

**DECISION No 11/2023  
OF THE EUROPEAN UNION AGENCY  
FOR THE COOPERATION OF ENERGY REGULATORS**

**of 19 July 2023**

**on the TSOs' proposal for the harmonised cross-zonal capacity allocation methodology**

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)(b) thereof,

Having regard to Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing<sup>2</sup>, and, in particular, Articles 5(1), 5(2)(g) and 38(3) 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 12 July 2023, delivered pursuant to Article 22(5)(a) of Regulation (EU) 2019/942,

Whereas:

**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

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<sup>1</sup> OJ L158, 14.6.2019, p. 22.

<sup>2</sup> OJ L 312, 23.11.2017, p. 6.

requirements for the allocation of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves. In particular, Article 5(2)(g) and Article 38(3) of the EB Regulation require all TSOs to develop a proposal to harmonise the methodology for the allocation process of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves per timeframe pursuant to Article 40 of the EB Regulation and, where relevant, pursuant to Articles 41 and 42 of the EB Regulation (the ‘HCZCA methodology’) and submit it for revision and approval to ACER.

- (2) Annex I to this Decision sets out the HCZCA methodology pursuant to Article 38(3) of the EB Regulation as decided by ACER.

## **2. PROCEDURE**

- (3) On 29 June 2022, all TSOs published for public consultation on the ENTSO-E website a draft proposal for the HCZCA methodology. The consultation lasted from 29 June 2022 to 29 August 2022.
- (4) On 16 December 2022, all TSOs submitted to ACER the ‘All TSOs proposal to harmonise the methodology for the allocation processes of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves per timeframe in accordance with Article 38(3) of the Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing’ (the ‘Proposal’).
- (5) On 13 April 2023, ACER launched a public consultation on the Proposal, inviting all market participants to submit their comments by 15 May 2023. The summary and evaluation of the responses received are presented in Annex II to this Decision.
- (6) Between 16 December 2022 and 22 June 2023, ACER held regular discussions with the TSOs, the regulatory authorities, ENTSO-E and regional coordination centres (‘RCCs’). In particular, the following procedural steps were taken:
- 24 January 2023: discussion with TSOs and regulatory authorities at the electricity balancing coordination group meeting<sup>3</sup>;
  - 25 January 2023: discussion with the regulatory authorities at the electricity balancing task force (‘EB TF’) meeting<sup>4</sup>;
  - 26 January 2023: discussion with all TSOs, all regulatory authorities, ENTSO-E and RCCs;
  - 7 February 2023: discussion with the regulatory authorities at the AEWG meeting;

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<sup>3</sup> Joint platform between ACER, TSOs, the European Commission and regulatory authorities for discussing issues connected to the EB Regulation

<sup>4</sup> ACER’s platform to discuss issues related to the EB Regulation with regulatory authorities.

- 17 February 2023: discussion with all TSOs, all regulatory authorities ENTSO-E and RCCs;
  - 8 March 2023: discussion with the regulatory authorities at the AEWG meeting;
  - 17 March 2023: discussion with all TSOs, all regulatory authorities ENTSO-E and RCCs;
  - 23 March 2023: discussion with all TSOs, all regulatory authorities ENTSO-E and RCCs;
  - 29 March 2023: discussion with all TSOs, all regulatory authorities ENTSO-E and RCCs;
  - 6 April 2023: discussion with all TSOs, all regulatory authorities ENTSO-E and RCCs;
  - 14 April 2023: discussion with all TSOs, all regulatory authorities ENTSO-E and RCCs;
  - 14 April 2023: discussion with all regulatory authorities at the EB TF meeting;
  - 19 April 2023: public workshop on the Proposal;
  - 20 April 2023: discussion with all TSOs, all regulatory authorities ENTSO-E and RCCs;
  - 28 April 2023: discussion with all TSOs, all regulatory authorities ENTSO-E and RCCs;
  - 3 May 2023 discussion with the regulatory authorities at the AEWG meeting;
  - 4 May 2023: discussion with all TSOs, all regulatory authorities ENTSO-E and RCCs;
  - 11 May 2023: discussion with all TSOs, all regulatory authorities ENTSO-E and RCCs;
  - 16 May 2023: discussion with the regulatory authorities at the EB TF meeting
  - 17 May 2023: discussion with all TSOs, all regulatory authorities ENTSO-E and RCCs;
  - 7 June 2023: oral hearing with all TSOs, ENTSO-E and RCCs;
  - 22 June 2023: discussion with the regulatory authorities at the AEWG meeting.
- (7) On 24 May 2023, ACER shared its preliminary position on the Proposal with TSOs and regulatory authorities, offered a possibility to request an oral hearing and invited them to submit their written inputs by 5 June 2023.
- (8) By 5 June 2023, ACER received written observations of all TSOs from ENTSO-E and written observations from the regulatory authorities of Germany and Luxembourg, as well as a request for an oral hearing by all TSOs. The requested oral hearing was held on 7 June 2023 and included all TSOs, ENTSO-E and RCCs.

(9) The AEWG was consulted between 19 and 26 June 2023 and provided its advice on 26 June 2023 (see Section 5.3).

(10) On 12 July 2023, ACER's Board of Regulators issued a favourable opinion.

### **3. THE AGENCY'S COMPETENCE TO DECIDE ON THE PROPOSAL**

(11) According to Article 5(2)(b) of Regulation (EU) 2019/942, proposals for common terms and conditions or methodologies developed pursuant to network codes and guidelines adopted before 4 July 2019 which require the approval of all regulatory authorities, shall be submitted to ACER for revision and approval.

(12) According to Articles 5(1) and 5(2)(g) of the EB Regulation, as initially adopted, namely as a guideline before 4 July 2019, the proposal for the HCZCA methodology 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 HCZCA methodology and any amendments thereof have been explicitly subjected to approval by ACER.

(13) According to Article 5(6) of Regulation (EU) 2019/942 and Article 5(1) of the EB Regulation, ACER, before approving the terms and conditions or methodologies, shall revise the submitted proposals where necessary, after consulting the respective TSOs and ENTSO-E, in order to ensure that they are 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.

(14) On 16 December 2022, all TSOs submitted to the Proposal to ACER for approval.

(15) Therefore, ACER is competent to decide on the Proposal based on Article 5(2)(b) of Regulation (EU) 2019/942 as well as Articles 581) and 5(2)(g) of the EB Regulation.

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

(16) The Proposal includes the following elements:

- a) TITLE 1: 'General provisions' (Articles 1-6) including definitions, general principles and provisions for notifications and the organisation of the co-operation of application TSOs;
- b) TITLE 2: 'Methodology for the co-optimised allocation process' (Articles 7-11) describing the timings and process for the co-optimised allocation process, the limits for maximum allocation of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves, determination of actual market values of cross-zonal capacity and determination of allocated cross-zonal capacity;
- c) TITLE 3 'Methodology for the inverted market-based allocation' (Article 12) only contains one paragraph mentioning the relation to the co-optimised allocation process;

- d) TITLE 4 ‘Methodology for the market-based allocation process’ (Articles 13-19) describing the timings and process for the market-based allocation process, governance provisions for implementation and operation, the limits for maximum allocation of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves, determination of the forecasted market value of cross-zonal capacity from the exchange of energy, determination of the actual market value of cross-zonal capacity from the exchange of balancing capacity or sharing of reserves and determination of allocated cross-zonal capacity;
  - e) TITLE 5 ‘Provisions on cross-zonal capacity’ (Articles 20-22) with provisions on firmness and pricing of cross-zonal capacity and distribution of congestion income; and
  - f) TITLE 6 ‘Final provisions’ (Articles 23-28) with provisions for fallback procedures, publication of information, implementation, cost sharing and language.
- (17) The Proposal therefore aims to harmonise the co-optimised allocation process pursuant to Article 40 or the EB Regulation and the market-based allocation process pursuant to Article 41 of the EB Regulation, but does not consider the allocation process based on economic efficiency analysis pursuant to Article 42 of the EB Regulation as a relevant allocation process of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves to be harmonised in accordance with Article 38(3) or the EB Regulation.

## **5. SUMMARY OF THE OBSERVATIONS RECEIVED BY THE AGENCY**

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

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

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

- (19) The following paragraphs provide a summary<sup>5</sup> of views on ACER’s preliminary position received during the hearing phase between 24 May and 7 June 2023. ACER received written comments from BNetzA (i.e. regulatory authority of Germany), ILR (i.e. regulatory authority of Luxembourg); and all TSOs (by ENTSO-E on their behalf), and oral comments by all TSOs during the oral hearing.
- (20) BNetzA provided comments on the single gate closure time and pricing principle used in the market-based allocation process.

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<sup>5</sup> This is ACER’s summary of key concerns and not to be considered a complete representation of the comments received.

- (21) ILR provided inputs asking to consider the specific case of Luxembourg in the definition of ‘TSO demand’.
- (22) All TSOs provided inputs on the following points:
- a) the co-optimised allocation process;
  - b) the market-based allocation process;
  - c) the governance of the market-based allocation process;
  - d) the forecast and forecast validation in the market-based allocation process;
  - e) the pricing principle in the market-based allocation process;
  - f) the maximum volume of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves;
  - g) the role of RCCs;
  - h) 3<sup>rd</sup> countries; and
  - i) the consideration of the specific case of Luxembourg in the definition of ‘TSO demand’.
- (23) More detailed summaries and assessments of the feedback received can be found in section 6.2 below.
- (24) In their hearing input, the TSOs also mentioned that they would have needed more time than the 8 working days after receiving ACER’s preliminary position. ACER generally agrees that the availability of time for this decision process was challenging for all involved parties. However, ACER exchanged extensively, including on preliminary drafts, with the TSOs, as well as regulatory authorities, during the entire consultation phase. This allowed TSOs to be informed about ACER’s preliminary position and prepare their views well ahead of ACER’s actual submission of its preliminary position. Therefore, ACER considers that the period of two weeks given to TSOs to provide their views on ACER’s preliminary position was still sufficient and justified.

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

- (25) The AEWG provided its advice on 26 June 2023 and broadly endorsed the draft Decision.
- (26) In its advice the AEWG invited ACER to take note of the comments by ILR (see Recital (113)) and mentioned comments by BNetzA, ERU (i.e. regulatory authority of the Czech Republic) and E-Control (i.e. i.e. regulatory authority of Austria) concerning the pricing principle).

## **6. ASSESSMENT OF THE PROPOSAL**

### **6.1. Legal framework**

- (27) Articles 4(1), 4(2) and 5(2)(g) of the EB Regulation require all TSOs to submit the Proposal to ACER for revision and approval in accordance with Article 5(2)(b) of the Regulation (EU) 2019/942.
- (28) Article 38(3) of the EB Regulation requires the harmonisation of processes for the allocation of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves pursuant to Article 40 of the EB Regulation and, where relevant, pursuant to Articles 41 and 42 of the EB Regulation, no later than five years after the entry into force of the EB Regulation, i.e. by 18 December 2022.<sup>6</sup>
- (29) Article 38(1) and Article 38(2) of the EB Regulation address the voluntary initiative of TSOs for the application of cross-zonal capacity allocation processes for the exchange of balancing capacity or sharing of reserves.
- (30) Article 38(4) to Article 38(9), Article 40(4) and Article 41(5) of the EB Regulation contain general requirements related to the cross-zonal capacity, which may be allocated by a process for the allocation of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves.
- (31) Article 39 of the EB Regulation contains provisions regarding the calculation of market value of cross-zonal capacity and specifies that the co-optimised or market-based allocation process shall be based on the actual or forecasted market values of cross-zonal capacity.
- (32) Article 39(2) and (3) of the EB Regulation specify that the actual market value of cross-zonal capacity shall be calculated based on the bids submitted for the relevant market.
- (33) Article 39(4) of the EB Regulation provides that the actual market value of cross-zonal capacity for the sharing of reserves used in a market-based allocation process shall be calculated based on the avoided costs of procuring balancing capacity.
- (34) Article 39(5) of the EB Regulation further elaborates that the forecasted market value of cross-zonal capacity shall be based on one of the following alternative principles:
- a) the use of transparent market indicators that disclose the market value of cross-zonal capacity; or
  - b) the use of a forecasting methodology enabling the accurate and reliable assessment of the market value of cross-zonal capacity.
- (35) Article 39(6) of the EB Regulation allows for a review of the efficiency of the forecasting methodology pursuant to Article 39(5)(b) of the EB Regulation, including a comparison of the forecasted and actual market values of the cross-zonal capacity,

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<sup>6</sup> The EB Regulation entered into force on 18 December 2017.



by the relevant regulatory authorities. Furthermore, it allows that where the contracting is done not more than two days in advance of the provision of the balancing capacity, the relevant regulatory authorities may, following this review, set a limit other than that specified in Article 41(2) of the EB Regulation.

- (36) Article 40(1) and Article 41(1) of the EB Regulation contain the provisions for the submission of the methodologies for the co-optimised allocation process and for the market-based allocation process. Their sub-paragraphs list the required content for these methodologies:
- a) sub-paragraph (a) requires the methodologies to include the notification process for the use of the relevant cross-zonal capacity allocation process;
  - b) sub-paragraph (b) requires the co-optimisation methodology to include a detailed description of how cross-zonal capacity shall be allocated and the market-based methodology to include a detailed description of how to determine the actual or forecasted market values of cross-zonal capacity;
  - c) sub-paragraph (c) requires the methodologies to include a detailed description of the pricing method, the firmness regime and the sharing of congestion income for the cross-zonal capacity that has been allocated to bids for the exchange of balancing capacity or sharing of reserves; and
  - d) sub-paragraph (d) requires the methodologies to include the process to define the maximum volume of allocated cross-zonal capacity for the exchange of balancing capacity or sharing of reserves.
- (37) Article 41(2) of the EB Regulation specifies that cross-zonal capacity allocated on a market-based process shall be limited to 10 % of the available capacity. Its second sub-paragraph clarifies that this limit may not apply where the contracting is done not more than two days in advance of the provision of the balancing capacity.
- (38) Article 40(2) and Article 41(3) of the EB Regulation specify that the cross-zonal capacity allocation processes are based on a comparison of market values. The co-optimised allocation process shall be based on a comparison of the actual market values of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves and for the exchange of energy. The market-based allocation process shall be based on a comparison of the actual market value of cross-zonal capacity of one market and the forecasted market values of cross-zonal capacity of the other market.
- (39) Article 40(3) and Article 41(4) of the EB Regulation require that the pricing method, the firmness regime and the sharing of congestion income for cross-zonal capacity that has been allocated for the exchange of balancing capacity or sharing of reserves via the relevant CZC allocation process shall ensure equal treatment with the cross-zonal capacity allocated for the exchange of energy. Concerning the requirement for equal treatment which needs to be ensured by the pricing method, Article 38(1)(b) of Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (the ‘CACM Regulation’) requires the SDAC to apply marginal pricing.



- (40) As a general requirement, Article 5(5) of the EB Regulation requires that the Proposal includes a proposed timescale for its implementation and a description of its impact on the objectives of the same Regulation.
- (41) Article 33 of the EB Regulation addresses the requirement for establishing harmonised rules for the exchange and procurement of balancing capacity for TSOs who exchange balancing capacity.
- (42) Article 58(3) of the EB Regulation requires under sup-paragraph (a) to minimise the overall procurement costs of all jointly procured balancing capacity.
- (43) Article 17 of Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (the ‘Electricity Regulation’) establishes requirements for the allocation of cross-zonal capacity across timeframes.
- (44) Title 8 and its Chapters 1 and 2 of Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation (the ‘SO Regulation’) set out rules for the exchange of balancing capacity and sharing of reserves in accordance, which need to be considered by the cross-zonal capacity allocation processes.

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

### **6.2.1. Assessment of the requirements for the development and for the general content of the Proposal**

#### *6.2.1.1. Development of the Proposal*

- (45) The Proposal fulfils the requirements of Articles 4(1), 4(2) and 5(2)(g) of the EB Regulation, as all TSOs jointly developed and submitted the Proposal to ACER.
- (46) The procedure for the development of the Proposal respected the requirements of Article 38(3) of the EB Regulation, as the Proposal was submitted by all TSOs on 16 December 2022, which is within five years after the entry into force of the EB Regulation. The Proposal was subject to a consultation of stakeholders, as mentioned in Recital (3) above.

#### *6.2.1.2. Consultation and involvement of stakeholders*

- (47) When drafting the Proposal, the TSOs aimed at addressing the requirements of Article 10 of the EB Regulation regarding the involvement of stakeholders.
- (48) As indicated in Recital (3) above, the TSOs fulfilled the requirements of Article 10(4) of the EB Regulation, since stakeholders were consulted on the first draft of the Proposal pursuant to Article 10(1) of the EB Regulation. The justifications regarding the consideration given to the views expressed by stakeholders during the TSOs’ public consultation in the drafting of the Proposal were provided in a separate document and submitted to ACER together with the Proposal.

*6.2.1.3. Cross-zonal capacity allocation processes covered by the Proposal*

- (49) The Proposal addresses the co-optimised allocation process pursuant to Article 40 of the EB Regulation and the market-based allocation process pursuant to Article 41 of the EB Regulation. The Proposal does not address an allocation process based on economic efficiency analysis pursuant to Article 42 of the EB Regulation. Article 38(3) of the EB Regulation requires the HCZCA methodology to include the co-optimised allocation process. Article 38(3) of the EB Regulation also requires the HCZCA methodology to include the processes pursuant to Article 41 and 42 of the EB Regulation if relevant. Since no regional methodologies exist for an allocation process based on economic efficiency analysis and TSOs do not consider this process as relevant for the HCZCA methodology, the Proposal includes all the cross-zonal capacity allocation processes, which are required pursuant to Article 38(3) of the EB Regulation.

*6.2.1.4. Required content for the cross-zonal capacity allocation processes*

- (50) Article 40(1) and Article 41(1) of the EB Regulation list the required content for the methodology which addresses the co-optimised and market-based allocation process.
- (51) While the Proposal mainly describes a market-based allocation process where the actual market value of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves is compared with a forecasted market value of cross-zonal capacity for the exchange of energy, several parts of the Proposal also refer to an ‘inverted market-based process’, where a forecasted market value of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves is compared with the actual market value of cross-zonal capacity for the exchange of energy. Both approaches are generally allowed in accordance with Article 41(3) of the EB Regulation. However, the Proposal is incomplete regarding the inverted market-based process, since there is, amongst other missing elements, no description of forecasted market value of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves in accordance with Article 41(1)(b) of the EB Regulation. Further, the benefits of such inverted market-based process are questionable and according to the TSOs’ current intentions this process may never be applied. ACER therefore revised Article 1(2) of the Proposal, according to which TSOs may request amendments of the HCZCA methodology to determine the requirements of such process once TSOs intend to apply an inverted market based process and moved this provision to the recitals of the methodology. ACER deleted all other references to the inverted market-based process in the Proposal.
- (52) The Proposal generally addresses the content requirement for the co-optimised allocation process and the (regular) market-based allocation process by including in the Proposal specific articles for each item required pursuant to Article 40(1) and Article 41(1) of the EB Regulation. The specific provisions and detailed contents of these articles of the Proposal is assessed under section 6.2.2 to 6.2.8.

*6.2.1.5. Proposed timescale for implementation*

- (53) The Proposal partly fulfils the requirements of Article 5(5) of the EB Regulation with regard to the timescale for implementation.
- (54) Article 25 of the Proposal addresses the implementation of the harmonised market-based allocation process but does not address the implementation of the co-optimised allocation process. As mentioned in Recital (115), the co-optimised allocation process needs to be implemented as a functionality of the price coupling algorithm, which is operated by all NEMOs in accordance with Article 36(1) of the CACM Regulation. Therefore, the HCZCA methodology needs to take account of the implementation of the co-optimised allocation process by requiring all TSOs to submit to all NEMOs a new set of requirements<sup>7</sup> for the price coupling algorithm pursuant to Article 8(2)(a) of the CACM Regulation.
- (55) To address this issue with due regard to Article 5(5) of the EB Regulation, ACER introduced a new paragraph under Article 27(7) of Annex I for the implementation of the co-optimised allocation process. This new paragraph sets a two-month deadline after the approval of the present methodology by which all TSOs need to review their set of requirements for the price coupling algorithm and to submit a new set of requirements for the price coupling algorithm to the NEMOs if all TSOs identify any requirements from the HCZCA methodology which are not already addressed in their submission from 16 June 2022. Since the requirements for the co-optimised allocation process did not significantly change from the implementation of ACER's Decision No 12/2020 of 17 June 2020 to this decision, ACER considers the period of two months as sufficient for enabling all TSOs to perform such review and eventually make such submission.
- (56) In the all TSOs' response to ACER's preliminary position, TSOs stated that they see no need to amend the requirements, since there is no new information which would require such amendment. ACER acknowledges the TSOs' conclusions after reviewing ACER's preliminary position. ACER understands that TSOs may come to the same conclusion after ACER's decision and does not deem it necessary to revise the preliminary position in this regard.
- (57) As described in section 6.2.7, ACER amended Article 25(1) of the Proposal to require a submission of an amendment proposal by the deadline which is already defined under Article 25(1) of the Proposal. ACER also added Article 27(4) of Annex I to address the requirement for a submission of an amendment proposal as described under Recital (79). Article 25(7) of the Proposal addresses the required

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<sup>7</sup> Following ACER's Decision No 12/2020 of 17 June 2020 on the methodology for a co-optimised allocation process of cross-zonal capacity, all TSOs already submitted to all NEMOs on 16 June 2022 a set of requirements for the price coupling algorithm incorporating the requirements for the co-optimised allocation process.

implementation of undefined interfaces. ACER deleted Article 25(7) of the Proposal and similar references in the Proposal, as the implementation of such interfaces is either already addressed in Annex I or needs to be addressed in the relevant methodologies of the relevant CCR.

- (58) In accordance with Article 41(1) of the EB Regulation, methodologies for regional market-based allocation processes exist for the Nordic, Baltic, Core, IT-North and GRIT CCRs. The HCZCA methodology harmonises these regional methodologies for the market-based allocation process. Article 24(5) and Article 24(6) of the Proposal address the use of regional market-based processes in accordance with Article 41(1) of the EB Regulation and the transition of these processes towards the market-based process under the HCZCA methodology. While ACER understands that allowing some time for a smooth transition from a regional market-based process to the harmonised market-based process could be beneficial, ACER considers the proposed transition time as unnecessarily long. Further, ACER does not consider it possible to operate an application of such regional market-based process in parallel to an interdependent application of the harmonised market-based allocation process. Therefore, ACER revised Article 24(5) and Article 24(6) of the Proposal, by reducing the deadline from 18 months after the uncertain time of the implementation of all relevant CCR methodologies (i.e. addressed under Article 24(2) of the Proposal) to no more than 12 months after the implementation of the market-based cross-zonal capacity allocation optimisation function software (i.e. addressed under Article 24(3) of the Proposal).
- (59) Further ACER revised Article 25 of the Proposal by summarising several provisions which contained unnecessary technical details, and deleted provisions which mainly related to application methodologies in accordance with Article 38(1) of the EB Regulation. ACER also deleted Recital (5) in the whereas-section of the Proposal, which addressed application methodologies in accordance with Article 38(1) of the EB Regulation, and deleted Recital (6) in the whereas-section of the Proposal, which included principles for the transition towards the harmonised market-based process.
- (60) In the all TSOs' response to ACER's preliminary position, TSOs mentioned that some of the defined implementation steps have fixed dates (e.g. 31 July 2024) while others have deadlines in relative terms (e.g. 12 months after X) and argued that in some cases it is challenging to meet fixed deadlines and they would therefore prefer relative deadlines. ACER understands that TSOs faced difficulties to meet implementation deadlines in the past but considers clear deadlines necessary in accordance with Article 5(5) of the EB Regulation. While relative deadlines are equally applicable regarding the implementation of a methodology, ACER understands that a fixed deadline under Article 27(1) of Annex I for the submission of pan European amendment proposals and Article 27 (3) of Annex I for the development of the market-based cross-zonal capacity allocation optimisation function software provides more clarity and ensures consistency also in case of the expected amendment process for the HCZCA methodology. Moreover, while the deadline under Article 27(2) of Annex I for the submission of required amendment proposals per CCR and Article 27(4) of Annex I for the developments of harmonised rules for the forecast consideration

cannot be provided as a fixed value, the deadline under Article 27(5) of Annex I for the transitional use of regional market-based allocation processes is directly linked to the fixed deadline of Article 27(3) of Annex I and hence provides sufficient clarity. Therefore, ACER did not revise its preliminary position by considering the TSOs' input.

*6.2.1.6. Description of the expected impact on the objectives of the EB Regulation*

- (61) The Proposal addresses the requirement of Article 5(5) of the EB Regulation with regard to the description of the expected impact on the objectives of the EB Regulation. Recital (4)(a) to (i) of the Proposal provides a description of the expected impact of the HCZCA methodology on the objectives of the EB Regulation. However, ACER deemed it necessary to revise these recitals to add additional descriptions of the impact of the HCZCA methodology on the objectives of the EB Regulation.

*6.2.2. Requirements for the determination of the maximum volume of allocated cross-zonal capacity*

- (62) For co-optimisation, Article 8 of the Proposal on the process to define the maximum volume of allocated cross-zonal capacity for the exchange of balancing capacity or sharing of reserves specifies that by default there is a 100% limit (no limited availability of cross-zonal capacity) besides the limits required in accordance with the SO Regulation. For the market-based allocation process, Article 16 of the Proposal concerning the process to define the maximum volume of allocated cross-zonal capacity for the exchange of balancing capacity or sharing of reserves specifies that by default there is a 10% limit besides the limits required in accordance with the SO Regulation on bidding zone borders between LFC Blocks.
- (63) ACER understands that these default limits are in accordance with the default limits of the EB Regulation, since Article 40 of the EB Regulation does not require a limit for the co-optimised allocation process and Article 41(2) of the EB Regulation specifies a default limit of 10%. Therefore, ACER agrees to these limits defined in the Proposal.
- (64) However, the Proposal includes several additional provisions for the determination of the limit for the maximum volume of allocated cross-zonal capacity for the exchange of balancing capacity or sharing of reserves. Article 7(2)(c)(vii), Article 7(2)(c)(ix), Article 13(2)(e)(viii) and Article 13(2)(e)(vi) of the Proposal further mention the possibilities of additional limits, which may be defined by TSOs and are not explicitly mentioned under Articles 8 and 16 of the Proposal. Article 8(1)(b) of the Proposal also specifies that TSOs may propose to apply additional limits, which should be justified in accordance with the objectives of the EB Regulation and the Electricity Regulation. Article 16(1)(d) of the Proposal also provides the possibility to reduce the maximum limit to consider the inaccuracy of the forecast and refers to Article 17(5)(d) of the Proposal where the possibility to reduce the limit is mentioned without further specifying a process on how the maximum limit would be reduced. These additional limits would be subject to the decision of individual entities and the Proposal does not specify a process how these additional limits are determined in a transparent way.



Several respondents to ACER's public consultation stated that any adjustment limits for maximum volume of cross-zonal capacity for balancing capacity should be subject to regulatory approval. ACER agrees and is concerned that the additional limits proposed by TSOs would not be determined in a sufficiently transparent manner in accordance with Article 3(1)(a) and Article (2)(b) of the EB Regulation and that they would undermine the processes to define the maximum volume of allocated cross-zonal capacity for the exchange of balancing capacity or sharing of reserves in accordance with Article 40(1)(d) and Article 41(1)(d) of the EB Regulation.

- (65) Article 16(1)(b) of the Proposal suggests to have no maximum limit for the market-based process in case of bidding zone borders within a LFC block. TSOs mentioned in the explanatory document that the 10% limit is to protect the day-ahead market, while in a LFC block such limit could result in security of supply issues. In accordance with Article 41(2) of the EB Regulation, a limit above the 10% default limit is generally allowed where the contracting is done not more than two days in advance of the provision of the balancing capacity. However, ACER understands that Article 41(2) of the EB Regulation should be read in connection with Article 39(6) of the EB Regulation, given the latter's reference to Article 41(2) EB Regulation. Considering the TSOs' reasoning for the increase of the default limit within LFC blocks, ACER understands that insufficient balancing capacity bids would endanger security of supply and such situation with insufficient bids would therefore by default not lead to a case of insufficient forecast accuracy in accordance with Article 39(6) of the EB Regulation. Such consideration regarding the relevance of forecast accuracy in cases of insufficient balancing capacity bids is also relevant for the provisions under Article 16(1)(c) and (d) of the Proposal, which were revised by ACER for improving clarity. However, having a default limit of 100% (no limited availability of cross-zonal capacity) within a LFC block is not justified in accordance with Article 39(6) of the EB Regulation as it is neither proven that a 100% limit is required in every LFC block to ensure a sufficient provision of balancing capacity bids nor based on an assessment proving a sufficient forecast accuracy.
- (66) Therefore, ACER revised the Proposal by generally considering the applicable default limits in accordance with the EB Regulation also as the default limits defined in the HCZCA methodology, while allowing for different limits if these are approved in an application methodology in accordance with Article 38 of the EB Regulation. ACER removed any provisions which would allow the determination of additional limits in a non-transparent way. As the reference under Article 16(1)(b) of the Proposal to the forecast error consideration was therefore also deleted, ACER would like to clarify that TSOs may decide to add such a provision once they specify the forecast error consideration in the HCZCA methodology in accordance with Article 18(7) of Annex I (also see Recitals (79)-(81)).
- (67) In the all TSOs' response to ACER's preliminary position, TSOs shared their understanding that Article 41(2) of the EB Regulation allows for other limits than the default limit and stressed that there are cases with justified needs for higher limits. ACER agrees to the possibility of other limits in accordance with Article 39(6) and

Article 41(2) of the EB Regulation and understands that a higher limit can be justified as foreseen by Article 17(1)(d) of Annex I.

- (68) ACER further revised the provisions for defining the maximum volume of allocated cross-zonal capacity for the exchange of balancing capacity or sharing of reserves to have consistent general references for limits related to the SO Regulation in Articles 8 and 16 of the Proposal, and added considerations for the difference between cross-zonal capacities from CCRs where the coordinated net transmission capacity is applied and from CCRs where the flow-based approach is applied. ACER understands that for CCRs where the flow-based approach is applied, maximum limits can by default only be efficiently applied to all critical network elements of the CCR and amended the Proposal accordingly.
- (69) In the all TSOs' response to ACER's preliminary position, TSOs advocated for a solution where different limits can be applied per CNEs. ACER understands that more flexible limitations per flow-based CCRs may be beneficial and invites TSOs to assess if efficient methods could be implemented for applying maximum volume limits related to bidding zone borders in flow-based regions. If such assessment proves feasibility and the benefit of more flexible cross-zonal capacity volume limitations in flow-based CCRs, TSOs are invited to submit an amendment to the HCZCA methodology.
- (70) In the all TSOs' response to ACER's preliminary position, TSOs suggested to involve each impacted TSO (i.e. all TSOs of the CCR in case of flow-based CCRs) in the decision concerning the determination of a maximum volume of allocated cross-zonal capacity. During the oral hearing TSOs clarified that this decision-making process could be further defined when specifying the governance for balancing capacity platforms. However, ACER understands that, in case of CCRs applying the flow-based approach, not all impacted TSOs would be part of the governance of a balancing capacity platform. The application TSOs and regulatory authorities approving a proposal pursuant to Article 38(1) of the EB Regulation are required to consider negative impacts due to inefficient forecasts as described in Recital (80). Impacted TSOs will at least be able to provide feedback to the required public consultation of a proposal in accordance with Article 38(1) of the EB Regulation and will be notified in accordance with Article 150 of the SO Regulation. ACER also understands that impacted TSOs would be protected against financial losses in accordance with Article 22(3) of the Proposal. Therefore, ACER does not deem it necessary to extensively involve TSOs and regulatory authorities beyond the ones which are involved in an application proposal in accordance with Article 38(1) of the EB Regulation and ACER amended the Proposal as indicated in its preliminary position with the requirement to consider the maximum volume of allocated cross-zonal capacity in proposal pursuant to Article 38(1) of the EB Regulation.
- (71) While Article 24(8) of the Proposal (see also Recital (82)) already addresses the monitoring of relevant maximum volume limits for the market-based allocation process, ACER also added a provision under Article 26(8) of Annex I allowing the monitoring of the impact of additional maximum volume limits applied in the co-optimised allocation process.



6.2.3. Requirements for the comparison of market values of cross-zonal capacity

- (72) The Proposal generally fulfils the requirements of Article 40(2) and Article 41(3) of the EB Regulation since the co-optimised and market-based allocation processes described in the Proposal are based on a comparison of the relevant market values of cross-zonal capacity. However, as mentioned in Recital (110), ACER deemed it necessary to significantly amend the articles related to the comparison of market values of cross-zonal capacity for improving the structure and clarity of the Proposal. Under Articles 11 and 19 of the Proposal, ACER also specified more clearly the required inputs, constraints and objectives of the relevant cross-zonal capacity allocation optimisation function in these articles.
- (73) An effective comparison of market values of cross-zonal capacity, considering actual bids and interdependencies of cross-zonal capacities, also requires the definition of a gate closure time for the relevant cross-zonal capacity allocation process. Article 4(5) of the Proposal requires each capacity calculation process to operate with a single gate closure time for balancing capacity bids. While Article 7(1)(a) of the Proposal defines the gate closure time for the co-optimised allocation process, the Proposal does not define a single gate closure time and does not specify either how TSOs should agree on such single gate closure time for the market-based process. Therefore, in its preliminary position ACER specified that all application TSOs of the market-based allocation process shall decide on a single gate closure time for the market-based process.
- (74) In the all TSOs' and BNetzA's response to ACER's preliminary position, TSOs and BNetzA stated that they do not see a need for a single gate closure time for the market-based allocation process since there cannot be any interdependencies between balancing capacity platforms. ACER agrees and revised the Proposal according to the TSOs' and BNetzA's view. ACER specified under Article 14(1) of Annex I that all application TSOs of a balancing capacity platform need to agree on a single gate closure time per balancing capacity platform.

6.2.4. Requirements for the calculation of market values of cross-zonal capacity

- (75) Articles 9, 10 and 18 of the Proposal describe the calculation of actual market-values while Article 17 of the Proposal aims to address the determination of the forecasted market value of cross-zonal capacity for the exchange of energy for the market-based allocation. As mentioned in Recital (110), ACER deemed it necessary to significantly amend Articles 9, 10, 17 and 18 of the Proposal for improving the structure and clarity of the Proposal. Article 17 of the Proposal includes requirements related to forecasting and to the forecast validation process. When improving the structure of this article, ACER also separated the content of the article by introducing the new Article 19 of Annex I, which includes provisions for the forecast validation process.
- (76) ACER is of the opinion that the Proposal fulfils the general requirement of Article 39(1) of the EB Regulation. Concerning the more specific requirements related to the actual and forecasted market value of cross-zonal capacity under Article 39(2) to (5) of the EB Regulation, ACER deemed it necessary to revise the text of Article 3

of the Proposal to establish a simplified, clear and correct description of how to determine the economic surplus from the exchange of balancing capacity or sharing of reserves. Further, ACER made clarifying revisions to the definition of the cross-zonal capacity allocation optimisation function under Article 2(2)(c) of the Proposal. Concerning the actual market value of cross-zonal capacity for the exchange of balancing capacity and sharing of reserves, ACER also revised the wording of Article 4(14) of the Proposal. The new wording of this provision, which was moved to Article 6(4) of Annex I, reflects ACER's interpretation of the requirement pursuant to Article 58(3)(a) of the EB Regulation. As already established in ACER's previous decisions on methodologies concerning the cross-zonal capacity allocation processes, ACER is of the opinion that the text of Article 58(3)(a) of the EB Regulation (i.e. 'minimise the overall procurement costs of all jointly procured balancing capacity') has to be understood as a minimisation of the socioeconomic costs for the procurement of balancing capacity, to allow for efficient cross-zonal capacity allocation processes. Regarding the requirements related to the calculation of the forecasted market value of cross-zonal capacity under Article 39(5) and Article 39(6) of the EB Regulation, ACER deemed it necessary to introduce several revisions to the provisions under Article 17 of the Proposal as described in the remaining Recitals of this section.

- (77) Concerning the description of how to determine the forecasted market value of cross-zonal capacity for the exchange of energy, ACER deemed it important to clearly differentiate between the forecasted market value of cross-zonal capacity for the exchange of energy and forecasted SDAC bid curves. While the Proposal specifies that all application TSOs of each balancing capacity platform have to define a forecasting method to forecast the day-ahead energy bids which needs to be applied by the designated forecasting entity, the term 'forecasting process', which is used in Article 17 and in other parts of the Proposal is not defined or clearly described. ACER understands that TSOs' Proposal aims for using of a forecasting methodology, which enables the accurate and reliable assessment of the market value of cross-zonal capacity in accordance with Article 39(5)(b) of the EB Regulation. However, in ACER's view Article 17 of the Proposal does not provide a clear and detailed description of how to determine the forecasted market value of cross-zonal capacity for the exchange of energy in accordance with Article 41(1)(b) of the EB Regulation. ACER therefore deemed it necessary to revise Article 17 of the Proposal. Article 18 of Annex I describes the determination of the forecasted market value of cross-zonal capacity for the exchange of energy, including the use of forecasted day-ahead energy bids. Further, ACER revised the description of the relevant requirements concerning the determination and provision of forecasted day-ahead energy bids in Article 18(5) and (6) of Annex I. To provide for transparency regarding the forecast method defined by the application TSOs of a balancing capacity platform, ACER added a requirement under Article 26(11) of Annex I for publishing the forecast method.
- (78) ACER also revised the provisions concerning forecast validation. The definition of the forecast error and descriptions related to the forecast error in the Proposal and the accompanying explanatory note are to some extent contradicting. ACER therefore consulted with TSOs and revised the provisions related to the calculation of forecast

errors and the forecast validation process in coordination with TSOs. Following these revisions, ACER also deleted the forecast error under Article 2(2)(f) of the Proposal.

- (79) The consideration of the forecast error is insufficiently defined and not harmonised in the Proposal. ACER understands that the impact of the forecast error should in principle be the same throughout different regions where the market-based allocation process is applied and should therefore also be considered in a harmonised manner by the HCZCA methodology. However, so far TSOs did not assess the potential efficiency of the proposed forecasting process and the impact of an eventual consideration of the forecast error. Considering this, ACER is of the opinion that specifying harmonised details on how a forecast error should be considered would be risky since the resulting impact is highly uncertain. Therefore, ACER introduced under Article 18(7) of Annex I a requirement for TSOs to perform the relevant assessments and amend the HCZCA methodology for including provisions for a harmonised consideration of the forecast errors.
- (80) In the all TSOs' response to ACER's preliminary position, TSOs argued that the forecast error consideration should not be harmonised as suggested in ACER's preliminary position. TSOs agreed to the risk stemming from the current uncertainty of the forecast efficiency and shared their concerns of limited possibilities to consider specificities of regions and the limited time of 12 months for the requested assessment and amendment proposal. In the oral hearing, TSOs further clarified their preference to harmonise the forecast error consideration only after gaining some operational experience. ACER therefore revised its preliminary position to require the harmonisation of the forecast error consideration only at a later stage as described in Article 18(7) and Article 27(4) of Annex I. In addition, ACER introduced Article 18(8) of Annex I, which requires TSOs to duly take into the expected forecast efficiency when considering a limit for the maximum volume of allocated cross-zonal capacity for the exchange of balancing capacity in accordance with Article 17(1)(d) of Annex I and in accordance with Article 39(6) of the EB Regulation. For the consideration of such limit, TSOs should complement their proposal for the application of the market-based allocation process in accordance with Article 38(1) of the EB Regulation with an assessment of the expected forecast accuracy and the expected impact on the SDAC. ACER deems the required consideration of the forecast accuracy of especially high importance for the time when the risks of negative impacts on the SDAC from inaccurate forecasts are not yet mitigated by an implemented harmonised forecast error consideration.
- (81) In the all TSOs' response to ACER's preliminary position, TSOs also shared their preference to allow the forecasting entity to lower the limit for the maximum volume of allocated cross-zonal capacity for the exchange of balancing capacity or sharing of reserves for market-based allocation in cases where the forecasting entity is not confident in its forecast. Such provision may lead to possibly daily changes of the maximum volume of allocated cross-zonal capacity for the exchange of balancing capacity or sharing of reserves only based on a daily confidence of a forecasting entity. TSOs did not provide sufficient evidence that such daily adjustment based on the confidence of the forecasting entity could significantly better mitigate the negative

impacts on the SDAC from inefficient forecasts compared to a transparently defined, fixed limit. ACER is of the opinion that such provision would not provide for sufficient transparency in accordance with Article 3(1)(a) and (2)(b) of the EB Regulation and undermine the process to define the maximum volume of allocated cross-zonal capacity for the exchange of balancing capacity or sharing of reserves pursuant to Article 41(4)(b) of the EB Regulation and did therefore not include such provision in Annex I (also see section 6.2.2).

- (82) Article 24(8) of the Proposal addresses the requirement for a report by the ‘forecast process’. Since ACER understands that such report mainly relates to forecast validation, ACER clarified that such report should be issued by the RCC carrying our forecast validation and added relevant elements related to forecast validation.

6.2.5. Requirement for the equal treatment between the exchange of energy and the exchange of balancing capacity or sharing of reserves

- (83) Article 40(3) and Article 41(4) of the EB Regulation requires that the pricing method, the firmness regime and the sharing of congestion income for the cross-zonal capacity allocated for the exchange of balancing capacity or sharing of reserves via the co-optimised allocation and market-based allocation process ensures equal treatment with the cross-zonal capacity allocated for the exchange of energy. Articles 20, 21 and 22 of the Proposal aim to fulfil this requirement.

6.2.5.1. *Firmness regime for cross-zonal capacity allocated for the exchange of balancing capacity or sharing of reserves*

- (84) Article 20 of the Proposal includes the provisions for the firmness regime for cross-zonal capacity allocated for the exchange of balancing capacity or sharing of reserves. ACER considers this proposed article in line with the requirements of the EB Regulation.

- (85) During the exchanges listed in Recital (6), TSOs stressed the limited time available for the market-based allocation process and the related risk for capacity calculation processes which are required for the SDAC and proposed to shift the time of the firmness of the results of the market-based allocation process. ACER agrees to the TSOs’ concern about the risk for SDAC in such situation and amended the Proposal accordingly. The new Article 14(5) of Annex I therefore addresses the process needed to consider the results of the market-based process as firm, which ensures that problems resulting from the market-based allocation process should not cause a failure of the RCC’s day-ahead capacity calculation process required for the SDAC. Regarding the necessary data exchanges between the market-based allocation process and the capacity calculation process, ACER also clarified, under Article 14(4) of Annex I, that the RCC needs to provide pre-final day-ahead capacity calculation results to the market-based process.

6.2.5.2. *Pricing of cross-zonal capacity allocated for the exchange of balancing capacity or sharing of reserves*

- (86) Article 21 of the Proposal describes the pricing of cross-zonal capacity allocated for the exchange of balancing capacity or sharing of reserves. To ensure equal treatment between cross-zonal capacity allocated for the exchange of balancing capacity or sharing of reserves and allocated for the exchange of energy in accordance with Article 40(3) and Article 41(4) of the EB Regulation, ACER deemed it necessary to amend the article on pricing of cross-zonal capacity.
- (87) Article 21(5) and Article 21(6) of the Proposal specify that for sharing of reserves marginal clearing prices from the day-ahead energy market should be used. Since marginal clearing prices from the day-ahead energy market do not directly relate to prices of balancing capacity, ACER sees no justification for using the former for pricing cross-zonal capacity for the case of sharing reserves. Therefore, in ACER's view, cross-zonal capacity for the case of sharing reserves should rather be priced in accordance with the underlying marginal clearing prices from the balancing capacity markets. Accordingly, ACER deleted Article 21(5) and Article 21(6).
- (88) Article 21(3) of the Proposal provides an exemption for cases where the pay-as-bid pricing principle is applied for the market-based allocation process. While Article 4(2) of the Proposal only allows the pay-as-cleared pricing principle for the co-optimised allocation process, Article 4(3) of the Proposal also allows applying the pay-as-bid pricing principle for the market-based allocation process.
- (89) In ACER's Decision No 11/2021 of 13 August 2021 on the market-based allocation process of cross-zonal capacity for the exchange of balancing capacity for the Core CCR, the use of the pay-as-bid pricing principle for the Core market-based process was rejected. This was mainly reasoned with the non-equal treatment in case of cross-zonal capacity allocated to the exchange of balancing capacity with the pay-as-bid pricing principle compared to the allocation of cross-zonal capacity for the exchange of energy, where SDAC is required to apply marginal pricing in accordance with Article 38(1)(b) of the CACM Regulation.<sup>8</sup> Hence, the pay-as-bid pricing principle for the market-based allocation process is not compliant with Article 41(4) of the EB Regulation, according to which the pricing method for cross-zonal capacity that has been allocated for the exchange of balancing capacity or sharing of reserves via the market-based process needs to ensure equal treatment with the cross-zonal capacity allocated for the exchange of energy.
- (90) While a broad majority of the respondents to ACER's public consultation supported the deletion of the pay-as-bid pricing principle, BNetzA and all TSOs argue for maintaining the possibility of the pay-as-bid pricing principle in the HCZCA methodology in their feedback to ACER's preliminary position and explain that they consider the pay-as-bid pricing principle as beneficial, especially in the case of highly

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<sup>8</sup> see section 6.2.2.5.2. in ACER's Decision No 11/2021



concentrated markets. BNetzA also claimed that there is no legal provision requiring the marginal pricing principle in the HCZCA methodology.

- (91) As already established during the process for ACER's Decision No 11/2021, ACER does not share the views expressed by TSOs and BNetzA regarding the pay-as-bid pricing principle for the market-based allocation process.<sup>9</sup> Though there is no explicit legal provision requiring the marginal pricing principle for the cross-zonal capacity allocation processes ACER understands that the requirement of equal treatment cannot be fulfilled when applying different pricing principles, which lead to different considerations of the market value of cross-zonal capacity. As explained in Recital (89) above, since marginal pricing principle is required for SDAC, also the balancing capacity procurement in a market-based allocation process needs to apply marginal pricing to fulfil the requirement pursuant to Article 41(4) of the EB Regulation. In that regard it is also to note that, following BNetzA's appeal against ACER's Decision No 11/2021, ACER's Board of Appeal had confirmed the application of the marginal pricing principle for the market-based allocation process in its Decision of 29 April 2022 in case A-013-2021. More specifically, the Board of Appeal's Decision clarified that ACER adequately responded to BNetzA's concerns in its Decision No 11/2021, agreed with ACER's arguments regarding the need to have the same pricing principle in both involved markets to guarantee equal treatment and dismissed all of BNetzA's pleas.<sup>10</sup> Since ACER did not identify any fundamentally new arguments in the TSOs' and BNetzA's reasoning, developments or any changes to the legal requirements which would question a rejection of the pay-as-bid pricing principle for the market-based allocation process, ACER deleted all provisions concerning the pay-as-bid pricing principle in the proposal.

*6.2.5.3. Sharing of congestion income for the exchange of balancing capacity or sharing of reserves*

- (92) Article 22 of the Proposal addresses the requirements for the sharing of congestion income for the exchange of balancing capacity or sharing of reserves. ACER considers this proposed article in line with the requirements of the EB Regulation.

6.2.6. Requirement for the use of cross-zonal capacity allocated for the exchange of balancing capacity or sharing of reserves

- (93) Article 40(4) and Article 41(5) of the EB Regulation require that cross-zonal capacity, which is allocated to the exchange of balancing capacity or sharing of reserves, shall only be used for the associated exchange of balancing energy. Article 38(4) and Article 38(9) of the EB Regulation set further requirements for the use of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves. The following

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<sup>9</sup> see Recitals (97) and (98) in ACER's Decision No 11/2021

<sup>10</sup> see Recitals (54), (66), (68), (76), (98), (107) and (115) in BoAs' Decision A-013-2021

recitals assess the Proposal's provisions related to the use of cross-zonal capacity allocated for the exchange of balancing capacity or sharing of reserves.

- (94) Article 4(7) to Article 4(10) of the Proposal address the interaction of the cross-zonal capacity allocation processes with the balancing energy platforms pursuant to Articles 19 to 21 of the EB Regulation. As mentioned in Recital (110), ACER separated the requirements concerning the provision of information to balancing capacity platforms from Article 4 of the Proposal and moved them to Article 7 of Annex I. When moving these provisions, ACER also shortened the text of the proposed paragraphs and specified under Article 5(4)(c) of Annex I the most efficient process for providing data to the balancing capacity platforms. To ensure that the cross-zonal allocation processes can also be operated if the balancing capacity platforms cannot receive data at the time of the relevant cross-zonal capacity allocation process, ACER added Article 7(3) of Annex I. To ensure the effective operation of balancing energy platforms, which currently still rely on NTC values for cross-zonal capacity, ACER also introduced Article 5(3) of Annex I for an NTC extraction process in case of flow-based cross-zonal capacities.
- (95) Articles 4, 11 and 19 of the Proposal contain provisions for the netting of cross-zonal capacity in the cross-zonal capacity allocation processes where simultaneous use of cross-zonal capacity for the exchange of balancing energy can be excluded. As mentioned in Recital (110), ACER moved Article 11(5) and Article 11(6) of the Proposal and the corresponding provisions under Article 19(9) and Article 19(10) of the Proposal to Article 4 of Annex I. To improve the efficiency of the cross-zonal capacity allocation processes, ACER revised Article 4(11) of the Proposal by keeping the Proposal's intention for the relevant netting possibilities but defined that netting should take place to prevent unnecessary allocation of cross-zonal capacity instead of only allowing the possibility of netting. ACER introduced the possibility of a derogation from such netting if justified in the relevant application proposal in accordance with Article 38(1) of the EB Regulation. ACER deleted any aspects of Article 4(11) which are not compatible with the functioning of balancing energy platforms.
- (96) While Article 24(3)(b) of the Proposal reflects the requirement pursuant to Article 12(3)(i)(ii) of the EB Regulation, the release of cross-zonal capacity to a subsequent timeframe in accordance with Article 38(8) of the EB Regulation relates to cross-zonal capacity allocated for the exchange of balancing capacity or sharing of reserves when contracting of balancing capacity is done more than one day in advance. Since all processes described in the Proposal take place one day in advance, this provision is not considered relevant and was therefore deleted by ACER.

#### 6.2.7. Responsibilities and governance for the harmonised market-based allocation process

- (97) Articles 6, 14, 15 and 25 of the Proposal contain most provisions related to the implementation and governance of the market-based allocation process. These provisions mainly address the general responsibilities for the implementation of the harmonised market-based process, the establishment of balancing capacity platforms and the operation of the functions run on such a balancing capacity platform.



Article 25(1) of the Proposal requires TSOs to establish additional rules for the market-based allocation process. The Proposal does not envisage a regulatory approval process for these further rules. ACER agrees that some of the additional rules required by Article 25(1) of the Proposal may address technical details, which would not need regulatory approval. However, as explained in the following recitals, the Proposal is currently missing several provisions and requirements on governance, which are necessary to ensure an efficient operation of the market-based allocation process and to allow for an effective increase of applications of the market-based allocation process in accordance with the objectives and regulatory aspects under Article 3 of the EB Regulation.

- (98) While Article 6(2) of the Proposal correctly defines that interdependent applications of the market-based allocation process shall use the same balancing capacity platforms, the Proposal does not include provisions which would ensure a non-discriminatory integration of new applications in case of interdependencies. Without such governance provisions in the HCZCA methodology, ACER sees a risk that new applications of the market-based allocation process may not be able to be implemented or may at least be significantly delayed. This is because new application TSOs may depend on the cooperation of TSOs participating in the existing applications when their application needs to join an existing balancing capacity platform. More specifically, the TSOs responsible for the existing balancing capacity platform might need to introduce amendments to their balancing capacity platform which may be sub-optimal for them, but would be needed by other TSOs to enter an application of the market-based allocation process. To ensure non-discrimination and an effective long-term development of the electricity sector in accordance with points (a), (b), (d) and (e) of Article 3(1) and points (a), (c) and (d) of Article 3(2) of the EB Regulation, ACER deems it necessary to include further provisions on the governance of the market-based allocation process. Provisions for the decision-making process are missing not only for balancing capacity platforms but also for all application TSOs when they take common decisions concerning the market-based cross-zonal capacity allocation optimisation function software. For the required provisions concerning the governance of the market-based allocation process, ACER recommends TSOs to consider rules similar to the ones for the decision-making processes established in the implementation frameworks for European balancing energy platforms in accordance with Articles 19, 20 and 21 of the EB Regulation.
- (99) In the all TSOs' response to ACER's preliminary position, TSOs explained that all application TSOs would like to start the development of the market-based cross-zonal capacity allocation optimisation function software in accordance with Article 27(3) of Annex I after ACER's approval decision. For doing so, all application TSOs intend to organise themselves and set up the contractual framework including the governance for the development of the market-based cross-zonal capacity allocation optimisation function software. TSOs stressed that requiring approved governance rules for such development would not be needed and would cause unnecessary delays.
- (100) ACER agrees that all application TSOs should start the development of the market-based cross-zonal capacity allocation optimisation function software as soon as

possible and encourages TSOs to do so. However, while ACER agrees that the limited number of all application TSOs after the approval of this Decision will be able to effectively develop the market-based cross-zonal capacity allocation optimisation function software, ACER is concerned that with a growing number of applications in the future and the potential need to amend the market-based cross-zonal capacity allocation optimisation function software, the governance of all application TSOs may become more challenging. Article 14(1)(c) of the Proposal already foresees the need to establish governance rules for a change request process for market-based cross-zonal capacity allocation optimisation function software. To ensure that these rules are defined in a non-discriminatory and effective way, ACER added an requirement under Article 15(2) of Annex I of including such rules in the HCZCA methodology. ACER revised this paragraph after ACER's preliminary position to take into account the all TSOs' response to ACER's preliminary position.

- (101) In the all TSOs' response to ACER's preliminary position, TSOs argued that governance rules for balancing capacity platform do not need to be included in the HCZCA methodology as these are regional and do not require European-wide harmonisation.
- (102) While ACER agrees with all TSOs that the EB Regulation does not explicitly require the inclusion of governance rules in the HCZCA methodology, ACER deems it necessary to include such rules to ensure an efficient operation of the market-based allocation process and an efficient evolvement of the application of the market-based allocation process in accordance with points (a), (b), (d) and (e) of Article 3(1) and points (a), (c) and (d) of Article 3(2) of the EB Regulation. As described in Recital (98), ACER deems it necessary to have a regulatory approval of such governance requirements for the balancing capacity platforms. While balancing capacity platforms would be of regional scope, interdependencies will require that different applications pursuant to Article 38(1) of the EB Regulation are operated under one balancing capacity platform. The introduction of new applications may also require the merger of balancing capacity platforms. Besides the HCZCA methodology, the EB Regulation does not consider a methodology which could address the scope of all TSOs of a balancing capacity platform. To ensure an efficient evolvement of balancing capacity platforms over time, ACER deems it necessary that the HCZCA methodology includes harmonised rules for the governance of balancing capacity platforms. ACER therefore did not change its preliminary position in this regard.
- (103) The Proposal foresees three different functions under each balancing capacity platform. ACER addressed this separation in different functions in Article 16(3) of Annex I and specified under Article 16(4) of Annex I that TSOs may designate one entity for each of these functions or one entity for multiple functions under a balancing capacity platform. Further, ACER clarified in Article 16(6) of Annex I that TSOs shall consider the efficiency gains of a balancing capacity platform expected from a lesser number of entities operating the different functions. More specifically, considering the data required from RCCs for operating the market-based allocation process and the required access for the RCC to the market-based allocation optimisation function software for the forecast validation function, ACER would expect efficiency gains if

an RCC were to facilitate the regional procurement of balancing capacity also by operating the market-based allocation optimisation function software in accordance with Article 16(3)(a) of Annex I. Further, ACER understands that the RCC may also forecast the day-ahead energy bids. Regarding the forecasting of day-ahead energy bids TSOs already trust in the RCC to propose improvements to the forecasting method as part of the forecast validation process. Therefore, ACER recommends TSOs to consider a more extensive role for RCCs in the market-based allocation process by fulfilling more functions under a balancing capacity platform. TSOs could also specify the RCCs as a default entity to operate any function under a balancing capacity platform, if TSOs under this balancing capacity platform cannot agree on the determination of a different entity.

- (104) In the all TSOs' response to ACER's preliminary position, TSOs stressed that for reasons of effective monitoring of the forecast performance, TSOs have proposed separate the roles and responsibilities for the forecasting of day-ahead energy bids and the forecast validation. Therefore, TSOs are of the opinion that the same RCC must not operate these two functions.
- (105) The forecasting method is defined by all application TSOs under a balancing capacity platform. If an RCC performing forecast validation identifies that an amendment of the forecasting method would improve the efficiency of the forecast, it shall issue a recommendation to the relevant application TSOs for such amendment in accordance with Article 16(6)(b) of the Proposal. ACER is of the opinion that the general improvements to the process of the forecasting day-ahead energy bids could also be considered as an internal review or optimisation process of the entity performing the forecast. ACER expects that recommendations for improving the forecasting of day-ahead energy bids could therefore be provided even more efficiently if the RCC also gains experience from performing the forecast of day-ahead energy bids on a daily basis. Since the forecasting method should be published in accordance with Article 26(11) of Annex I, also other independent parties may generally review the forecasting method. The other main sub-task under the forecast validation process is the calculation of forecast errors. ACER is of the opinion that an RCC can be trusted to correctly determine the forecast errors in accordance with the HCZCA methodology also when performing the forecast of day-ahead energy bids. Therefore, ACER understands that the same entity could effectively perform the forecast and the forecast validation and does not agree that the roles for forecasting and forecast validation need to be separated.
- (106) Besides adding provisions related to the required submission of an amendment proposal for complementing the HCZCA methodology with the needed provisions for the governance of the market-based allocation process, ACER also significantly re-structured Articles 14, 15 and 25 to improve clarity and to remove unnecessary details or provisions, which rather relate to a proposal for the application of the market-based allocation process in accordance with Article 38(1)(b) of the EB Regulation. Since ACER moved all relevant provisions under Article 6 of the Proposal to Articles 4, 5 and 16 of Annex I, ACER removed Article 6 of the Proposal in Annex I. For improving clarity, ACER also introduced a definition of 'market-based cross-zonal

capacity allocation optimisation function software’ and revised the definition of ‘balancing capacity platform’.

- (107) Related to the responsibilities of TSOs for the market-based allocation process, Article 26 of the Proposal addresses the categorisation and sharing of costs related to the HCZCA methodology. ACER complemented this article with Article 28(1) of Annex I, which addresses the costs resulting from the methodology that are subject to all TSOs. ACER added another paragraph to address the sharing of historical costs from developing the market-based cross-zonal allocation optimisation function software. ACER also deleted provisions on costs which are not defined in the Proposal and rather relate to an application methodology in accordance with Article 38(1) of the EB Regulation. In its preliminary position, ACER also deleted references to third countries in paragraph (5) of Article 26 of the Proposal. Other revisions of this article were necessary to improve structure and clarity.
- (108) In the all TSOs’ response to ACER’s preliminary position, TSOs shared their concerns about deleting references to third countries in Article 26 of the Proposal, remarking that Article 23 of the EB Regulation includes references to third countries and that TSOs from third countries can be part of the CZCA process considering the definition of ‘application’ and therefore ‘application TSOs’. In the oral hearing, TSOs further explained that TSOs from third countries can also enter into applications pursuant to Article 38(1) of the EB Regulation and asked ACER to fully include the involvement of 3<sup>rd</sup> countries in the HCZCA methodology.
- (109) ACER understands that the provisions of Article 26(5) of the Proposal aim to reflect Article 23(3) of the EB Regulation, which refers to the cost sharing among TSOs of both Member States and third countries and thereby ensures that TSOs of both types are included in the cost sharing where they are allowed to participate in a platform and do so in accordance with all relevant legal requirements. ACER agrees that such principle should also be considered when sharing costs of the market-based allocation process. In that regard it is however to note that in principle the EB Regulation does not apply to third countries and that accordingly third country TSOs cannot participate in the market-based allocation process unless the third country and its TSO(s) have been subject to the relevant EU law provisions (including, if applicable, in accordance with Articles 1(6) and 1(7) of the EB Regulation). This precept is also relevant for the definition of ‘application’ under Article 2(2)(a) of the Proposal and the meaning of ‘application TSOs’, i.e. the TSOs which are subject to an approved application proposal in accordance with Article 38(1) of EB Regulation and which may apply a cross-zonal capacity allocation process of the HCZCA methodology: a third country TSO can become an application TSO, however only provided that the third country and its TSO have been subject to the relevant EU law provisions. Nevertheless, the meaning of application TSOs is in general broad enough to include, where applicable, also third country TSOs. And where they are lawfully participating in a cross-zonal capacity allocation process of the HCZCA methodology, those third country TSOs should be application TSOs also for the purpose of sharing the costs among the application TSOs. Therefore, ACER does not deem it appropriate to distinguish for the purpose of cost sharing between application TSOs from Member States and

application TSOs from third countries. Consequently, ACER revised Article 26(5) of the Proposal and amended its preliminary position by referring more generally to countries of the market-based application TSOs and also revised Article 26(6) and Article 26(9) of the Proposal accordingly which refer to Member States but not to third countries.

6.2.8. Other amendments necessary to ensure legal clarity and consistency with existing legal provisions

- (110) As described in Recital (16), the Proposal is structured into 6 Titles under which provisions for each specific cross-zonal capacity allocation process (i.e. co-optimisation and market-based) or provisions relevant for all cross-zonal capacity allocation processes are addressed. However, especially provisions under the titles for each specific cross-zonal capacity allocation process are sometimes repetitive and equally applicable to all cross-zonal capacity allocation processes. To avoid any unnecessary repetitions and ensure clarity and readability of the Proposal, ACER significantly re-structured the Proposal, and clarified which provisions are harmonised over all cross-zonal capacity allocation processes and which are specific for each individual cross-zonal capacity allocation process. Therefore, ACER introduced a new Title 2 in Annex I for ‘rules for all timeframes allocating cross-zonal capacity for the exchange of balancing capacity or sharing of reserves’ and divided Article 4 of the Proposal into Articles 4 to 7 of Annex I. Any relevant provisions under Title 2 and 4 of the Proposal, which are equally applicable to the co-optimised and the market-based allocation process, were moved to the newly structured Articles 4 to 7 of Annex I. Therefore, this re-structuring of the Proposal also leads to significantly shortened content in Articles 7 and 13 of the Proposal. For improving the structure and consistency in the Proposal ACER also made further revisions to Articles 9, 10, 11, 18 and 19 of the Proposal.
- (111) ACER removed unnecessary repetitions of the requirement to consider the case of TSOs applying a central dispatching model and only left provisions addressing the case of TSOs applying a central dispatching model where the general provision of Article 1(5) of the Proposal is not sufficient.
- (112) ACER replaced the definitions of ‘TSO BC demand’ and ‘TSO BC volume sensitive demand’ with a general definition of ‘TSO demand’, which also considers the sensitivity of demand through sharing reserves and removed the definition of ‘TSO procurement volume’ which is not needed in Annex I.
- (113) In the ILR’s and the all TSOs’ response to ACER’s preliminary position, TSOs and the regulatory authority of Luxembourg asked for a revision of the ‘TSO demand’ definition to consider the specific case of the TSO of Luxembourg. More specifically, TSOs and ILR suggest to amend the proposed definition by keeping the wording ‘per control area’ instead of ‘per scheduling area’ from the initial definition in the Proposal and to add ‘or the delegated TSO’ to ‘by the connecting TSO’. ACER understands that having a definition per scheduling area would reflect the wording used under Article 32(1) of the EB Regulation. Further, ACER understands that defining the TSO demand per control area would not be suitable for the Nordic CCR, where an LFC



area consist of multiple scheduling areas and cross-zonal capacity needs to be allocated between these. ACER understands that, in accordance with Article 1(5) of the EB Regulation, the relevant TSOs (i.e. Creos and Amprion) may propose to their regulatory authorities to coordinate and submit a combined TSOs demand to the relevant cross-zonal capacity allocation process. Therefore, ACER amended the Proposal as indicated in its preliminary position. AEWG's advice asked ACER to take note of the further comments provided by ILR considering the specific case of the TSO of Luxembourg. More specifically, ILR proposed to allow for an optional consideration of the TSO demand per LFC area by referring to Article 143(4) of the SO Regulation. ILR further shared concerns about problems with Article 1(5) of the EB Regulation in case the relevant TSOs are not willing to cooperate. ACER does not deem the reference to Article 143(4) of the SO Regulation as suitable since the relevant Article under the SO Regulation is addressing the frequency restoration process, while the 'TSO demand' definition relates to the procurement of balancing capacity and not to the frequency restoration process. ACER considers Article 1(5) of the EB Regulation as the suitable provisions for this case. Further, ACER considers that also Article 13 of the EB Regulation could be applied for delegating a required submission of a TSO demand. Considering the ongoing coordination between the relevant TSOs (i.e. Creos and Amprion) and the joint request to consider their specific situation (see Recital (22)(i), ACER does not share ILR's concern about the potential lack of cooperation between the relevant TSOs. Further, ACER understands that there is sufficient time for the development and approval of a proposal in accordance with Article 1(5) of the EB Regulation before a possible application of a harmonised cross-zonal capacity allocation process. Therefore, ACER did not revise the 'TSO demand' definition after receiving the AEWG advice.

- (114) Article 5 of the Proposal describes the notification process for applying a cross-zonal capacity allocation process and refers to Article 150 of the SO Regulation. To fully consider the requirement pursuant to Article 150 of the SO Regulation, ACER added the information defined in Article 150(1)(b) of the SO Regulation, which, though necessary, was missing in Article 5(1) of the Proposal.
- (115) In coordination with TSOs, ACER introduced under Article 9(3) of Annex I a general provision describing the relation between the cross-zonal capacity allocation optimisation function for the co-optimised allocation process and the MCO function and clarified that the co-optimised allocation process shall be performed together with SDAC in one step. Further, ACER clarified under Article 9(4) of Annex I the provision for linking between balancing capacity bids and day-ahead energy bids. Considering the possible drawbacks of 'unilateral' linking, as highlighted by respondents in the public consultation, ACER did not limit the this provision to 'unilateral' linking as proposed under Article 7(2)(a) of the Proposal.
- (116) ACER revised Article 23 of the Proposal, which addresses fallback procedures, by inserting relevant cross-references and shortening provisions which are sufficiently covered by other articles.
- (117) Article 24 of the Proposal contains several provisions on the publication of information. ACER revised this article as mentioned under Recitals (58), (71), (82)

and (96). ACER further revised Article 24(2) and Article 24(3) to improve the clarity of these provisions and improve the transparency of the information provided in accordance with these provisions. ACER also clarified in Article 26(10) of Annex I that the information mentioned in this article shall be published on ENTSO-E's transparency platform. Finally, in Article 26(12) of Annex I ACER added a requirement for a report by all TSOs to ensure transparency of the effective and efficient use of the harmonised cross-zonal capacity allocation processes.

- (118) ACER further revised Article 1(3), Article 1(4) and Article 2(2)(a) of the Proposal by removing the wording of 'one or more TSO(s)', considering the wording used in Article 33(1) and Article 38(1) of the EB Regulation.
- (119) ACER removed Recital (7) in the whereas-section of the Proposal and introduced Article 1(2) and Annex 1 in Annex I, containing a list of all the TSOs to which this methodology applies to specify the personal scope of the HCZCA methodology. This amendment is necessary to provide clarity on changes in the group of TSOs to which the HCZCA methodology should apply, making those changes transparent by amendments to HCZCA methodology, namely the list of TSOs in Annex I.
- (120) Besides the revisions explicitly addressed in this section 6.2, ACER also made some further editing amendments throughout the Proposal to improve the readability and align the content.

## **7. CONCLUSION**

- (121) For all the above reasons, ACER considers the Proposal in line with the requirements and objectives 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, ENTSO-E and the regulatory authorities, are necessary to ensure that the Proposal is in line with the purpose of the EB Regulation and contributes to market integration, non-discrimination, effective competition, and the proper functioning of the market, as well as to improve the Proposal's editorial quality.
- (122) Therefore, ACER approves the Proposal subject to the necessary substantive and 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*

The methodology for harmonising processes for the allocation of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves pursuant to Article 38(3) of Regulation (EU) 2017/2195 is adopted as set out in Annex I to this Decision.



*Article 2*

This Decision is addressed to:

- APG – Austrian Power Grid AG
- VÜEN – Vorarlberger Übertragungsnetz GmbH
- Elia – Elia System Operator S.A
- ESO – Electroenergien Systemen Operator EAD
- HOPS - Croatian Transmission System Operator Ltd
- ČEPS - ČEPS, a.s.
- Energinet – Energinet
- Elering – Elering AS
- Fingrid – Fingrid OyJ
- Kraftnät Åland Ab
- RTE - Réseau de Transport d'Electricité, S.A
- Amprion – Amprion GmbH
- Baltic Cable AB
- TransnetBW -TransnetBW GmbH
- TenneT GER – TenneT TSO GmbH
- 50Hertz – 50Hertz Transmission GmbH
- IPTO – Independent Power Transmission Operator S.A.
- MAVIR ZRt. - MAVIR Magyar Villamosenergia-ipari Átviteli Rendszerirányító Zártkörűen Működő Részvénytársaság ZRt.
- EirGrid – EirGrid plc
- Terna – Terna SpA
- Augstsprieguma tīkls - AS Augstsprieguma tīkls
- LITGRID – LITGRID AB
- CREOS Luxembourg – CREOS Luxembourg S.A.
- TenneT TSO – TenneT TSO B.V.
- PSE – PSE S.A.
- REN - Rede Eléctrica Nacional, S.A.
- Transelectrica - C.N. Transelectrica S.A.
- SEPS - Slovenská elektrizačná prenosová sústava, a.s.
- ELES – ELES, d.o.o.
- REE - Red Eléctrica de España S.A.U.

- Svenska Kraftnät - Affärsverket Svenska Kraftnät
- SONI System Operator for Northern Ireland Ltd.

Done at Ljubljana, on 19 July 2023.

**- SIGNED -**

*For the Agency  
The Director*

C. ZINGLERSEN

Annexes:

- Annex I – Methodology for harmonising processes for the allocation of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves
- Annex Ia – Methodology for harmonising processes for the allocation of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves – with track changes - (for information only)
- Annex II – Evaluation of responses to the public consultation on Methodology for harmonising processes for the allocation of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves (for information only)

*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.*