

**DECISION No 26/2020**  
**OF THE EUROPEAN UNION AGENCY**  
**FOR THE COOPERATION OF ENERGY REGULATORS**

**of 23 October 2020**

**ON THE REQUEST OF REGULATORY AUTHORITIES OF AUSTRIA  
AND ITALY TO EXTEND THE PERIOD FOR REACHING AN  
AGREEMENT ON THE REQUEST FOR EXEMPTION OF THE  
INTERCONNECTION PROJECT SOMPLAGO-WÜRMLACH**

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 Regulators<sup>1</sup>, and, in particular, Article 6(10) thereof,

Having regard to Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity<sup>2</sup>, and, in particular, Article 63(5) thereof,

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

Having regard to the favourable opinion of the Board of Regulators of 13 October 2020, delivered pursuant to Article 22(5)(a) of Regulation (EU) 2019/942,

Whereas:

**1. INTRODUCTION**

- (1) Article 63 of Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity provides for the

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<sup>1</sup> OJ L 158, 14.6.2019, p. 22.

<sup>2</sup> OJ L 158, 14.6.2019, p. 54.

possibility to exempt, upon request, new interconnectors from certain requirements of Regulation (EU) 2019/943 and Directive (EU) 2019/944.

- (2) According to Article 63(1), (4) and (5) of Regulation (EU) 2019/943, the regulatory authorities of the Member States concerned or, where they have not been able to reach an agreement within six months from the date on which the last of those regulatory authorities received the request for exemption, ACER shall decide on the request for exemption.
- (3) The present Decision follows from the request of the regulatory authorities of Austria, Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control), and of Italy, Autorita di Regolazione per Energia Reti e Ambiente (ARERA), to extend the six-month period for reaching an agreement on the request of Alpe Adria Energia srl for an exemption under Article 63 of Regulation (EU) 2019/943 of the 220 kV interconnection power line between Somplago, Italy and Würmlach, Austria ('Exemption request'), by six months according to Article 6(10) of Regulation (EU) 2019/942.

## **2. PROCEDURE**

- (4) In a letter dated 4 August 2020 and received by ACER on the same day, E-Control submitted, also on behalf of ARERA, a joint request to *'provide a six months extension of the time period as laid down in Art. 63 (4) subparagraph 5 of Regulation (EU) 2019/943 according to Art. 6 (10) subparagraph 3 of Regulation (EU) 2019/942 establishing a European Union Agency for the Cooperation of Energy Regulators with the effect that the NRAs concerned are required to reach an agreement on the exemption decision by 5 February 2021'*.
- (5) According to this letter, the Exemption request was received by E-Control on 20 December 2019, by the Italian Ministry of Economic Development on 24 December 2019 and by ARERA on 5 February 2020.
- (6) In support of the request for extension, the letter states in particular the following:

*'According to Art. 63 (4) Regulation (EU) 2019/943, a decision on an exemption request shall be taken on a case-by-case basis by the regulatory authorities of the Member States concerned, which are in the case at hand ARERA and E-Control. However, in the course of their assessment the concerned NRAs encountered two particular burdens to hand down a coordinated decision within the above-mentioned time period:*

*1. Firstly, the regulators' analysis, in particular in the light of the exemption criteria laid down in Art. 63 (1) (a) and (b) of Regulation (EU) 2019/943, requires complex calculation and modelling of the concerned TSOs with regard to the forecasted cross-zonal capacities which had not been performed before the Submission of the exemption application. The complexity of this calculation has well increased due to the currently on-going implementation*

*of several methodologies under the applicable network codes and guidelines as well as the “70 %-criterion” of Art. 16 of Regulation (EU) 2019/943. Therefore, the concerned NRAs require more time to be able to arrive, on the basis of the coordinated TSOs’ analysis, at a sound assessment of the impact of the proposed interconnector project.*

*2. Secondly, in accordance with ACER decision 5/18 (AQUIND decision), confirmed by BoA Decision A-001-2018, the requirement of Art. 63(1) (b) of Regulation (EU) 2019/943 is deemed not to be fulfilled when a project included in the projects of common interest list pursuant to Art. 3 (4) Regulation (EU) 347/2013 has not first made an application according to Art. 12 Regulation (EU) 347/2013. The project at hand is on the PCI-list since its first adoption in 2013 therefore the concerned NRAs deem that ACER’s decisional practice may be applicable also in the current proceedings. An action for annulment on this matter is currently pending before the Court of First Instance (T-735/18 AQUIND vs. ACER). The hearing in this case took place 30.6.2020. The concerned NRAs esteem that with an extended time frame the judicial clarification of this legal issue may contribute to the future decisions of the concerned NRAs.’*

- (7) On 23 September, E-Control and ARERA informed ACER that they had already received the results of a first calculation and they are in the phase of addressing more detailed questions and analysis to the transmission system operators, expecting the results by end of October. E-Control and ARERA also informed ACER that the project promoter is aware of their joint request for extension and the project promoter does not seem to oppose it.
- (8) On 23 September, ACER informed Alpe Adria Energia srl of the present request for extension and invited it for comments.
- (9) On 23 September 2020, a proposed draft of the present decision was submitted ACER’s Electricity Working Group for consultation in accordance with Article 24(2) of Regulation (EU) 2019/942.
- (10) On 29 September, Alpe Adria Energia srl informed ACER that it does not oppose to extend the six-month period within which the competent regulatory authorities have to reach an agreement on the request for exemption until 5 February 2021. Alpe Adria Energia srl indicated that *“The requested time extension it’s acceptable since we strongly believe in the necessity to obtain a new and suitable NTC [Net Transfer Capacity] calculation from TSOs, as we already requested with two different specific communications to NRAs last July.”*
- (11) On 30 September, ACER’s Electricity Working Group provided its comments endorsing the draft ACER decision which accepts the request of regulatory authorities of Austria and Italy to extend the period for reaching an agreement on the request for exemption of the interconnection project Somplago-Würmlach until 5 February 2021.

## **2.1. Legal framework**

- (12) According to point (a) of the second subparagraph of Article 6(10) of Regulation (EU) 2019/942, ACER shall decide on regulatory issues having effects on cross-border trade or cross-border system security which require a joint decision by at least two regulatory authorities, where such competences have been conferred on the regulatory authorities under a legislative act of the Union adopted under the ordinary legislative procedure and where the competent national regulatory authorities have not been able to reach an agreement within a period of six months from the referral of the case to the last of those regulatory authorities.
- (13) According to the third subparagraph of Article 6(10) of Regulation (EU) 2019/942, the competent national regulatory authorities may jointly request that the six-month period is extended by a period of up to six months.
- (14) According to Article 6(1) and (4) of Regulation (EU) 2019/943 (which has been adopted under the ordinary legislative procedure), the regulatory authorities of the Member States concerned shall take the decision on the request for exemption from Article 19(2) and (3) of this Regulation and from Articles 6 and 43, Article 59(7) and Article 60(1) of Directive (EU) 2019/944.
- (15) According to point (a) of the first subparagraph of Article 6(5) of Regulation (EU) 2019/943, where the regulatory authorities concerned have not been able to reach an agreement within six months from the date on which the last of those regulatory authorities received the exemption request, ACER shall take the decision on the request for exemption.

## **2.2. Admissibility**

- (16) Article 63 of Regulation (EU) 2019/943 does not explicitly provide for the possibility to extend the six-month period within which the competent regulatory authorities have to reach an agreement on the request for exemption. However, paragraph (5) of that article does condition ACER's competence on the expiry of the six-month period, also referred to in point (a) of the second subparagraph of Article 6(10) of Regulation (EU) 2019/942, and, moreover, such request for exemption is a regulatory issue in the meaning of the first subparagraph of Article 6(10) of Regulation (EU) 2019/942.
- (17) Therefore, the transfer of the decision-making competence from the regulatory authorities to ACER under Article 63(5) of Regulation (EU) 2019/943 may be subject to an extension of the six-month period to reach an agreement, in accordance with Article 6(10) of Regulation (EU) 2019/942.
- (18) The third subparagraph of Article 6(10) of Regulation (EU) 2019/942 allows for an extension of the prescribed period within which the competent regulatory authorities have to reach an agreement. The competent regulatory authorities should submit the respective request before the end of the period for reaching an agreement. The maximum period of an extension is six months.

- (19) The present request for extension relates to a request for exemption concerning a new interconnector between Austria and Italy. The requesting regulatory authorities, namely those of Austria and Italy, are therefore competent according to Article 63(4) of Regulation (EU) 2019/943. Accordingly, they are also the competent regulatory authorities which may request an extension of the six-month period for reaching an agreement in accordance with the third subparagraph of Article 6(10) of Regulation (EU) 2019/942.
- (20) Given the receipt of the Exemption request by E-Control on 20 December 2019 and by ARERA on 5 February 2020, those regulatory authorities have to decide, in accordance with Article 6(4) and (5) of Regulation (EU) 2019/943, by 5 August 2020. As their request for extension was received by ACER on 4 August 2020, it was submitted before the expiry of the six-month deadline on 5 August 2020.
- (21) In their request, the competent regulatory authorities ask for an extension until 5 February 2021. As such, the requested extension does not exceed the maximum limit of six months as provided in the third subparagraph of Article 6(10) of Regulation (EU) 2019/942.
- (22) Therefore, ACER considers this request for extension admissible.

### **2.3. Substance**

- (23) Article 6(10) of Regulation (EU) 2019/942 does not lay down requirements for the justification of an extension.
- (24) The requesting regulatory authorities of Austria and Italy invoke two reasons to justify the requested extension:
- They need more time to assess the impact of the proposed interconnector project as the exemption criteria under Article 63(1)(a) and (b) of Regulation (EU) 2019/943 require complex calculation and modelling by the concerned transmission system operators regarding the forecasted cross-zonal capacities which had not been performed before the submission of the Exemption request and which became even more complex with the on-going implementation of several methodologies under the network codes and guidelines as well as the requirement under Article 16 of Regulation (EU) 2019/943 to reach a minimum level of 70% of transmission capacity available for cross-zonal trade.
  - They consider that the question whether the requirement of Article 63(1)(b) of Regulation (EU) 2019/943 is not fulfilled where a project of common interest according to Regulation (EU) No 347/2013 has not first made an application according to Article 12 of that Regulation will be clarified by the forthcoming judgment of the General Court in case T-735/18, AQUIND v ACER, and that this clarification will be relevant for the proposed interconnector project because it is a project of common interest.

- (25) ACER agrees with the regulatory authorities of Austria and Italy that the assessment of the exemption criteria under Article 63(1) of Regulation (EU) 2019/943, in particular points (a) and (b) thereof, requires complex calculation and modelling by the concerned transmission system operators regarding the forecasted cross-zonal capacities. Given that the regulatory authorities of Austria and Italy have already received the results of a first calculation and expect the transmission system operators to provide more detailed results by 31 October 2020, ACER finds that the requested extension until 5 February 2021 is reasonable and appropriate for those regulatory authorities to obtain the necessary calculation and modelling from the concerned transmission system operators and, on that basis, to assess the criteria under Article 63(1) of Regulation (EU) 2019/943.
- (26) It is already for this reason that ACER considers an extension until 5 February 2021 justified, without it being necessary to assess whether the pending case T-735/18, *AQUIND v ACER*, would also justify that extension.
- (27) Moreover, Alpe Adria Energia srl does not oppose the requested extension.

### **3. CONCLUSION**

- (28) For the above reasons, ACER accepts the request for an extension submitted by the regulatory authorities of Austria and Italy, competent according to Article 63(4) of Regulation (EU) 2019/943, and extends the period for those regulatory authorities to reach an agreement on the Exemption request until 5 February 2021,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The period within which the regulatory authorities of Austria and Italy, competent according to Article 63(4) of Regulation (EU) 2019/943, shall reach an agreement on the request of Alpe Adria Energia srl for an exemption under Article 63 of Regulation (EU) 2019/943 of the 220 kV interconnection power line between Somplago and Würmlach, received by those authorities respectively on 20 December 2019 and 5 February 2020, is extended, in accordance with the third subparagraph of Article 6(10) of Regulation (EU) 2019/942, until 5 February 2021.

*Article 2*

This Decision is addressed to:

Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft  
(Austria)  
Autorita di Regolazione per Energia Reti e Ambiente (Italy)

Done at Ljubljana, on 23 October 2020.

**- SIGNED -**

*For the Agency  
The Director*

C. ZINGLERSEN

*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 ACER 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.*