

**DECISION  
OF THE BOARD OF APPEAL OF THE EUROPEAN UNION AGENCY FOR THE  
COOPERATION OF ENERGY REGULATORS**

**of 7 July 2022**

<b>Case number:</b>	A-001-2022
<b>Language of the case:</b>	English
<b>Appellant:</b>	<i>Polskie Sieci Elektroenergetyczne S.A.</i> ('PSE') Represented by: L. JESIEŃ, President
<b>Defendant:</b>	<i>European Union Agency for the Cooperation of Energy Regulators</i> (‘ACER’) Represented by: C. ZINGLERSEN and its legal representatives P. GOFFINET and M. SHEHU (Strelia cvba/scrl)
<b>Application for:</b>	remittal to the competent body of ACER of Decision No 14/2021 on the long-term capacity calculation methodology of the Core capacity calculation region, for the adoption of a new decision
<b>Board composition:</b>	P. EECKHOUT (Rapporteur), M. SUPPONEN (Rapporteur), A. BIONDI, K. SARDI, K. WIDEGREN and M. PREK (Chair),

**THE BOARD OF APPEAL OF THE EUROPEAN UNION AGENCY FOR THE  
COOPERATION OF ENERGY REGULATORS**

**HAS ADOPTED THIS DECISION**

**I. Procedural steps relevant for the decision**

1. On 3 November 2021, the *European Union Agency for the Cooperation of Energy Regulators* (hereinafter ‘ACER’ or the ‘Defendant’) adopted Decision No 14/2021 on the long-term capacity calculation methodology of the Core capacity calculation region (hereinafter the ‘Contested Decision’ or ‘the Core LT CCM’).
2. On 3 January 2022, *Polskie Sieci Elektroenergetyczne S.A.* (hereinafter ‘PSE’ or the ‘Appellant’), lodged an appeal against the Contested Decision, requesting the Board of Appeal to remit the case to the competent body of ACER for a new decision to be adopted.
3. On 4 January 2022, the announcement of appeal was published on ACER's website<sup>1</sup> and the Notice of Appeal was served to ACER.
4. On 18 January 2022, *Urząd Regulacji Energetyki* – the National Regulatory Authority of Poland (hereinafter ‘URE’) submitted a leave to intervene.
5. On 21 January 2022, the Parties were notified of the composition of the Board of Appeal.
6. On 8 February 2022, ACER submitted its defence requesting the Board of Appeal to dismiss the appeal.

---

<sup>1</sup>[https://extranet.acer.europa.eu/en/The\\_agency/Organisation/Board\\_of\\_Appeal/Announcements%20of%20Appeal/Announcement%20of%20Appeal%20A-001-2022.pdf](https://extranet.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Announcements%20of%20Appeal/Announcement%20of%20Appeal%20A-001-2022.pdf)

7. On 18 February 2022, URE was granted leave to intervene.
8. On 23 February 2022, URE received access to the file of the appeal proceedings.
9. On 3 March 2022, PSE and ACER were summoned to the oral hearing to be held on 16 March 2022.
10. On 13 March 2022, URE was invited to the oral hearing. On the same date, the announcement of the hearing was published on ACER's website<sup>2</sup>.
11. On 16 March 2022, the oral hearing took place in the presence of PSE and ACER.

## II. *Pleas in law*

12. The Appellant contests the lawfulness of Article 1 of the Contested Decision and Articles 10 and 17(1) of Annex I to the Contested Decision.
13. In its first plea, the Appellant claims that ACER infringed the principle of conferral set out in Article 5(2) of the Treaty on European Union (hereinafter 'TEU') in conjunction with Article 17(1) of Annex I to the Contested Decision by limiting the Core TSOs' right to correct long-term capacity relevant to their bidding zone borders for reasons of operational security during the validation process only to situations listed in Article 17(1) of Annex I to the Contested Decision.
14. In its second plea, the Appellant claims infringement of Article 10(3) and Article 10(4) of Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation (hereinafter 'FCA Regulation') in conjunction with Article 10 of Annex I to the Contested Decision, by setting rules for the usage of the Common Grid Model Methodology (hereinafter "CGMM") or temporary procedures for building this Common Grid Model (hereinafter "CGM") in the long-term capacity calculation which result in planned outages not being sufficiently reflected in the capacity calculation process.
15. In its third plea, the Appellant claims infringement of the duty to state reasons and of the principle of good administration for two reasons. First, the validation process as described in Article 17 of Annex I to the Contested Decision would not be supported by unequivocal and sufficient analysis of its correctness. In particular, with regard to Article 17(1)(c) of Annex I to the Contested Decision, ACER would have not given reasons for limiting the Core TSOs' right to correct the calculated level of a remaining available margin (hereinafter 'RAM'). Second, Article 17 of Annex I to the Contested Decision would not be supported by the reasoning provided by ACER for its adoption and therefore, its inclusion in the Contested Decision would be inconsistent and illogical.

### II.1 *The first plea*

#### *Arguments of the Parties*

16. The Appellant contends that, by limiting the Core TSOs' right to correct long-term capacity relevant to their bidding zone borders for reasons of operational security during the validation process only to situations listed in Article 17(1) of Annex I to the Contested Decision, ACER has acted *ultra vires* by exceeding its competence and has thus breached the principle of conferral.

---

<sup>2</sup>[https://extranet.acer.europa.eu/en/The\\_agency/Organisation/Board\\_of\\_Appeal/Announcements%20of%20Appeal/A-001-2022%20-%20PSE%20v%20ACER%20-%20Announcement%20-%20hearing.pdf](https://extranet.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Announcements%20of%20Appeal/A-001-2022%20-%20PSE%20v%20ACER%20-%20Announcement%20-%20hearing.pdf)

17. The Appellant points out that, like any other agency of the Union, ACER can only act within the limits of the powers that have been specifically and clearly conferred upon it by the EU legislator. In the case of the Contested Decision, ACER's power comes down to determination of a long-term capacity calculation methodology, pursuant to the guideline on forward capacity calculation adopted by the European Commission in the FCA Regulation. The Appellant argues that agencies such as ACER are entrusted only with limited, executive powers.
18. The Appellant further points out that network codes and guidelines are implementing acts, and in adopting such acts, the Commission can neither amend or supplement the legislative act; therefore, also the methodologies adopted to implement network codes or guidelines cannot amend, supplement, or otherwise extend the scope of the relevant provisions of the relevant regulation.
19. In light of the above, and in particular with regard to the right to reduce cross-zonal capacity during the validation of cross-zonal capacity for reasons of operational security, the Appellant argues that ACER is not entitled to adopt a measure which implements a methodology based on a relevant network code or guideline, if this results in limiting TSOs' rights that are explicitly provided for in the same network code or guideline.
20. The Appellant refers to Article 15 of the FCA Regulation, which cross-refers to Article 26 of Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (hereinafter "Regulation (EU) 2015/1222" or "CACM Regulation"). In Article 26(3) and (4) of the latter, there are limitations to the validation procedures, as follows: (i) validation of cross-zonal capacity is possible for reasons of operational security; and (ii) validation of cross-zonal capacity shall be coordinated with the neighbouring coordinated capacity calculators. Therefore, the Appellant argues that the list of restrictions or the validation process is closed and cannot be extended by ACER.
21. The Appellant further argues that, in violation of the above, ACER introduced additional limitations to the cross-zonal capacity validation laid down in Article 17(1) of Annex I to the Contested Decision, explaining that an example of such a limitation is the case of RAM calculated for a particular CNEC, and operational security limits applicable for the RAM calculations are in fact modelled via the input data for the capacity calculation process. The Appellant contends that, if, as a result of minRAM application, the RAM calculated for that CNEC is higher than technically feasible, i.e., it violates the operational security limits, the methodology adopted by the Contested Decision gives TSOs no right to adjust such RAM pursuant to Article 17 of Annex I to the Contested Decision.
22. According to the Appellant, the rules of Article 17(1)(a) and (b) preclude RAM adjustment, as the need for such adjustment does not result from a mistake in the input data or voltage/cos  $\phi$  related needs; also, the rules of Article 17(1)(c) cannot be the basis for RAM adjustment, as the power flow limits for this CNEC can be modelled via the input data for the capacity calculation process.
23. In the Appellant's view, Article 17(1)(c) of Annex I to the Contested Decision limits the possibilities of RAM adjustment only to circumstances where operational security violation cannot be modelled via the input data for the capacity calculation process, which is also not the case in the example above.
24. In its Defence, ACER sets out the legislative and regulatory framework, and the process which led to the Contested Decision.
25. The Defendant considers that the Appellant's first plea should be dismissed as unfounded.
26. The Defendant refutes the Appellant's arguments that by limiting Core TSOs' right to correct long-term capacity relevant to their bidding zone borders for reasons of operational security

- during the validation process only to situations listed in Article 17(1) of Annex I to the Contested Decision, the Defendant has acted *ultra vires* by exceeding its competence and thus breaching the principle of conferral under Article 5(2) of the TEU, and that the Defendant has breached the *Meroni* line of case-law and adopted a methodology which amends, supplements or otherwise extends the scope of the relevant legal provision.
27. In particular, the Defendant contends that ACER did not limit TSO's right to correct long-term capacity relevant to their bidding zone borders for reasons of operational security during the validation process and it argues that ACER did not infringe the principle of conferral.
  28. The Defendant explains that, contrary to what the Appellant argues, the Defendant did not set other limitations for validation of cross-zonal capacity in Article 17(1) of Annex I to the Contested Decision than those provided by Articles 15 and 24 of the FCA Regulation and Article 26 of the CACM Regulation.
  29. According to the Defendant, the three situations identified under paragraphs (a), (b) and (c) of Article 17(1) of Annex I to the Contested Decision encompass all possible circumstances where and how long-term capacity can be corrected by Core TSOs for reasons of operational security during the validation process. The Defendant explains that by listing the three scenarios under paragraphs (a), (b) and (c) of Article 17(1) of Annex I to the Contested Decision, the Defendant did not limit TSOs' right to perform individual validation. In particular, it explains that the Contested Decision rather specifies and categorises, in a more detailed and comprehensive manner, all the different "types" of reasons of operational security to correct (i.e., reduce) long-term capacity, in line with Article 15 and Article 24 of the FCA Regulation and Article 26 of the CACM Regulation.
  30. The Defendant then examines the different situations as regulated in the respective parts of Article 17 of Annex I to the Contested Decision one by one.
  31. With regard to the correction under Article 17(1)(c), the Defendant argues that the correction of long-term capacity, necessary for reasons of operational security, cannot be modelled in the capacity calculation process via the input data.
  32. In particular, it indicates that Article 17(1)(c) of Annex I to the Contested Decision specifies the third and last type of correction of long-term capacity that can be done in the context of the individual validation process. As a result, TSO can adjust long-term capacity if the calculated level of a RAM is unable to ensure operational security, and the adjustment required by the TSO cannot be modelled through the capacity calculation process via the input data.
  33. The Defendant further explains that a TSO can directly correct long-term capacity without any recalculation of the cross zonal capacities or a new validation process by decreasing the RAM of its own CNECs (if necessary, even below the minRAM specified in Article 14(5) of the Core LT CCM) subject to two conditions. First, there shall be an operational security issue which necessitates to correct long-term capacity. Second, the adjustment required by the TSO shall not fall under the cases set out in Article 17(1)(a) and Article 17(1)(b) of Annex I to the Contested Decision.
  34. As a result, by reading Article 17(1)(c) of the Contested Decision in conjunction with Article 17(2)(a) thereof, the measure foreseen in Article 17(1)(c) would consist of a "last resort correction", as a more general category of individual validation adjustments whenever there is an operational security issue.
  35. The Defendant further explains that the corrections under Article 17(1)(c) of Annex I to the Contested Decision, which cannot be modelled in the capacity calculation via the input data, occur in two cases: i) where the stability constraints, aiming at ensuring the reliability and consistency in power or electricity production, return quickly through this transient condition to

- a sustainable operating state, or ii) where there are security constraints – which are in fact already taken into account in the input data but which would be overwritten by the minRAM application.
36. The Defendant underlines that given that the adjustment under Article 17(1)(c) of Annex I to the Contested Decision does not concern one of these two categories of issues and is not self-explanatory, the TSO requiring a correction (i.e., reduction) of the long-term capacity needs to provide a justification for such a correction in the short-term and explain the operational security concern (e.g., a reduction due to dynamic stability of the system).
  37. In particular, according to the Defendant, operational security is the only reason that can trigger Article 15 and Article 24 of the FCA Regulation and Article 26 of the CACM Regulation and can give the right to TSOs to correct (i.e., reduce) long-term capacity.
  38. In addition, the Defendant also points out that under Article 17(1)(c) of Annex I to the Contested Decision, given the nature of the correction (i.e., it cannot be modelled in the capacity calculation), any TSO requiring an adjustment needs to prove that its request falls under the operational security legal requirement of Article 15 and Article 24 of the FCA Regulation and Article 26 of the CACM Regulation, explaining why the level of a RAM is unable to ensure operational security.
  39. The Defendant concludes that it follows from the foregoing that, provided there is an operational security issue, Article 17(1)(c) of Annex I to the Contested Decision includes, by definition, all other possible corrections of long-term capacity that can be done by TSOs during the validation process, and which do not fall under the specific “adjustment categories” of Article 17(1)(a) of Annex I to the Contested Decision or Article 17(1)(b) of Annex I to the Contested Decision. According to the Defendant, Article 17(1) of Annex I to the Contested Decision contains all possible corrections of long-term capacity due to operational security issues. In this respect, the Defendant provides an exhaustive list of RAM reductions due to security concerns.
  40. The Defendant further provides its view on the inaccuracy of the Appellant’s allegations regarding a concrete example from point 33 of the Notice of Appeal relating to minRAM. In particular, the Defendant contends that the issue that is brought up by the Appellant in its example does not relate to the right of TSOs to correct long-term capacity, but rather concerns the minRAM application. The Defendant points out that the right of the TSOs to correct long-term capacity during the validation process (Article 17 of Annex I to the Contested Decision) on the one hand, and the application of the minRAM (Article 14(4)-(5) of Annex I to the Contested Decision) on the other, are two distinct elements.
  41. In addition, the Defendant argues that there is no violation of the principle of conferral. The Defendant explains that it adopted the Contested Decision following the referral of the TSOs’ Proposal by the NRAs, having acted on the basis of Articles 5(3) and 6(10) of 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 (recast) (hereinafter the ‘ACER Regulation’) and Article 4(10) of the FCA Regulation. These legal provisions confer an express competence on ACER to adopt the Contested Decision. Specifically, when adopting the Contested Decision, ACER was competent to decide on the regulatory issues, including Article 15 and Article 24 of the FCA Regulation and Article 26 of the CACM Regulation. The Defendant also underlines that Article 17 of Annex I to the Core LT CCM is fully in line with the right of each TSO to reduce cross-zonal capacity for reasons of operational security during the validation process, and lawfully implements Article 15 and Article 24 of the FCA Regulation and Article 26 of the CACM Regulation.
  42. The Defendant argues that the fact that ACER classified and specified what such a right would imply and how such right is to be implemented in practice by TSOs during the validation process



does not mean, contrary to the Appellant's allegations, that ACER limited TSOs' right to reduce cross-zonal capacity in case of operational security issues.

43. Firstly, the Defendant points out that ACER's powers are directly granted by the EU legislature through the ACER Regulation (i.e., Articles 5(3) and 6(10)).
44. Secondly, the Defendant clarifies that ACER's powers are precisely delineated, as confirmed by Recital 16 of the ACER Regulation, according to which ACER's specific decision-making competences under that Regulation have been conferred upon ACER under clearly specified conditions, and cover technical and regulatory issues requiring regional coordination, in particular those concerning the implementation of network codes and guidelines. Thus, when ACER makes use of these decision-making powers, it acts within the limits of the competences conferred upon it and under clearly specified conditions. The Defendant further explains that ACER's competence is subject to strict requirements, in particular under Articles 5(3) and 6(10) of the ACER Regulation, Articles 4(10), 15 and 24 of the FCA Regulation, and Article 26 of the CACM Regulation. Furthermore, ACER is bound by a strict timeline of 6 months as per Article 6(12) of the ACER Regulation. The Defendant also added that ACER should adopt the Contested Decision with the favourable opinion of the Board of Regulators, requiring a two-thirds majority of its members (the NRAs), in compliance with Article 22 of the ACER Regulation and Article 4(10) of the FCA Regulation.
45. Thirdly, the Defendant argues that ACER's competence to adopt the Contested Decision is amenable to review by the Board of Appeal, as provided under Article 28 of the ACER Regulation and by the Court of Justice of the European Union through a review of the Board of Appeal's decision in compliance with Article 29 of the ACER Regulation. Consequently, the conferral of powers to ACER does not undermine Article 291 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU').
46. Finally, with regard to the Appellant's claim according to which "methodologies adopted to implement network codes or guidelines cannot amend, supplement or otherwise extend the scope of the relevant provisions of the relevant regulation", the Defendant argues that the claim is ill-founded, since the Contested Decision complies with Article 15 and Article 24 of the FCA Regulation, as well as Article 26 of the CACM Regulation.
47. The Defendant concludes that the Appellant's first plea should therefore be dismissed as unfounded.

#### *Assessment*

#### Legal Test

48. The Appellant argues that ACER, by restricting, in Article 17(1) of Annex I to the Contested Decision, the right of TSOs to correct long-term capacity, beyond the conditions set in Articles 15 and 24 of the FCA Regulation and of Article 26 of the CACM Regulation, violated the principle of conferral (Article 5(2) of the TEU) and the CJEU case law on the limits to the powers of the agencies of the Union, following the *Meroni* line of case-law.
49. The contours and consequences of the principle of conferral and of the relevant CJEU case law are not in dispute between the Parties. The Board of Appeal accepts that ACER is not entitled to amend, supplement or otherwise extend the scope of the relevant provisions of the FCA and CACM Regulations (see, in this regard, judgment of the Court (Grand Chamber) of 22 January 2014, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, C-270/12, EU:C:2014:18, in particular points 53 and 54).
50. It is therefore necessary to start with an analysis of those provisions.

51. Article 15 of the FCA Regulation provides that the proposal for a common capacity calculation methodology which lies at the basis of the Decision “shall include a cross-zonal validation methodology which shall meet the requirements of Article 26” of the CACM Regulation. This provision, therefore, contains no substantive conditions, other than through reference to Article 26 of the CACM Regulation.
52. Article 24(1) of the FCA Regulation provides that “[e]ach TSO shall validate the results of the calculation for long-term cross-zonal capacity on its bidding zone borders or critical network elements for each long-term capacity calculation time-frame pursuant to Article 15”. The further provisions of Article 24 require TSOs to send the capacity calculation to the relevant coordinated capacity calculators and to the other TSOs (paragraph 3), and to provide, upon request, a report detailing how the long-term cross-zonal capacity value has been obtained from their regulatory authorities (paragraph 5). It must be noted that these provisions do not impose substantive conditions either.
53. Article 26(1) of the CACM Regulation provides that “[e]ach TSO shall validate and have the right to correct cross-zonal capacity relevant to the TSO's bidding zone borders or critical network elements provided by the coordinated capacity calculators in accordance with Articles 27 to 31.” Article 26(3) provides that “[e]ach TSO may reduce cross-zonal capacity during the validation of cross-zonal capacity referred to in paragraph 1 for reasons of operational security”. Those provisions confirm that the EU legislature conferred a right on TSOs to correct cross-zonal capacity at the validation stage, and to reduce such capacity for reasons of operational security.
54. However, the validation stage of the capacity calculation is not the only point at which issues of operational security are addressed. Operational security is fully taken into account in the construction of the capacity calculation methodology, as shown by a combined reading of the relevant provisions of the FCA and CACM Regulations. More specifically, Article 12 of the FCA Regulation provides that “[t]he proposal for a common capacity calculation methodology shall include methodologies for operational security limits and contingencies which shall meet the requirements set out in Article 23(1) and (2) of Regulation 2015/1222”.
55. The Parties do not dispute the fact that, at the validation stage, TSOs have the right to correct cross-zonal capacity for reasons of operational security (hereafter the “right to correct”). It is therefore unnecessary to conduct a more in-depth analysis of the regulatory framework that governs the capacity calculation methodology. The TSOs’ right to correct must be construed in such a way so as to remain within the parameters of that regulatory framework, imposing a series of obligations on the various actors involved in capacity calculation, including the TSOs.
56. It must further be noted that the FCA Regulation does not define “operational security”, while Article 1(7) of the CACM Regulation does that as follows: “‘operational security limits’ means the acceptable operating boundaries for secure grid operation such as thermal limits, voltage limits, short-circuit current limits, frequency and dynamic stability limits”.
57. This regulatory framework requires further implementation. The provisions of Article 4 of the FCA Regulation lay down the various steps of that implementation process. With regard to the capacity calculation methodology, the TSOs of the respective regions must make a proposal, which is subject to approval by all the regulatory authorities of the relevant region (paragraph 7). In the absence of such approval, or upon request of those authorities, ACER shall adopt a decision concerning the TSOs’ proposal (paragraph 10). The Contested Decision was indeed adopted following a request by the regulatory authorities of the Core region, it was based on the proposal developed by the Core TSOs, and it was adopted following an extensive process of consultation with the various stakeholders.

58. It is this regulatory framework that determines the powers of ACER and their limits. The Board of Appeal finds that those powers extend to ensuring that operational security is maintained, both within the adopted capacity calculation methodology and at the validation stage. ACER is clearly entitled, and indeed mandated, to determine, with greater level of technical detail of that contained in the regulatory framework, how operational security is best protected. In addition, ACER does not act on its own, given that it works with TSOs' own proposal and consults stakeholders. It is also noted that the Appellant does not allege that ACER failed to consult properly or to take the results of that consultation duly into account.
59. It follows that ACER was entitled to determine, in Articles 17(1) and (2) of Annex I to the Decision, under what conditions TSOs are entitled to exercise their right to correct long-term capacity at the validation stage. That right is not absolute, in light of the regulatory framework and ACER's powers, and it is not solely for individual TSOs to decide which operational security concerns justify correcting long-term capacity. Such interpretation of the right to correct would risk undermining the fundamental objectives behind the construction of a common capacity calculation methodology.
60. ACER's powers are subject to limits. In this case, ACER would not be entitled to restrict TSOs' right to correct operational security in such a way that the latter could no longer be guaranteed. Nor is ACER entitled to restrict this right in a manner that violates the regulatory framework.
61. In so far as the Appellant's first plea could be construed as meaning that ACER was not entitled, in light of the principle of conferral, to limit Core TSOs' right to correct, in any way, shape or form, the Board of Appeal cannot accept it. As determined above, the right to correct is not an absolute one.
62. Therefore, the issue before the Board of Appeal, under the first plea, is whether the considerations on which the Contested Decision is based are vitiated by an error (see, in this regard, judgment of the General Court of 18 November 2020, Aquind Ltd v European Union Agency for the Cooperation of Energy Regulators, T-735/18, EU:T:2020:542, currently under appeal) when laying down, in Articles 17(1) and (2) of Annex I to the Contested Decision, the conditions under which the Core TSOs are entitled to correct long-term capacity relevant to their bidding zone borders for reasons of operational security, either by restricting the right to correct in such a way that operational security could no longer be guaranteed, or by violating the regulatory framework.
63. The Appellant does not point to any specific regulatory provisions that are binding on ACER, other than those referred to above in paragraph 20, and which lay down the right to correct in a general manner. The Board of Appeal will therefore limit its examination to the question of whether ACER restricted the right to correct in such a way that operational security could no longer be guaranteed.

#### Application of the test

64. The first plea refers to the validation of cross-border capacities in the Contested Decision. The methodology prescribes how to achieve the yearly and monthly cross-zonal capacities which will be sold to the market in yearly and monthly auctions in the Core region.
65. The rules for validation of results are required by virtue of Article 15 of the FCA Regulation ("Cross-zonal capacity validation methodology"), which reads:

"The proposal for a common capacity calculation methodology shall include a cross-zonal validation methodology which shall meet the requirements set out in Article 26 of Regulation 2015/1222."
66. Article 26(1) of the CACM Regulation gives guidance to the validation process as follows:



“Each TSO shall validate and have the right to correct cross-zonal capacity relevant to the TSO's bidding zone borders or critical network elements provided by the coordinated capacity calculators in accordance with Articles 27 to 31.”

67. Article 26(3) of the CACM Regulation gives guidance to the validation process as follows:
- “Each TSO may reduce cross-zonal capacity during the validation of cross-zonal capacity referred to in paragraph 1 for reasons of operational security.”
68. The Core LT CCM includes a three-stage process with (i) an input from the TSOs, (ii) a calculation of the cross-zonal capacities by the capacity calculation coordinator and (iii) a validation of the results by the TSO. The Appellant’s claim refers to the last phase of this process (i.e., the validation of the results).
69. The disputed article in the Contested Decision is Article 17 (1) of Annex I, which reads:
- “In accordance with Article 15 and Article 24 of the FCA Regulation, referring to Article 26 of the CACM Regulation, the Core TSOs shall have the right to correct long-term capacity relevant to their bidding zone borders for reasons of operational security during the validation process. The individual validation adjustments may be done by a Core TSO only in the following situations:
- (a) a mistake in the input data has occurred, resulting in a wrong estimation of long-term capacity from an operational security perspective;
  - (b) there is a potential need to reconsider voltage or  $\cos \varphi$  on certain CNECs; or
  - (c) the TSO requiring an adjustment provides justification that the calculated level of a RAM is unable to ensure operational security, which cannot be modelled via the input data for the capacity calculation process.”
70. The Appellant argues that the Defendant introduced “additional limitations” in Article 17(1) of Annex I to the Contested Decision (Appeal, paragraph 32), beyond those laid down in the regulatory framework. The Appellant considers that the possibility to adjust the long-term capacity only in these three cases is more limitative than the one provided in Article 26 of the CACM Regulation. Notably, referring to the Article 17(1)(c), the Appellant claims that there are operational security issues which can be modelled via the input data, but still need an adjustment in the validation phase because the capacity calculation process does not fully capture all possible security constraints. Thus, the possibility in Article 26(3) of the CACM Regulation to reduce cross-zonal capacity during the validation of cross-zonal capacity for reasons of operational security should not be limited by any further conditions.
71. The Appellant is concerned that Article 17(1)(c) of Annex I to the Contested Decision does not allow a TSO to adjust the RAM for a CNEC, where, as a result of the minRAM application, the RAM calculated for that CNEC is higher than technically feasible, i.e., it violates the operational security limits. In this case, the Appellant contends at paragraph 33 of its Notice of Appeal that: “Article 17(1)(c) [of Annex I to the Contested Decision] cannot be the basis for the RAM adjustment, as the power flow limits for this CNEC can be modelled via the input data for the capacity calculation process”.
72. The Defendant, by contrast, contends, at paragraph 40 of its defence, that Article 17(1) of Annex I to the Contested Decision is comprehensive and encompasses “all possible circumstances where (and how) long-term capacity can be corrected by Core TSOs for reasons of operational security during the validation process”. It argues that ACER did no more than specifying and categorising all the different types of reasons of operational security.
73. The Defendant further offers a reading of the combined provisions of Article 17(1) and (2) of Annex I to the Contested Decision and points out that Article 17(2)(a) expressly provides that “a Core TSO may reduce RAM for its own CNECs, even below the minimum RAM specified in Article 14(5), if necessary”. The Defendant’s conception of Article 17(1) is that it provides

for two types of corrections: (i) those that can be modelled (letters (a) and (b)), and (ii) those that cannot be modelled via the input data (letter (c)). In particular, at paragraph 43 of its Defence, the Defendant states: “[s]uch reasons of operational security can concern: [i] stability constraints (such as dynamic, voltage, frequency stability); [ii] the security constraints which would, under the attempt to be modelled via the input data, be overwritten by the application of the minRAM.”

74. The Defendant also states at paragraph 55 of its Defence: “[i]n other words, provided that (i) there is an operational security issue which necessitates to correct long-term capacity, and (ii) where the adjustment required by the TSO does not fall under the cases set out in Article 17(1)(a) Core LT CCM and Article 17(1)(b) Core LT CCM, a TSO can directly correct long-term capacity (without any recalculation of the cross zonal capacities or a new validation process) by decreasing the RAM of its own CNECs (if necessary, even below the minRAM specified in Article 14(5) Core LT CCM). Put differently, Article 17(1)(c) Core LT CCM, read in conjunction with Article 17(2)(a) Core LT CCM, consists of a “last resort correction” and as a more general category of individual validation adjustments whenever there is an operational security issue”.
75. At the hearing, the Appellant indicated that this reading of the provisions of Article 17(1) and (2) meets its concerns. However, it was not convinced that this is the only possible interpretation of Article 17(1), and in particular of its letter (c).
76. The Board of Appeal finds that the provisions of Article 17(1) and (2) of Annex I to the Contested Decision are not a model of clarity. The Appellant’s reading, according to which security constraints that can be modelled, and which are overridden by the minRAM application, are not covered by Article 17(1)(c) of Annex I to the Contested Decision precisely because they can be modelled, is compelling from a textual perspective. It creates an ambiguity which is not removed by the provisions of Article 17(2) of Annex I to the Contested Decision, or by ACER’s emphatic Defence. Even though every provision should be interpreted in its context, if needed, such interpretation is not possible where the wording of a provision is clear.
77. That ambiguity constitutes an error, which the Board of Appeal cannot correct. The Decision must therefore be remitted to ACER.
78. The Board of Appeal concludes that the first plea is well-founded as the Defendant erred in the interpretation and application of its own act. Such an error can only be corrected by the competent body of ACER.
79. While it is possible and natural for ACER to bring additional elements of interpretation of the Contested Decision during the procedures of its review, those additional elements must be closely linked to the Contested Decision and must ideally be traceable from the documented preparatory work. However, these elements may not go as far as to change the meaning of the Contested Decision. Furthermore, the addressees of a Contested Decision cannot be expected to examine the paraphernalia of a legal act. The addressees should be able to rely directly and without further study on its usual wording and meaning normally attributed to it. When the “wished for” interpretation does not flow from the Contested Decision by means of habitual methods of interpretation or it is even incompatible with it, as in the present case, such a decision cannot be remedied by the Board of Appeal.

## **II.2 *The second plea***

### *Arguments of the Parties*

80. The Appellant points out that according to Article 10(4) of the FCA Regulation, it shall include a security analysis based on multiple scenarios by using the capacity calculation inputs or through a statistical approach based on historical cross-zonal capacity for day-ahead or intraday time frames. As it is mentioned in Recital (4) of the FCA Regulation, the long-term capacity calculation takes into account the uncertainty associated with long-term capacity calculation time frames when applying a security analysis based on multiple scenarios, i.e. CGMs and using the capacity calculation inputs, the capacity calculation approach referred to in Article 21(1)(b) of the CACM Regulation and the validation of cross-zonal capacity referred to in Article 21(1)(c) of the CACM Regulation.
81. The Appellant argues that according to Article 10(3) of the FCA Regulation, long-term capacity calculation shall be compatible with the capacity calculation methodology established for the day-ahead and intraday time frames pursuant to Article 21(1) of Regulation (EU) 2015/1222. This means that planned outages should be included in relevant scenarios for the same period.
82. According to Article 10(1) of Annex I to the Contested Decision, Core TSOs shall use the ENTSO-E CGMs for each long-term capacity calculation time frame, while according to Article 3(3)(a)(i) of the CGMM, which regulates forecast situation for grid topology, outages, irrespective of the reason for the outage, shall only be modelled if the network element is expected to be unavailable for the entire duration of the time frame, in the case of the year-ahead and month-ahead capacity calculation time frames. This implies that only limited set of planned outages of cross border relevant elements is foreseen to be used in scenarios for long-term capacity calculation in a particular period.
83. According to Article 10(2) of Annex I to the Contested Decision, Core TSOs may establish a temporary procedure of creating the CGMs suitable for long-term capacity calculation, with respect to application of outage topologies, and Core TSOs may adjust all applied CGMs, by applying the planned outages from the Outage Planning Coordination (hereinafter ‘OPC’) database at reference timestamps. However, according to Article 99 of Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation (hereinafter ‘SO Regulation’), the due date for TSOs to finalise a year-ahead outage coordination of internal relevant assets is 1 December, so there is no possibility to finalise the capacity calculation process and conduct two long-term auctions (yearly and monthly for January) respecting the time restrictions set in harmonised allocation rules (hereinafter ‘HAR’) in one month time.
84. Moreover, according to Article 10(2) of Annex I to the Contested Decision, temporary procedure of building CGM should respect a predefined number of scenarios. The number of scenarios is limited to up to 24 for the year-ahead process and up to 10 scenarios for monthly process. Considering the complexity of the Core transmission system, the number of grid elements included in the list of relevant assets for OPC coordination and the number of involved TSOs, increasing the foreseen granularity of CGMs, including those from the temporary procedure, does not guarantee appropriate implementation of OPC in the long-term capacity calculation process. The resulting CGM will thus not be able to account for all relevant outage scenarios.
85. According to Article 10(3) of Annex I to the Contested Decision, the temporary procedure referred to in the paragraph above shall be replaced by the next CGMM amendment, while according to Article 3(4) of the CGMM, after definition of the scenarios all TSOs shall publish the detailed scenarios description until the 15th of July (having in mind that according to Article 99 of the SO Regulation, each TSO shall finalise year-ahead outage coordination of internal relevant assets before the 1st of December). Therefore, the Appellant believes that it is unrealistic to mitigate such a time gap and ensure consideration of outage planning coordination in the CGM scenarios created according to the amended CGMM.

86. According to the Defendant, the Appellant refers to the 1st of December as the due date for TSOs to finalise the OPC database (the year-ahead outage coordination of internal relevant assets), in order to demonstrate its concern. For the Defendant, the 1st of December is only the latest date for TSOs to finalise the OPC database pursuant to Article 99 of Regulation 2017/1485. According to Article 99(1) of the SO Regulation, before the 1st of December of each calendar year, each TSO shall: (a) finalise the year-ahead outage coordination of internal relevant assets; and (b) finalise the year-ahead availability plans for internal relevant assets and store them on the ENTSO for Electricity operational planning data environment. According to the Defendant, if TSOs want to finalise the OPC database before the 1st of December, they are free to do so.
87. The Defendant explains the selection of planned outages for scenarios of year-ahead and month-ahead capacity calculation, clarifying that the timestamp selection considers and counts only relevant grid element outages of Core TSOs, but then all planned outages available in OPC database in the selected timestamp are applied for network model creation for CC.
88. The Defendant claims that the relevant draft OPC data is available well before the 1st of December, i.e., on the 4th-5th of November. The Core Coordinated capacity calculator will update the CGM based on these OPC data, which also constitute an input of the capacity calculation process provided by the Coordinated capacity calculator. If any of the Core TSOs considers that a selected timestamp with all its planned outages does not represent the most critical network condition in the related period, it may require to add any of the planned outages from the related period to the related set of outages. For this reason, contrary to what the Appellant alleges, it is possible for Core TSOs to finalise under the temporary procedure the capacity calculation process and to timely conduct two long-term auctions (yearly and monthly for January).
89. According to the Defendant, it is thus realistic to mitigate the time gap between the publication of the detailed scenarios description on the 15th of July pursuant to Article 3(4) of the CGMM and the consideration of the OPC on the 1st of December, and to ensure consideration of the OPC in the CGM scenarios created according to the expected amended long-term common grid model methodology, as provided pursuant to Article 10(3) of Annex I to the Contested Decision.
90. The Defendant also claims that the Appellant does not indicate the essential elements sufficiently coherently and intelligibly in the text of the second plea of its Notice of Appeal. In any event, according to the Defendant, in order to have the long-term common grid model methodology fully in line with TSOs' needs regarding the long-term capacity calculation, for the benefit of Core and other regions, the long-term common grid model methodology needs to be amended. Such amendment is feasible even before the go-live of the Contested Decision.

#### *Assessment*

91. The Board of Appeal finds that the Appellant's argumentation does not identify in a sufficiently clear and precise manner either the provisions of the applicable regulatory framework that are alleged to be violated, or indeed the practical impossibility of constructing workable scenarios. As it is not for the Board of Appeal to speculate on the potential meaning of the unclear allegations of the Parties, but rather for the Parties to clearly and precisely identify and substantiate the alleged errors in the Contested Decision, the Board of Appeal will limit itself to those arguments of the Appellant that are sufficiently clear and precise to be examined.
92. The Board of Appeal finds that the capacity calculation for long-term capacity auctions in the Core capacity region is complicated and includes several parameters, which the TSOs must take into account through a scenario approach. The outage planning database is linked to this work. There is evidently a trade-off between how early the scenarios and outage information are available and how fresh the information is at the time of capacity calculation.

93. The Appellant claims that the timetable of outage input does not allow appropriate capacity calculation for the yearly and monthly time frame for January capacity auctions.
94. As demonstrated by the Defendant, the timing of scenarios used is in the hands of the TSOs. Thus, the date of 1st December is only the latest date for the TSOs to finalise the OPC, but TSOs who want to finalise the OPC database before the 1st of December are free to do so. In this regard, Article 99(1) of the SO Regulation provides that before the 1st of December of each calendar year, each TSO shall: (a) finalise the year-ahead outage coordination of internal relevant assets; and (b) finalise the year-ahead availability plans for internal relevant assets and store them on the ENTSO for Electricity operational planning data environment. In addition, if there are relevant scenarios missing in the capacity calculation process, any TSO in the Core capacity region can add any scenario which they consider necessary for the security assessment.
95. The Board of Appeal considers as convincing the arguments presented by the Defendant and summarized above in paragraphs 38 to 40 of this Decision with regard to the possibility for Core TSOs to finalise the capacity calculation process, to timely conduct two long-term auctions (yearly and monthly for January) under the temporary procedure, as well as regarding the temporary capacity calculation methodology which needs in any case to be amended.
96. The Board of Appeal, after having examined the arguments of both Parties, finds no error in the Contested Decision. The Appellant's second plea is therefore dismissed as unfounded.

### **II.3 *The third plea***

#### *Arguments of the Parties*

97. The Appellant argues that in the part related to the validation process, as described in Article 17 of Annex I to the Contested Decision, the latter was not supported by unequivocal and sufficient analysis of its correctness. In particular, ACER did not provide an adequate statement of reasons for the Contested Decision, thus infringing upon its procedural duties stemming from EU law. As an agency of the Union, ACER has a duty to duly reason its decisions. This obligation is specifically foreseen in Article 14(7) of the ACER Regulation, according to which: “[i]ndividual decisions of ACER shall state the reasons on which they are based for the purpose of allowing an appeal on the merits”. This can also be derived from Article 296 of the TFEU, which requires all legal acts of the Union to state the reasons on which they are based, and Article 41(2)(c) of the Charter of Fundamental Rights of the European Union, which provides that the right to good administration includes, inter alia, the obligation of the administration to give reasons for its decisions.
98. The Appellant refers to established and consistent case law, according to which the statement of reasons must be appropriate to the measure at issue and it must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure so as to, firstly, enable the persons concerned to ascertain the reasons for it and thus enabling them to defend their rights and to verify whether or not the decision is well founded and, secondly, to permit the competent court of the European Union to exercise its jurisdiction to review the legality of the measure. Furthermore, the obligation to state reasons in Article 296 of the TFEU requires that the reasons on which a decision is based must be clear and unequivocal. Thus, the Appellant argues that the reasoning must be logical, and it must contain no internal inconsistency that would prevent a proper understanding of the reasons underlying the measure.
99. The Appellant adds that the Board of Appeal has confirmed in its decisions that ACER must comply with the general principles of EU law, including the Charter of Fundamental Rights of the European Union.



100. The Appellant contends that, in relation to Article 17 of Annex I to the Contested Decision, the latter does not meet the above standards.
101. The Appellant refers to recitals 119-124 of the Contested Decision and argues that ACER did not give any reasons for limiting, in Article 17(1)(c), Core TSOs' right to correct the calculated level of a RAM which is unable to ensure operational security in situations which cannot be modelled via the input data for the capacity calculation process. It points out that this limitation was not present in the Core TSOs' proposal which ACER amended. Whilst giving reasons for the amendments, ACER failed to justify why TSOs may provide justification that the calculated level of RAM is unable to ensure operational security, but only in situations which cannot be modelled via the input data for the capacity calculation process.
102. The Appellant argues that the reasoning which justified the adoption of Article 17 is inconsistent with the wording of that provision, and thus illogical. It reiterates its position from the first plea that Article 17(1)(c) of Annex I to the Contested Decision is inconsistent with Article 26(3) of the CACM Regulation, contrary to what recital 120 of the Contested Decision claims.
103. The Appellant also points out that, in the Contested Decision, ACER consistently states that TSOs can adjust calculated RAM even below the minimum RAM value if operational security needs to be ensured, without indicating any additional conditions (see recitals 74(e), 112 and 115 of the Contested Decision).
104. The Appellant concludes that, in light of the above, the statement of reasons for the Contested Decision cannot be assessed on the basis of appropriate evidence, since it was not substantiated unequivocally and sufficiently, and that it does not enable the Core TSOs to ascertain the reasons behind the Contested Decision and to effectively defend their rights.
105. The Defendant contends that the Contested Decision is duly reasoned.
106. First, the Defendant points out, in line with its arguments under the first plea, that the Appellant misinterprets Article 17(1) of Annex I to the Contested Decision, in the sense that this provision does not limit the right of TSOs to correct long-term capacity during the validation process and complies with Articles 15 and 24 of the FCA Regulation and Article 26 of the CACM Regulation. Providing that the legal requirements of those provisions with respect to the existence of a reason of operational security are fulfilled, a TSO will always be able to correct long-term capacity during the validation process by applying one of the types of adjustment specified in Article 17(1), according to the origin of the adjustment needed. The Defendant did not limit the cases to instances where an adjustment of the RAM can be done when such level is unable to ensure operational security, but only classified and specified the different type of adjustments.
107. The Defendant also argues that it duly reasoned the changes it made to the TSOs' proposal, in recitals 120-124 of the Decision.
108. It further points out that, contrary to what the Appellant argues in its Appeal, the Defendant did not limit TSOs' right to correct long-term capacity (see recitals 74(e), 112 and 115 of the Contested Decision).
109. Second, the Defendant contends that, with regard to the justification that needs to be provided by TSOs in case they reduce cross-zonal capacity during the validation process, the Appellant again misread Article 17(1) of Annex I to the Contested Decision; according to the Defendant, this article refers to the provisions of Article 17(3) and (4) of the same Annex, which refer to the need for justification. It argues that, contrary to what the Appellant argues, a justification that the calculated level of a RAM is unable to ensure operational security is not only prescribed to situations where the adjustment cannot be modelled via input data, but for any reduction requested by a TSOs, irrespective of the cause of such reduction.

110. The Defendant further argues that the reason why the obligation to provide a justification is further mentioned in the context of Article 17(1)(c) of Annex I to the Contested Decision lies in the fact that, when the adjustment is required by a TSO under Article 17(1)(a) or Article 17(1)(b) of the same Annex, the corrections are rather self-explanatory, given that these corrections can be the result of the submission of new input data in (part of) the capacity calculation process. However, given that the adjustment under Article 17(1)(c) of Annex I to the Contested Decision does not concern (one of) these two (specific) categories of issues and is not self-explanatory, the TSO requiring a correction (i.e., reduction) of the long-term capacity needs to provide a justification for such a correction in the short-term and explain the operational security concern (e.g., a reduction due to dynamic stability of the system). Indeed, operational security is the only reason that can trigger Article 15 and Article 24 of the FCA Regulation and Article 26 of the CACM Regulation and can give the right to TSOs to correct (i.e., reduce) long-term capacity.
111. The Defendant concludes by stating that, in light of this analysis, the reasoning is not inconsistent with the wording of Article 17 of Annex I to the Contested Decision.

#### *Assessment*

112. The Board of Appeal finds that the various elements of the duty to give reasons are not disputed between the Parties. That duty emanates from Article 296 of the TFEU, second sentence, which provides that “[l]egal acts shall state the reasons on which they are based” and from Article 41(2)(c) of the EU Charter of Fundamental Rights of the European Union, which provides for “the obligation of the administration to give reasons for its decisions”.
113. It is settled case law that “the obligation to provide a statement of reasons laid down in Article 296 of the TFEU is an essential procedural requirement”, and that “the statement of reasons (...) must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the court having jurisdiction to exercise its power of review”. It is equally settled case law that “the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure at issue, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 of the TFEU must be assessed with regard not only to its wording but also to its context and all the legal rules governing the matter in question” (see judgment of the Court of 2 September 2021, European Federation of Public Service Unions (EPSU) v European Commission, C-928/19 P, EU:C:2021:656, paragraphs 108-109).
114. The Appellant’s arguments under the third plea are closely connected to its reading of Article 17 of Annex I to the Contested Decision and to its first plea. It argues that ACER has not duly reasoned the limitation foreseen in Article 17(1)(c) of Annex I to the Contested Decision to the right of TSOs to correct long-term capacity at the validation stage.
115. As the Board of Appeal has established an error in the way in which the Contested Decision restricts the right to correct long-term capacity at the validation stage, and has accepted the first plea, there is no need to rule on the third plea. ACER will need to adopt a new decision and provide the necessary reasons for it.
116. At any rate, the reasons provided do not support the actual wording of the Contested Decision, particularly for Article 17(1)(c) of its Annex I.

For the above reasons, the Board of Appeal, pursuant to Article 28(5) of the ACER Regulation, hereby:

- remits the case to the competent body of ACER.

Done at Ljubljana, 7 July 2022.

*For the Board of Appeal*  
*The Chairperson*  
M. PREK

*For the Registry*  
*The Registrar*  
S. VAONA