep the operations up running as it has its balancing obligations to comply with and this leads to the functions remaining operational at all times. ACER understands that any contractual framework can be ended in case of serious breaches but does not see any specific efforts by TSOs to address the risk identified. This is even further emphasised by the fact that TSOs explained in their Explanatory document 1 and in the discussions that the contracts are subject to automatic renewal for another 5 years. Additionally, TSOs did not explain or include any details on how the continuity of the functions would be upheld. Therefore, taking into account the advantages of the proposed setup based on already existing knowledge and infrastructure provided by the entities to be designated, ACER investigated on other options to address this problem and invited the TSOs to propose different solutions. In particular, ACER suggested TSOs to consider the cloud option that is implemented for the European platform for the exchange of balancing energy from replacement reserves (pursuant to Article 19(1) of the EB Regulation). According to the TSOs' statement in the oral hearing, due to the handling of real-time data, all TSOs did not deem a cloud solution as appropriate and the member TSOs have decided to operate with a physical infrastructure. TSOs further explained that they would incur costs for any additional back-up. Any further availability of another entity or of the entities to provide back-up for other functions would need the setup of at least the hardware necessary to run the additional platform functions, establishment of redundant communication and sufficient personnel (also on the side of IT suppliers). However, the TSOs did not propose any solution to the risk identified but only reiterated that the contractual agreements allow for a change of the designated entity.⁶⁰
- (126) Following all these discussions and after consultation with regulatory authorities, including the amendment adopted by the Board of Regulators on 21 September 2022, ACER understands that there are various parameters, including the cost aspect as well as technical specificities, which have to be taken into account when finding the best solution to address the lock-in risk. ACER acknowledges that a full cost as well as a technical assessment of all the possible options (including the one proposed by the TSOs, through their contractual agreements, which could lead to long hand-over periods with difficulties to estimate costs) is a lengthy process. This is especially the case since the operation of the aFRR-Platform has only started, and the technical aspects that are still being clarified call for further investigation. Therefore, ACER

⁶⁰ The relevant contractual framework was not included in the TSOs' submission of the Proposal to ACER. ACER did not review this contractual framework.

invites the TSOs to further evaluate the different possibilities of addressing the lock-in risk and develop processes to ensure that this risk is mitigated.

- (127) ACER's amendment therefore ensures that the aFRRIF complies with the provisions on efficient and effective governance and operation pursuant to Article 21(3)(e)(ii) of the EB Regulation as well as the objectives under its Article 3(1)(b) and (c) and Article 3(2)(f).

6.2.5.8. *Fall-back principles*

- (128) The Proposal does not include any provision on fall-back principles apart from the provisions in Article 4(3)(d) requiring TSOs to define necessary procedures including fall-back situations. Article 3 of Annex I of ACER Decision 02/2020 includes principles for fall-back situations in case of failure of the AOF but the CMF failure is not yet included.

- (129) Article 21(3)(e)(ii) of the EB Regulation requires efficient and effective operation, in particular also for fall-back situations as described in Recital (76)(c) as well as (b) taking into account the need for the coordination of functions which increases in the multiple-entity setup. Moreover, the EB Regulation expressly aims at enhancing efficiency and ensuring operational security (Article 3(1)(b) and (c)). The EB Regulation also requires TSOs to ensure system security (Article 3(2)(f)).

- (130) Therefore, in agreement with regulatory authorities and TSOs and also following the responses to the ACER's public consultation highlighting the importance of system security, ACER introduced minor changes with Article 2(a) of Annex I.⁶¹ As described, those changes reflect the changes in operations due to the implementation and the proposed designation of multiple entities to perform the functions of the aFRR-Platform. After consultation of the TSOs, this new paragraph was added to clarify the fall-back measures in case of a failure of CMF and its back-up (Article 10 of Annex I⁶²). In such case, the current processes without the CMF being implemented, whereby each participating TSO individually sends the available cross-zonal capacities to the aFRR-Platform, should apply. This was clarified after the consultation process and receiving ILR's written input, that it is indeed only "participating TSOs" sending such data. This is also in line with the market participants' views highlighting the priority of system security.

6.2.6. Requirement of Article 21(3)(e)(iii) of the EB Regulation

- (131) The third and last additional requirement in case multiple entities are designated, is stated in Article 21(3)(e)(iii) of the EB Regulation: "*Where the TSOs propose to designate more than one entity, the proposal shall demonstrate and ensure:*

⁶¹ Article 3(11) of the amended aFRRIF.

⁶² Article 18(1) and (2) of the amended aFRRIF.

(iii) an effective coordination and decision making process to resolve any conflicting positions between entities operating the European platform;”.

(132) Article 4(3)(b) of the Proposal (together with its recital 14(e)) clearly outlines the process to be followed in case of any arising dispute, starting with a dispute notice to be provided including all necessary details to further proceed to resolve the conflict. In addition, the steps of the settlement process are described and its outcome is defined as binding. It is further clarified that such process shall not preclude any interim or relief measure.

(133) ACER in general agrees with the steps and measures proposed. Amendments by ACER relate to the wording, to reflect the changes in the governance set-up (cf. Section 6.2.5.2) and to clarify that also all disputes including the designated entities performing the functions of the aFRR-Platform are covered. For better readability of the aFRRIF, ACER dedicated a specific Article 8 in Annex I⁶³ to the dispute resolution. Therefore, the amended Annex I fulfils the objectives of the EB Regulation and the specific requirements set by Article 21(3)(e)(iii) of the EB Regulation.

6.2.7. Amendments necessary to ensure legal clarity and consistency with existing legal provisions

(134) ACER amended the definitions of the approved aFRRIF according to the amendments as described in the previous sections. In particular, it amended the definition of ‘member TSO’ (cf. Article 1(b) of Annex I⁶⁴) to make clear that these are TSOs which have acquired member status (at the end all EU TSOs will become member TSOs) and only TSOs to which the EB Regulation applies.

(135) ACER amended paragraph 3(a) of Article 5 of Annex I of ACER Decision 02/2020 (roadmap for the implementation of the aFRR-Platform) to be in line with Article 21(4) of the EB Regulation which requires ‘all TSOs’ to designate the entities performing the functions of the aFRR-Platform. As this paragraph put this obligation on ‘member TSOs’, being a group of TSOs which have joined the aFRR-Platform (cf. definition in Article 1(b) of Annex I), so not necessarily the same as ‘all TSOs’, ACER amended it to ensure compliance with the EB Regulation.

(136) Furthermore, the Proposal addresses the entities designated to perform the functions of the aFRR-Platform as ‘Common Service Providers’ to better link the aFRRIF to the contractual agreements between TSOs. Article 21(3)(e) of the EB Regulation requires TSOs to submit a “*proposed designation of the entity or the entities that will perform the functions*” and Article 21(4) of the EB Regulation specifies further that “*all TSOs shall designate the proposed entity or entities*”. To reflect these requirements, ACER

⁶³ Article 16 of the amended aFRRIF.

⁶⁴ Article 2(m) of the amended aFRRIF.

amended the wording throughout the aFRRIF to the effect that the term ‘Common Service Providers’ refers to “*entities designated to perform the functions*”.

- (137) As proposed by TSOs and supported by the responses to ACER’s public consultation, ACER included Article 5(a) of Annex I⁶⁵ on TSOs’ obligations on transparency, in particular their obligation to “*publish relevant information stemming from this aFRRIF in a commonly agreed harmonised format at least through the ENTSO-E central information transparency platform established pursuant to Article 3 of Regulation (EU) No 543/2013 and Article 12 of the EB Regulation.*”
- (138) With regard to Article 17 of Annex I of ACER Decision 02/2020, ACER clarified paragraph (3) (cf. Article 11(a) of Annex I⁶⁶) requiring TSOs to publish a detailed description of the optimisation algorithm pursuant to Article 12(3)(k) of the EB Regulation. ACER, for legal clarity, specified that “*this description shall ensure that the interested public is able to understand the functioning of the algorithm.*” This is to clarify the initial intention to ensure transparency of balancing markets also for the public. Such description was already published by TSOs in April 2022, as they also explained during the hearing phase. Therefore, this change reflects the current situation.
- (139) In general, ACER adapted the Proposal, where necessary, to streamline the wording throughout the aFRRIF.

7. CONCLUSION

- (140) For all the above reasons, ACER considers the Proposal in line with the requirements of the EB Regulation, provided that the amendments described in this Decision are integrated in the Proposal, as presented in Annex I. The amendments, which have been consulted with the TSOs and ENTSO-E, are necessary to ensure that the Proposal is in line with the purpose of the EB Regulation and contribute to market integration, non-discrimination, effective competition and the proper functioning of the market.
- (141) Therefore, ACER approves the Proposal subject to the necessary amendments and to the necessary editorial amendments. To provide clarity, Annex I to this Decision sets out the Proposal as amended and approved by ACER,

HAS ADOPTED THIS DECISION:

Article 1

⁶⁵ Article 13(7) of the amended aFRRIF.

⁶⁶ Article 21(3) of the amended aFRRIF.

The amendment to the implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation in accordance with Article 21 of Regulation (EU) 2017/2195 is adopted as set out in Annex I to this Decision.

Article 2

This Decision is addressed to all TSOs:

50Hertz Transmission GmbH,
Amprion GmbH,
AS Augstsprieguma tīkls,
Austrian Power Grid AG,
BritNed Development Limited (NL),
BritNed Development Limited (UK),
C.N.T.E.E. Tranelectrica S.A.,
ČEPS a.s.,
Creos Luxembourg S.A.,
EirGrid Interconnector DAC,
EirGrid plc,
Elektroenergien Systemen Operator EAD,
Elering AS,
ELES, d.o.o.,
Elia System Operator NV/SA,
Energinet Electricity System Operator,
Fingrid Oyj,
HOPS d.o.o.,
Hrvatski operator prijenosnog sustava,
Independent Power Transmission Operator S.A.,
Kraftnät Åland Ab,
Litgrid AB,
MAVIR ZRt,
Moyle Interconnector Limited,
National Grid Electricity Interconnector Limited,
National Grid Electricity System Operator,
Nemo Link Limited,
Polskie Sieci Elektroenergetyczne,
Red Eléctrica de España S.A.,
Rede Eléctrica Nacional, S.A.,
Réseau de Transport d'Electricité,
Slovenská elektrizačná prenosová sústava, a.s.,
Svenska kraftnät,
System Operator for Northern Ireland Ltd,
TenneT TSO B.V.,
TenneT TSO GmbH,
Terna Rete Elettrica Nazionale S.p.A.,

TransnetBW GmbH and
VÜEN-Vorarlberger Übertragungsnetz GmbH.

Done at Ljubljana, on 30 September 2022.

- SIGNED -

*For the Agency
The Director*

C. ZINGLERSEN

Annexes:

Annex I – Amendment to the Implementation framework for the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation in accordance with Article 21 of the Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing

Annex Ia (for information only) – Amendment to the Implementation framework for the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation in accordance with Article 21 of the Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing – with track changes of the Proposal to Annex I

Annex II (for information only) – Consolidated version of the amended Implementation framework for the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation in accordance with Article 21 of the Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing

Annex IIa (for information only) – Consolidated version of the amended Implementation framework for the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation in accordance with Article 21 of the Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing – with track changes of Annex I to ACER Decision 02/2020

Annex III (for information only) – Public consultation on the amendments to the mFRR, aFRR and IN Implementation Frameworks

In accordance with Article 28 of Regulation (EU) 2019/942, the addressees may appeal against this Decision by filing an appeal, together with the statement of grounds, in writing at the Board of Appeal of the Agency within two months of the day of notification of this Decision.

In accordance with Article 29 of Regulation (EU) 2019/942, the addressees may bring an action for the annulment before the Court of Justice only after the exhaustion of the appeal procedure referred to in Article 28 of that Regulation.