

**DECISION No 01/2023  
OF THE EUROPEAN UNION AGENCY  
FOR THE COOPERATION OF ENERGY REGULATORS**

**of 10 January 2023**

**on the Nominated Electricity Market Operators proposal for the  
harmonised maximum and minimum clearing price methodology for the  
single day-ahead coupling**

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 5(2) thereof,

Having regard to Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management<sup>2</sup>, and, in particular, Articles 9(5), 9(6)(i) and 9(13) as well as Article 41 thereof,

Having regard to the outcome of the consultation with the concerned regulatory authorities and nominated transmission operators,

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 6 January 2023, delivered pursuant to Article 22(5)(a) of Regulation (EU) 2019/942,

Whereas:

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

<sup>2</sup> OJ L 197, 25.7.2015, p. 24

## **1. INTRODUCTION**

- (1) Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (the ‘CACM Regulation’) laid down a range of requirements for cross-zonal capacity allocation and congestion management in the day-ahead and intraday markets in electricity. These requirements also include specific provisions for the single day-ahead coupling (‘SDAC’) in accordance with Chapter 5 of the CACM Regulation and, particularly, for setting the harmonised maximum and minimum clearing prices in accordance with Article 41 of the CACM Regulation.
- (2) On 14 November 2017, ACER issued its Decision No 04/2017 on the nominated electricity market operators’ (‘NEMOs’) proposal for harmonised maximum and minimum clearing prices (‘HMMCP’) for SDAC according to Article 41 of the CACM Regulation (the ‘HMMCP for SDAC methodology’).<sup>3</sup>
- (3) The present Decision follows from the NEMOs’ proposal to amend the HMMCP for SDAC methodology as approved by Decision No 04/2017. Annex I to this Decision sets out the amended HMMCP for SDAC, pursuant to Article 41(1) of the CACM Regulation, as approved by ACER.

## **2. PROCEDURE**

- (4) On 24 May 2022, the All NEMO committee, on behalf of the NEMOs, launched a public consultation on a reassessment of the HMMCP for SDAC methodology. The consultation lasted until 15 July 2022.
- (5) By email of 15 September 2022, the All NEMO committee submitted, on behalf of all designated NEMOs, a proposal for amendments to the HMMCP for SDAC methodology in accordance with Article 41(1) of the CACM Regulation (the ‘Proposal for amendment’).
- (6) On 15 September, a teleconference with the NEMOs and the regulatory authorities was organised for NEMOs to present the Proposal for amendment.
- (7) On 19 September 2022, ACER launched a public consultation on the Proposal for amendment, inviting all market participants to submit their comments by 9 October 2022. The consultation documents focused on the Proposal for amendment with additional questions aiming at defining the stakeholders’ views on potential evolutions of the

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<sup>3</sup> Decision No 04/2017 of 14 November 2017 on the NEMOs’ proposal for harmonised maximum and minimum clearing prices for single day-ahead coupling  
[https://www.acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Individual%20decisions/ACER%20Decision%2004-2017%20on%20NEMOs%20HMMCP%20for%20single%20day-ahead%20coupling.pdf](https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Individual%20decisions/ACER%20Decision%2004-2017%20on%20NEMOs%20HMMCP%20for%20single%20day-ahead%20coupling.pdf)

Proposal for amendment. The summary and evaluation of the responses received are presented in Annex II to this Decision.

- (8) By email of 20 September 2022, the All NEMO committee specified its Proposal for amendment and clarified the proposed textual changes. The specified Proposal for amendment documents were uploaded to the ACER public consultation.<sup>4</sup>
- (9) Between 21 September 2022 and 31 October 2022, ACER cooperated closely with the NEMOs and the regulatory authorities and consulted them on various amendments suggested by ACER during teleconferences and via email communication. In particular, the following procedural steps were taken:
- 21 September: discussion with the regulatory authorities during the CACM Task Force meeting<sup>5</sup>;
  - 21 September: discussion with the regulatory authorities at the meeting of the Board of Regulators;
  - 27 September: discussion with the NEMOs, Transmission System Operators ('TSOs') and regulatory authorities during the CACM pentilateral coordination group meeting<sup>6</sup>;
  - 3 October: public workshop presenting the Proposal for amendment to the stakeholders and providing them with clarifications;
  - 5 October: discussion with the regulatory authorities during the AEWG<sup>7</sup>;
  - 6 October: discussion with a sub-group of regulatory authorities in the CACM Algorithm Expert Team<sup>8</sup>;
  - 13 October: discussion with a sub-group of regulatory authorities in the CACM Algorithm Expert Team;
  - 20 October: discussion with a sub-group of regulatory authorities in the CACM Algorithm Expert Team;
  - 24 October: discussion with the NEMOs and regulatory authorities during a dedicated meeting;

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<sup>4</sup> Having as objective to conduct the procedure in an expedited manner, ACER decided not to wait for the documents submitted by the NEMOs on 20 September to open its public consultation. Those documents bringing only specifications and minor content changes to the Proposal for amendment submitted on 15 September 2022, ACER considers that this approach did not affect the quality of the public consultation.

<sup>5</sup> ACER's platform for discussing all issues connected to the CACM Regulation with the regulatory authorities.

<sup>6</sup> Joint platform between ACER, NEMOs, TSOs, the European Commission and regulatory authorities for discussing issues connected to the CACM Regulation.

<sup>7</sup> ACER's high level platform for discussing all issues connected to all network codes and guidelines

<sup>8</sup> Subgroup of the CACM TF involving regulatory authorities experts on algorithm and market coupling operation topics such as the HMMCP for SDAC

- 27 October: discussion with a sub-group of regulatory authorities in the CACM Algorithm Expert Team;
  - 9 November: discussion with the regulatory authorities during the CACM Task Force meeting;
- (10) On 31 October 2022, ACER shared its preliminary position on the Proposal for amendment with the NEMOs and the regulatory authorities and invited them to submit their written observations and any requests for an oral hearing by 11 November 2022.
- (11) Between 16 November and 24 November, ACER consulted the AEWG, including a discussion during the 22 November AEWG meeting. The AEWG provided its advice on the draft decision on 25 November 2022 (see Section 5.3).
- (12) On 14 December 2022, upon the proposal of several regulatory authorities, the Board of Regulators submitted an amendment for the draft decision concerning Article 4(3) of the Proposal for amendment. The Director rejected this amendment on the grounds set out in recitals (62) to (66) below.
- (13) On 6 January 2023, the Board of Regulators issued a favourable opinion pursuant to Article 22(5)(a) of Regulation (EU) 2019/942 on the draft decision.

### **3. ACER'S COMPETENCE TO DECIDE ON THE PROPOSAL FOR AMENDMENT**

- (14) According to Article 5(2)(b) of Regulation (EU) 2019/942, ACER shall revise and approve proposals for terms and conditions or methodologies, based on network codes and guidelines adopted before 4 July 2019, which require the approval of all regulatory authorities.
- (15) According to Articles 9(5) and 9(6)(i) of the CACM Regulation, as initially adopted, namely as a guideline before 4 July 2019, the proposal for the HMMCP for SDAC in accordance with Article 41(1) of the same 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 HMMCP for SDAC and any amendments thereof have been explicitly subjected to approval by ACER.
- (16) According to the second sentence of Article 9(13) in joint reading with Articles 9(1), 9(6)(i) and 41(1) of the CACM Regulation, NEMOs responsible for developing the proposal to the HMMCP for SDAC (i.e. all NEMOs) may propose amendments to this methodology and submit them to ACER for approval.
- (17) According to Article 5(6) of Regulation (EU) 2019/942 and Article 9(5) of the CACM Regulation, ACER, before approving the proposal for amendment, shall revise it where necessary, after consulting the respective NEMOs, in order to ensure that the methodology is in line with the purpose of the CACM Regulation and contributes to market integration, non-discrimination, effective competition and the proper functioning of the market.

- (18) The Proposal for amendment has been submitted by the NEMO committee, on behalf of all NEMOs, to ACER for approval. It aims to amend the HMMCP for SDAC, under Article 41 of the CACM Regulation, as approved by Decision No 04/2017 of 14 November 2017.
- (19) Therefore, based on Article 5(2)(b) of Regulation (EU) 2019/942 as well as Articles 9(5), 9(6)(i) and 9(13) of the CACM Regulation, ACER is competent to decide on the Proposal for amendment.

#### **4. SUMMARY OF THE PROPOSAL FOR AMENDMENT**

- (20) The Proposal for amendment includes the following elements:
- a) a ‘Whereas’ section;
  - b) general provisions, including on the scope of application and on harmonised definitions, in Title 1;
  - c) provisions on the maximum and minimum prices, including the values of the harmonised maximum and minimum clearing prices for SDAC, criteria and process for establishing and amending maximum and minimum price for SDAC , in Title 2;
  - d) final provisions on the timeline for implementation and language disclaimer, in Title 3;
- (21) The Proposal for amendment, therefore, consists of the complete HMMCP for SDAC as contained in Annex I to ACER’s Decision No 04/2017, subject to the following NEMOs’ amendments:
- a) Whereas:
    - i. addition of a clarification that the document includes a mechanism for amending both the maximum and minimum clearing price;
    - ii. addition of one paragraph to the recitals that describes that the document considers the context leading to an increase of the harmonised maximum price in SDAC in May 2022 and the outcomes of the public consultation that all NEMOs organized;
    - iii. addition of one paragraph describing that the proposed conditions to decrease the harmonised maximum clearing price for SDAC “while still having in mind the Value of Lost Load (‘VoLL’) principle (sic)”;
    - iv. modification of the description of the transition period;

- v. removal of the outdated reference to former SDAC regions (MRC and 4MMC);

b) Article 4:

- i. modification of the conditions for triggering an increase of the harmonised maximum clearing price for SDAC towards conditions that are much stricter (i.e. that would lead to much less increases);
- ii. clarification of the bidding zones to which the conditions to trigger an increase of the harmonised maximum clearing price for SDAC would apply;
- iii. reduction of the duration of the transition period;
- iv. addition of a specific condition to the transition period, during which the harmonised maximum clearing price for SDAC would not be further modified;
- v. addition of additional specific conditions to trigger an increase of the harmonised maximum clearing price for SDAC;
- vi. addition of a paragraph replicating the automatic increase of the harmonised maximum clearing price limit for SDAC to the reduction of the harmonised minimum clearing price limit for SDAC with different values for the decrease steps;
- vii. addition of a paragraph describing a possibility for the harmonised maximum clearing price limit to decrease or for the harmonised minimum clearing price limit to increase back to specific values in case the clearing prices stay within a specific price interval during a year; and
- viii. modification of the NEMOs' obligation to announce the new harmonised maximum or minimum clearing prices for SDAC in line with the modification of the transition period.

## **5. OBSERVATIONS RECEIVED BY ACER**

### **5.1. Public consultation on the Proposal**

- (22) Responses to ACER's public consultation are summarised in Annex II to this Decision.

### **5.2. Consultation on ACER's preliminary position**

- (23) ACER's preliminary position contained two major changes to the Proposal for amendment:

- a) easier-to-reach triggering conditions (Article 4(1)(a) and 4(2)(a) of the Proposal for amendment) to initiate adjustments of the harmonised maximum and minimum clearing prices; and
  - b) an adaptive transition period (Article 4(1)(b) and 4(2)(b) of the Proposal for amendment), with a duration of 28 days in case an adjustment of the harmonised maximum or minimum clearing price had not taken place recently and 90 days otherwise.
- (24) The following paragraphs provide a summary of the views which ACER received on its preliminary position during the hearing phase between 31 October and 16 November 2022. Written comments were submitted by the all NEMO committee on behalf of all NEMOs, by EPEX SPOT as well as by the following regulatory authorities: Energie Control Austria ('E-Control'), Bundesnetzagentur ('BNetzA'), Commission de Régulation de l'Énergie ('CRE'), Institut Luxembourgeois de Régulation ('ILR'), Autorità di Regolazione per Energia Reti e Ambiente ('ARERA'), Regulatory Authority for Energy ('RAE'), Public Utilities Commission ('PUC'), National Energy Regulatory Council ('NERC'), Energimarknadsinspektionen ('Ei') and Comisión Nacional de los Mercados y la Competencia ('CNMC'). No party requested an oral hearing.
- (25) On behalf of the NEMOs, the NEMO committee stated that:
- a) NEMOs cannot confirm, at the time of the submission of their input, that an immediate implementation as described in Article 5(2) of ACER's preliminary position is possible; and
  - b) NEMOs provided an updated list of NEMOs subject to the approved requirements for the HMMCP for SDAC.
- (26) EPEX SPOT's comment only contained a legal review of the HMMCP for SDAC and no comment regarding the content as EPEX SPOT's content view was represented by the all NEMO committee's comment. This legal review contained minor wording corrections.
- (27) E-Control stated the following:
- a) adjustments of the harmonised maximum and minimum clearing price for SDAC described in Articles 4(1)(a) and 4(2)(a) shall be triggered with stricter conditions:
    - i. addition of criteria on the amount of traded volumes compared to the total SDAC volumes;
    - ii. triggering conditions of the Proposal for amendment;
  - b) addition of a sentence in Articles 4(1)(d) and 4(2)(d) of ACER's preliminary position to only trigger an adjustment of the harmonised maximum or minimum clearing price for SDAC due to events occurring outside a transition period;

- c) addition of a clarification in Articles 4(1)(b) and 4(2)(b) regarding the start of the transition period;
- d) addition of a remark regarding the treatment of events which could occur between ACER's decision and the entry into force;
- e) addition of a remark stating a support of a lowering of the harmonised maximum price limit in case of steady prices over a certain duration;
- f) addition of a question regarding the treatment of the virtual bidding zones and their exclusion from the triggering conditions to adjust the harmonised maximum or minimum price limits; and
- g) wording suggestions with no content changes.

(28) CRE stated the following:

- a) Article 4(e) of ACER preliminary position excludes events of fall backs applied by TSOs which should not be excluded considering the potential heavy impact on zones;
- b) implementing the HMMCP for SDAC methodology during the winter 2022-2023, considering the unprecedented crisis, could create an unnecessary risk;
- c) ACER's proposal of adaptive transition periods is the only solution to avoid a "snowball effect" of the harmonised maximum clearing price for SDAC adjustments and must therefore be preserved; and
- d) a stricter approach for defining the triggering conditions of the adjustments of the harmonised maximum and minimum clearing prices for SDAC should be followed and the most appropriate ways to do so are:
  - i. decrease the increments to 500 €/MWh; and
  - ii. increase to 3 the number of different days in which high prices take place as described in Article 4(1)(a) of the Proposal for amendment;

(29) ILR stated the following:

- a) ACER's preliminary position introduces a transition period of 90 days which is potentially not consistent with Article 10 of the Electricity Regulation although the willingness to reduce the number of increases of the maximum limit within a year is understandable;
- b) the harmonised maximum clearing price for SDAC is a technical limit and not a political one even though it can impact the liquidity of market participants via collaterals when prices increase;



- c) the wording “capped” in Articles 4(1)(d) and 4(2)(d) of ACER’s preliminary position should be replaced by “limited” as it is a technical limit and not a political “cap”;
  - d) the NEMOs’ assessment of the HMMCP for SDAC methodology described in Article 4(4) of the Proposal for amendment could be discussed with ACER and the regulatory authorities; and
  - e) following the events of 17 August 2022 (i.e. clearing prices for SDAC reaching 4000/MWh in the Estonian, Latvian and Lithuanian bidding zones), the harmonised maximum clearing price for SDAC should have been set at 5000€/MWh according to ACER’s Decision No 04/2017 and the current HMMCP for SDAC methodology, and the current procedure does not suspend the application of the methodology.
- (30) BNetzA stated the following:
- a) the HMMCP for SDAC methodology is defining technical price limits and not price caps/emergency measures which are decided upon by the EU-legislator, also, Articles 3(b) and 7(2) of the Electricity Regulation limit the broad interpretation of Article 10(2) of that Regulation, which should be considered when defining the different parameters leading to adjustments of the harmonised maximum or minimum price limits;
  - b) the transition period should therefore be as short as possible and limited to a period that covers the technical needs of the implementation;
  - c) to cover from snowballing effects, smaller increase steps for adjusting the harmonised maximum or minimum price should be introduced which would be better representing the requirements of Article 10(2) of the Electricity Regulation;
  - d) the deletion of the paragraph describing the lowering of the maximum price limit in ACER’s preliminary position is not supported and could be justified by arguing a legal gap in Article 10(2) of the Electricity Regulation;
  - e) the word “capped” in ACER’s preliminary position should be replaced by “limited” as it is a technical limit and not a political “cap”;
  - f) Articles 4(1)(d) and 4(2)(d) of the Proposal for amendment should be clarified to only trigger an adjustment of the harmonised maximum or minimum clearing price for SDAC due to events occurring outside a transition period;
  - g) the second sentence of Article 4(4) of ACER’s preliminary position should be removed as it is redundant according to Article 6(1) and 13(2) of the CACM Regulation; and
  - h) the word “and” should be added in Article 3(3) of ACER’s preliminary position.

(31) ARERA stated the following:

- a) a distinction should be made between the technical price limits and a cap to market prices; therefore, the root cause of the technical price limit should be clarified, i.e. the existence of instances under which the market coupling algorithm would not be able to find a clearing price if a price limit were not specified; other considerations related to the issue of high average market prices should be kept out of the scope of the HMMCP for SDAC methodology and addressed by means of other appropriate mechanisms pursuing affordability;
- b) being in an energy-only market, price spikes are fundamental for peak plants to recover their fixed costs and, therefore, capping clearing prices can put system adequacy in danger;
- c) a longer freeze period as introduced in ACER's preliminary position is not legally justifiable and could be detrimental to the system;
- d) a lowering of the increments of the harmonised maximum clearing price limits adjustments to 500€/MWh is preferred; and,
- e) similarly, a lowering of the harmonised maximum clearing price limits in case no high prices occur for a certain durations is preferred.

(32) NERC supported the following:

- a) a lowering of the harmonised maximum clearing price limits in case no high prices occur for a certain duration;
- b) a set-back of the reference harmonised maximum clearing price to 3000€/MWh;
- c) upwards price adjustments of the harmonised maximum clearing price limit of 500€/MWh;
- d) reconsidering the criteria described in ACER's preliminary position in line with the implementation of 15 minutes market time units in 2025;
- e) a transition period of 4 weeks; and
- f) a coordination or agreement with ACER to decide on an increase of the harmonised maximum clearing price for SDAC.

(33) PUC supported the following:

- a) a lowering of the harmonised maximum clearing price limits in case no high prices occur for a certain duration; and

- b) in case the transition period described in ACER’s preliminary position is removed, a lowering of the increments of the harmonised maximum clearing price limits adjustments to 500€/MWh.
- (34) RAE supported the following:
- a) ACER’s preliminary position triggering conditions, however subject to a review of those conditions in line with the implementation of 15 minutes market time units in 2025;
  - b) ACER’s preliminary position transition period;
  - c) a lowering of the increments of the harmonised maximum clearing price limits adjustments to 500€/MWh; and
  - d) a lowering of the harmonised maximum clearing price limits in case no high prices occur for a certain durations.
- (35) Ei stated that the wording “capped” in ACER preliminary position should be replaced by “limited”.
- (36) CNMC stated the following:
- a) A shortening of the transition period should be accompanied by a reduction of the increment for the harmonised maximum clearing price for SDAC;
  - b) the Triggering conditions described in Articles 4(1)(a) and 4(2)(a) of the Proposal for amendment are preferred; and
  - c) a lowering of the harmonised maximum clearing price limits in case no high prices occur for a certain duration is preferred.

### **5.3. Consultation of the AEWG**

- (37) The AEWG provided its advice on 25 November 2022 and endorsed the draft Decision.
- (38) In the context of the AEWG’s advice, BNetzA repeated and elaborated its comment described in paragraph (30)d) regarding the deletion of Article 4(3) of the Proposal for amendment. In essence, BNetzA argued that ACER’s interpretation of Article 10(2) of the Electricity Regulation was only valid if the legislator intended to exclude the possibility to lower the harmonised maximum clearing price for SDAC. In BNetzA’s view, the legislator did not clarify such intention in the CACM Regulation or the Electricity Regulation so that the last sentence of Article 10(2) of the Electricity Regulation could also be interpreted as providing an indication on the duration of the application of a new harmonised maximum clearing price and not as a limitation to increases.

#### 5.4. Amendment of the Board of Regulators

- (39) According to the Board of Regulators' amendment, Article 4(3) of the Proposal for amendment should allow to lower the maximum price and to increase the minimum price under certain conditions, whereby the lowest maximum price should be 4.000 €/MWh and the highest minimum price should be minus 500 €/MWh. The proposal for this amendment was justified as follows:

*'Setting minimum and maximum clearing prices - and allowing them to be readjusted again - not only aims to "slow down" future price exaggerations (to some extent), but also aims to reflect a reduced VoLL. A diminution mechanism, which was also originally proposed by the NEMOs, could lower the burden on market participants, as in some cases the collaterals they have to place are directly correlated to the maximum price limit.*

*The Article 10 of the Electricity Regulation only mentions the increase of the technical limit in para. 2 sentence 4 ("higher limits"). Therefore, one could take the view that by only mentioning the increase of the price limit, the article hinders to introduce the opposite mechanism (argumentum e contrario). However, this is only the case if the legislator intended to exclude the opposite (= regulatory gap). If this is not the case, one can even apply the provision by analogy to justify the opposite. Such intention of the legislator could e.g. be indicated in the whereasection. Looking into the Electricity Regulation and CACM, we did not find any indication of such intention. Furthermore, the rationale behind the last sentence of para. 2 of Article 10 could be a clarification on the duration of the application of a new technical price limit (until the mechanism requires a new adjustment) and not a restriction to increases. This could indeed be the case if the legislation was issued without having in mind a (exceptional) situation which calls for a diminution. Moreover, the teleological interpretation of Article 10 of the Electricity Regulation would lead to the conclusion that the intended effect resides in the consistency of the price caps with the market situation. The provisions clearly stipulate the requirements that a price adjustment mechanism should observe (i.e. limits shall be sufficiently high so as not to unnecessarily restrict trade or set de facto maximum bidding price for electricity, and shall take into account the maximum value of lost load) and such requirements may be conceived as a "conditio sine qua non". Therefore, in case such conditions are fulfilled and, further to this, a downward mechanism is expected to foster the liquidity and the stable operation of the market, a restrictive interpretation of the last sentence of Article 10(2) could be regarded as not aligned with the principles of adequacy and proportionality and the general objectives of the Regulation.*

*Therefore, [the NRAs] see the possibility to include a diminution mechanism in the methodology on the basis of an analogy of Article 10(2) Electricity Regulation.'*

#### 6. ASSESSMENT OF THE PROPOSAL FOR AMENDMENT

## **6.1. Legal framework**

- (40) According to Article 10(1) of Regulation (EU) 2019/943 ('the Electricity Regulation'), there shall be neither a maximum nor a minimum limit to the wholesale electricity price.
- (41) According to Article 10(2) of the Electricity Regulation, the harmonised limits on maximum and minimum clearing prices for day-ahead applied by the NEMOs shall be sufficiently high so as not to unnecessarily restrict trade, be harmonised for the internal market and take into account the maximum VoLL. NEMOs shall also implement a transparent mechanism to automatically adjust the technical bidding limits in due time in the event that the set limits are expected to be reached. The adjusted higher limits shall remain applicable until further increases under that mechanism are required.
- (42) Article 41 of the CACM Regulation sets out specific requirements for the HMMCP for SDAC.
- (43) According to Article 41(1), the proposal for HMMCP for SDAC shall be developed by all NEMOs and shall take into account an estimation of the VoLL. It shall be subject to consultation in accordance with Article 12 of the CACM Regulation. Moreover, in accordance with Article 9(13) of the CACM Regulation, the NEMOs' proposals for amendment to the terms and conditions or methodologies shall also be subject to consultation in accordance with Article 12 of the CACM Regulation.
- (44) As a general requirement, Article 9(9) of the CACM Regulation sets out that every proposal for terms and conditions or methodologies includes a proposed timescale for their implementation and a description of their expected impact on the objectives of the CACM Regulation.
- (45) Further, for coherence reasons and as confirmed by Article 9(9) of the CACM Regulation, the proposal for terms and conditions or methodologies must be in line with the objectives of the CACM Regulation defined in its Article 3.

## **6.2. Assessment of the legal requirements**

- (46) The Proposal for amendment includes not only specific amendments to the HMMCP for SDAC approved by ACER Decision No 04/2017, but also the rest of the approved HMMCP for SDAC. To avoid duplication and because ACER does not see the need to reassess the Proposal for amendment in its entirety, ACER will focus on the NEMOs' proposed amendments and the additional amendments made by ACER.

### 6.2.1. Legal assessment of the conditions for adjusting the harmonised maximum clearing price for SDAC

- (47) In Articles 4(1)(a) and 4(2)(a) of the Proposal for amendment, the NEMOs adapted the conditions that are to be met to trigger an adjustment of the harmonised maximum and minimum clearing prices for SDAC ('the Triggering conditions'). Those conditions have been made more difficult to reach due to the following set of changes:

- a) the value, in percentage of the harmonised maximum clearing price, which a clearing price has to meet has been changed from 60 to 70 percent ('the Price spike definition'),
  - b) the number of hours during which the value of the clearing price has to be above the aforementioned value has been modified from one market time unit to 5 hours ('the Threshold'), and
  - c) a specific number of days (3 days) during which the aforementioned number of hours has to be spread has been introduced.
- (48) Articles 4(1)(b) and 4(2)(b) of the Proposal for amendment also introduce updated conditions for the transition period, during which no increases to the harmonised maximum clearing price shall be initiated.
- (49) ACER considers that the updated conditions for triggering an increase of the harmonised maximum clearing price for SDAC of the Proposal for amendment can have negative impacts on the efficient functioning of the SDAC market in two distinct types of situations.
- (50) First, in situations where repeated high prices, which are confined by the harmonised maximum price limit of SDAC, would occur frequently but on a not frequent enough basis to meet the Triggering conditions. In those circumstances, the harmonised maximum price limit for SDAC would not increase and would therefore restrict trade. In ACER's view, this restriction of trade would be unnecessary because, due to the set of Triggering conditions defined in the Proposal for amendment, it would restrict an orderly and free price formation, which is in principle to be pursued according to Article 3(b) of the Electricity Regulation and Article 3(h) of the CACM Regulation. Furthermore, by limiting the harmonised maximum clearing price to its current levels, it would restrict investment incentives for generation and demand response which are to be achieved according to Article 3(h) of the Electricity Regulation. The harmonised maximum price limit for SDAC would therefore not be sufficiently high so as not to unnecessarily restrict trade. In that regard, it would not comply with the second sentence of Article 10(2) of the Electricity Regulation: *'Those limits shall be sufficiently high so as not to unnecessarily restrict trade [...]'*.
- (51) Second, in situations where clearing prices would reach the harmonised maximum price limit in a repeated manner and over a duration of several months. In these situations, the Triggering conditions would be met multiple times over a limited duration which would lead to several increases of the harmonised maximum clearing price for SDAC. In ACER's view, this is a situation in which the frequent increase of harmonised maximum clearing price has a potentially detrimental impact on the market. Indeed, those frequent increases would allow for rapidly increasing clearing prices to be formed but to which the market would most likely not be able to react properly due to the short time between the increases of the harmonised maximum clearing price. After the first high prices and a first increase of the harmonised maximum clearing price, this situation would therefore most probably not lead to more demand reduction, demand-response or to the

commissioning of new generation units within the short transition period. Those increases would therefore lead to a social welfare transfer from consumers to producers with little or no more trade being accommodated which can be detrimental to the objective of contributing to the efficient development of the electricity sector in the Union according to Article 3(g) of CACM Regulation.

- (52) After many interactions with the involved parties, ACER eventually decided to correct those two detrimental effects of the Triggering conditions by adjusting Articles 4(1) and 4(2) of the Proposal for amendment in the following way:
- (i) by setting Triggering conditions for increasing the harmonised maximum price limit for SDAC that can be met more easily, combined with
  - (ii) a lower increment for the increases of the harmonised maximum clearing price for SDAC.
- (53) The Triggering conditions introduced by ACER ensure that the requirement under the third sentence of Article 10(2) of the Electricity Regulation is met: *‘NEMOs shall implement a transparent mechanism to adjust automatically the technical bidding limits in due time in the event that the set limits are expected to be reached.’* Those Triggering conditions are defined as the minimum conditions that lead to an expectation of the harmonised maximum clearing price to be reached. Indeed, single events that can occur due to a specific, circumstantial set of conditions should not be considered as events leading to an expectation of the harmonised maximum clearing price to be reached and should therefore be excluded from the Triggering conditions. All events including a higher occurrence of price spikes according to the Price spike definition of the Triggering conditions, however, are to be considered. Therefore, the Threshold of the Triggering conditions is defined as at least two market time units spread of two days over a rolling period of 30 days.
- (54) The reduced increment by which the harmonised maximum clearing price for SDAC shall be increased, introduced by ACER, ensures that the situations described in recital (51) are limited. The increment of 500€/MWh introduced by ACER is aligned with the observations<sup>9</sup> received from CRE, BNetzA, ARERA, NERC, PUC and RAE. This change is also underpinned by the third sentence of Article 10(2) of the Electricity Regulation: *‘NEMOs shall implement a transparent mechanism to adjust automatically the technical bidding limits in due time in the event that the set limits are expected to be reached.’* One might suspect that this reduction of the increment could lead to unnecessary restrictions of trade due to a lower increase of the harmonised maximum clearing price for SDAC in case of repeated events of price spikes reaching the harmonised maximum clearing price. However, such view falls short of the necessity to limit the situations described in recital (51), which requires to limit the intensity of the increases. In ACER’s view, this reduction of the increment is the best way, in line with

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<sup>9</sup> described in recitals (25) to (36)

the principle of proportionality, to mitigate the detrimental situations described in recital (51) while limiting the impact on free price formation and not deviating from the legal requirements set out in Article 10(2) of the Electricity Regulation.

- (55) ACER considers that the change of the transition period in the Proposal for amendment from 5 weeks to 4 weeks is supported by the third sentence of Article 10(2) of the Electricity Regulation: *‘NEMOs shall implement a transparent mechanism to adjust automatically the technical bidding limits in due time in the event that the set limits are expected to be reached.’* In the current circumstances, any further shortening of this transition period would endanger operational security due to the short duration for implementing the change in SDAC which would go against Article 3(c) of the CACM Regulation: *‘This Regulation aims at [...] ensuring operational security [...]’*. Compared to ACER’s preliminary position described in recital (23) that included a longer transition period, this transition period of 28 days was supported by ILR, BNetzA, ARERA and NERC in their hearing inputs.
- (56) The Proposal for amendment also contains new conditions for the transition period, described in Articles 4(1)(c) and 4(2)(c), during which the harmonised maximum and minimum clearing prices are limited to their current values and during which no further adjustments are triggered. Following a similar reasoning than the one detailed in recital (54), ACER considers that this provision is necessary to prevent the situations having detrimental effects on the market described in recital (51). No party objected to this proposal neither during the public consultation nor during the hearing phase. ACER only introduced a change in Articles 4(1)(c) and 4(2)(c) to differentiate the transition periods linked to an increase of the harmonised maximum clearing price from the transition periods linked to a decrease of the harmonised minimum clearing price which should be separate. Indeed, operational security should not be compromised by the possibility to have in parallel two transition periods, one pertaining to an increase of the harmonised maximum clearing price and one pertaining to a decrease of the harmonised minimum clearing price.
- (57) ACER adjusted Article 4(1)(e) of the Proposal for amendment to improve its clarity by removing the undefined and unclear references to *‘capacity related fall backs having been applied by Transmission System Operators’*.
- (58) These changes are compatible with the requirement to take into account the Value of Lost Load (‘VoLL’) according to the second sentence of Article 10(2) of the Electricity Regulation (*‘Those limits [...] shall take into account the maximum value of lost load.’*). Indeed, the ever-increasing price limits should ensure that the harmonised maximum clearing price for SDAC is always above the clearing price that would occur in the absence of price limits or in the case of price limits equal to VoLL as described in recital (26) of ACER Decision 04/2017.
- (59) ACER adjusted the durations in Article 4 of the Proposal for amendment from weeks to days to improve the precision of this Article.



- (60) ACER supports the introduction in the Proposal for amendment of an exclusion of virtual bidding zones (i.e. in which no demand or supply bids are submitted)
- (61) ACER deleted Article 4(3) of the Proposal for amendment. The deletion was necessary as this paragraph provided for a lowering of the maximum price limit, which goes directly against the requirement that applies to higher limits according to the fourth sentence of Article 10(2) of the Electricity Regulation (*'The adjusted higher limits shall remain applicable until further increases under that mechanism are required.'*). ACER considers that the higher limits referred to in this Article are the harmonised maximum and minimum clearing prices and that, therefore, any lowering of the harmonised maximum clearing price or any increasing of the harmonised minimum clearing price would be in direct contradiction with this requirement.
- (62) More specifically, and in particular with regard to the Board of Regulators' amendment, it is to note that reliance on an 'analogy' of Article 10(2) of Electricity Regulation seems not appropriate. Applying a legal rule by analogy typically means to extend an adopted legal rule to cases which the legislature had not foreseen. Here, however, the NEMOs and the Board of Regulators propose a rule, i.e. lowering the maximum price limit, which is not an adopted legal rule, in particular not under Article 10(2) of the Electricity Regulation (the latter being explicit about increasing the increased price limits). The proposed rule on lowering the maximum price limit is therefore a new rule. Accordingly, it cannot be argued that Article 10(2) of the Electricity Regulation can be applied by analogy to achieve a lowering of the maximum price limit.
- (63) Moreover, the lowering of the maximum price limit is not evidenced by the legislature's intention. The fact that the legislature did not explicitly exclude the lowering of the price could, but does not necessarily mean that such lowering is permissible. The purposive and teleological interpretation finds its limits in the clear meaning of the legal text. Here, the last sentence of Article 10(2) of the Electricity Regulation states: *'The adjusted higher limits shall remain applicable until further increases under that mechanism are required.'* This requirement will be violated once an increased price is lowered. Thus, except for the case where the maximum price is lowered before any increase adjustment occurs (which however will not be possible under the Board of Regulators' amendment because it provides for that *'the lowest maximum price shall be 4.000 €/MWh'*, while according to Article 3(1) of the Proposal for amendment as amended by ACER this value is the initial (reference) maximum price from which the adjustment mechanism starts), the proposed amendment will result in immediately violating the legal text of the last sentence of Article 10(2) of the Electricity Regulation. One cannot argue such violation as being intended by the legislature.
- (64) Furthermore, Article 3(b) of the Electricity Regulation requires that *'market rules shall encourage free price formation and shall avoid actions which prevent price formation on the basis of demand and supply'*. Free price formation with regard to the maximum price limit under Article 10(2) of the Electricity Regulation is promoted by increasing instead of decreasing the maximum price limit.

- (65) While the justification underlying the Board of Regulators' amendment seems to aim at the lowering and the '*diminution*' of the maximum price limits, the amendment itself proposes also an increase of the minimum price limit. In that regard, suffice it to note that the principle of Article 3(b) of the Electricity Regulation implies (conversely) promoting free price formation by a decrease rather than an increase of the minimum price limit, and that, accordingly, Article 10(2) of the Electricity Regulation is not meant to disable the free price formation.<sup>10</sup>
- (66) Therefore, in ACER's view, Article 4(3) of the Proposal for amendment as well as the related amendment proposed by the Board of Regulators are not in line with the Electricity Regulation. Consequently, the Board of Regulators' amendment had to be rejected.

6.2.2. Legal assessment of the introduction of conditions for adjusting the harmonised minimum clearing price for SDAC

- (67) ACER considers that the introduction in the Proposal for amendment of conditions for adjusting the harmonised minimum clearing price for SDAC is compliant with Article 10(2) of the Electricity Regulation, given that this provisions does not differentiate upper and lower limits, but instead refers to limits in general: '*NEMOs shall implement a transparent mechanism to adjust automatically the technical bidding limits in due time in the event that the set limits are expected to be reached*'[...]. An automatic mechanism to lower the minimum price limit is therefore supported by the legal framework and supported by the market participants according to the outcome of the public consultation. ACER considers indeed that similar principles for triggering a change of the maximum or minimum price limit should be followed, with a factor of proportionality regarding the amount of the respective increases or decreases steps. ACER therefore adjusted Article 4(2) of the Proposal for amendment following the reasoning of the changes described in section 6.2.1.

6.2.3. Assessment of the requirements in Article 41(1) of the CACM Regulation

- (68) The Proposal for amendment does not affect the finding in ACER's Decision No 04/2017 that the requirements of Article 41(1) of the CACM Regulation are fulfilled, except the amendments introduced in Article 4(3) of the Proposal for amendment which, however, cannot be approved for the reasons explained in section 6.2.1.
- (69) Therefore, the Proposal for amendment, except for those proposed for Article 4(3) of that Proposal, fulfils the requirements of Article 41(1) of the CACM Regulation.

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<sup>10</sup> Indeed, when Article 10(2) of the Electricity Regulation was adopted, the approved price adjustment mechanisms in place under Articles 41 and 52 of the CACM Regulation provided for an increase of only the maximum prices, and not of minimum prices.

6.2.4. Assessment of the requirements for consultation

- (70) The NEMOs, through the All NEMO committee, consulted the public on the reassessment of the HMMCP for SDAC methodology for more than one month, i.e. from 14 May 2022 until 15 July 2022 and published the responses received and summaries thereof.
- (71) In addition, ACER consulted the public on the draft Proposal for amendment from 19 September 2022 until 9 October 2022, thereby complementing the public consultation ran by the NEMOs before submitting their Proposal for amendment.
- (72) Therefore, ACER considers that the Proposal for amendment and its subject matter has been consulted with the public in such a way that stakeholders could present their views effectively and that Article 12 of the CACM Regulation and Article 9(13) of the CACM Regulation can be deemed as satisfied.

6.2.5. Assessment of the requirements in Article 9(9) of the CACM Regulation

- (73) Article 5 of the Proposal for amendment provides that the HMMCP for SDAC shall apply *'immediately after the MCO function has been implemented in accordance with Article 7(3) of the CACM Regulation'*. ACER amended Article 5 of the Proposal for amendment to correct the implementation date as it referred to outdated events.
- (74) Recitals (7) to (14) of the 'Whereas'-section in the Proposal for amendment describe the expected impact of the HMMCP for SDAC on the objectives listed in Article 3 of the CACM Regulation and remained unchanged in comparison to the version of the HMMCP for SDAC according to ACER's Decision No 04/2017.
- (75) Therefore, the Proposal for amendment complies with the requirement of the inclusion of the implementation timescale and of the description of the expected impact on the objectives, in accordance with Article 9(9) of the CACM Regulation.

6.2.6. Assessment of other points of the Proposal for amendment

- (76) ACER adjusted recital (3) of the 'Whereas' section of the Proposal for amendment to refer to the public consultation organised by ACER.
- (77) ACER adjusted recital (3) of the 'Whereas' section of the Proposal for amendment to remove the reference to the context of the increase of the SDAC harmonised maximum price limit change of May 2022 described in recital (21)a)ii considering that the context of this increase is already included in the public consultations to which references are made in the recital.
- (78) ACER adjusted recital (10) of the 'Whereas' section of the Proposal for amendment to remove the reference to the public consultation organised by the NEMOs described in recital (4) considering that the objective of this consultation was not to present the Proposal for amendment.

- (79) ACER amended the ‘Whereas’ section of the Proposal for amendment to rely on the wording used in Article 10(2) of the Electricity Regulation when referring to adjustment of the harmonised maximum or minimum clearing price limits.
- (80) ACER amended Article 1 of the Proposal for amendment to specify the personal scope of application of the HMMCP for SDAC methodology and to introduce an Annex 1, containing a list of all the NEMOs to which this methodology and the HMMCP for SDAC will apply. This amendment is necessary to provide clarity on changes in the group of NEMOs to which the HMMCP for SDAC should apply, making those changes transparent by amendments to the HMMCP for SDAC methodology, namely the list of TSOs in Annex I.
- (81) ACER amended Article 2(2) of the Proposal for amendment to define the term “Transition period” in order to simplify Article 4 of the Proposal for amendment.
- (82) The NEMOs clarified orally, during the meeting of the 24 October described in recital (9), the intention of Articles 3(1) and 3(2) of the Proposal for amendment which was to keep unchanged the values of the harmonised maximum and minimum clearing prices compared to the values currently applied in the SDAC (i.e. 4000 €/MWh for the harmonised maximum clearing price and minus 500 €/MWh for the harmonised minimum clearing price). ACER considered that the Proposal for amendment was unclear in that regard and therefore amended Article 3 of the Proposal for amendment to introduce the terms “reference harmonised maximum and minimum clearing prices” and to clarify the values that such limits should take at the entry into force of the HMMCP for SDAC (i.e. 4000 €/MWh for the harmonised maximum clearing price and minus 500 €/MWh for the harmonised minimum clearing price).
- (83) ACER amended Article 5 of the Proposal for amendment to introduce the publication of the document required according to Article 9(14) of the CACM Regulation.
- (84) ACER amended Article 6 of the Proposal for amendment to correct the reference to Article 9(6)(i) of the CACM Regulation.
- (85) Finally, ACER introduced some necessary editorial changes to improve the readability and the form.

## **7. CONCLUSION**

- (86) For all the above reasons, ACER considers the Proposal for amendment in line with the requirements of the Electricity Regulation and the CACM Regulation, provided that the amendments described in this Decision are integrated in the Proposal for amendment, as presented in Annex I to this Decision. The amendments, which have been consulted with the NEMOs, are necessary to ensure that the Proposal is in line with the purpose of the Electricity Regulation and the CACM Regulation and contributes to market integration, non-discrimination, effective competition and the proper functioning of the market.

(87) Therefore, ACER approves the Proposal for amendment subject to the necessary amendments. To provide clarity, Annex I to this Decision sets out the Proposal for amendment as amended and approved by ACER,

HAS ADOPTED THIS DECISION:

*Article 1*

The harmonised maximum and minimum clearing price methodology for single day-ahead coupling pursuant to Article 41 of Regulation (EU) 2015/1222 is amended and approved as set out in Annex I to this Decision.

*Article 2*

This Decision is addressed to:

EXAA AG

Independent Bulgarian Power Exchange (IBEX)

CROPEX Ltd

OTE a.s.

EPEX SPOT SE

HEnEx SA

HUPX Zrt.

SONI Ltd

EirGrid plc

GME Spa

Towarowa Gięlda Energii S.A.

OPCOM S.A.

OKTE a.s.

BSP Regionalna Energetska Borza d.o.o.

OMIE S.A.

NORD POOL EUROPEAN MARKET COUPLING OPERATOR AS

Nasdaq Spot AB

Done at Ljubljana, on 10 January 2023.

**- SIGNED -**

*For the Agency  
The Director*

C. ZINGLERSEN

Annexes:

Annex I – Harmonised maximum and minimum clearing prices to be applied in all bidding zones which participate in single day-ahead coupling pursuant to Article 41 of the Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management

Annex Ia – Harmonised maximum and minimum clearing prices to be applied in all bidding zones which participate in single day-ahead coupling pursuant to Article 41 of the Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management in track change compared to the Proposal (for information only)

Annex II - Evaluation of responses to the consultation of regulatory authorities, NEMOs, TSOs and other market participants on the Proposal (for information only)

*In accordance with Article 28 of Regulation (EU) 2019/942, the addressee(s) 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 addressee(s) 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.*