

**DECISION No 02/2021  
OF THE EUROPEAN UNION AGENCY  
FOR THE COOPERATION OF ENERGY REGULATORS**

**of 30 March 2021**

**on the Amendment of the Fallback Procedures of the Core Capacity  
Calculation Region**

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) No 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> ('Regulation (EU) 2019/942'), and, in particular, Article 5(3) and Article 6(10) thereof,

Having regard to Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management<sup>2</sup>, and, in particular, Article 9(7)(e) and Article 9(13) thereof,

Having regard to the favourable opinion of the Board of Regulators of 17 March 2021, delivered pursuant to Article 22(5)(a) of Regulation (EU) 2019/942,

Whereas:

**1. INTRODUCTION**

- (1) Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (the 'CACM Regulation') laid down a range of requirements for cross-zonal capacity allocation and congestion management in the day-ahead and intraday markets in electricity. These requirements also include specific provisions for the establishment of fallback procedures, in accordance with Article 44 of the CACM Regulation.

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<sup>1</sup> OJ L211, 14.8.2009, p. 1.

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

- (2) Pursuant to Articles 9(1), 9(7)(e) and Article 44 of the CACM Regulation, all transmission system operators ('TSOs') of a capacity calculation region ('CCR') are required to develop a proposal for fallback procedures ('Fallback Procedures') and submit it to all regulatory authorities of the concerned CCR for approval. Pursuant to Article 9(13) of the CACM Regulation, TSOs responsible for developing a proposal for terms and conditions or methodologies may request amendments of these terms and conditions or methodologies. Such a request is made in a form of a proposal for amendment that is submitted to regulatory approval. The regulatory authorities receiving the proposal for the fallback procedures shall reach an agreement and take a decision on the proposal within six months after the receipt of the proposal by the last regulatory authority in the CCR. When the regulatory authorities fail to reach an agreement within the six-month period or upon their joint request, ACER, pursuant to Article 9(11) of the CACM Regulation and the second subparagraph of Article 5(3) of Regulation (EU) 2019/942, is called upon to adopt a decision concerning the TSOs' proposal in accordance with point (b) of the second subparagraph of Article 6(10) of Regulation (EU) 2019/942.
- (3) This Decision of ACER follows from the failure of the regulatory authorities of the Core CCR to reach an agreement within six months following the date when the TSOs of the Core CCR ('Core TSOs') submitted a proposal for amendment of the Core Fallback Procedures to all Core regulatory authorities for approval. Annex I to this Decision sets out the Amendment of the Fallback Procedures of the Core Capacity Calculation Region in accordance with Article 44 of the CACM Regulation ('Amendment of Fallback Procedures'). Annex II to this Decision sets out the Shadow Allocation Rules as decided by ACER.

## **2. PROCEDURE**

### **2.1. Proceedings before regulatory authorities**

- (4) Article 44 of the CACM Regulation requires TSOs of each CCR to develop proposals for the establishment of robust and timely fallback procedures within 16 months after the entry into force of the CACM Regulation. The first Fallback Procedures of the Core CCR became effective in 2018 by the ACER Decision No 10/2018 of 27 September 2018 on the Core CCR TSO's proposal for fallback procedures<sup>3</sup> ('Fallback Procedures of the Core CCR').
- (5) In summer 2020, pursuant to Article 9(13) of the CACM Regulation, Core TSOs decided to propose amendments to the Fallback Procedures of the Core CCR. In

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[http://acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Individual%20decisions/ACER%20Decision%2010-2018%20on%20the%20Core%20CCR%20TSOs%20proposal%20for%20fallback%20procedures.pdf](http://acer.europa.eu/Official_documents/Acts_of_the_Agency/Individual%20decisions/ACER%20Decision%2010-2018%20on%20the%20Core%20CCR%20TSOs%20proposal%20for%20fallback%20procedures.pdf)

accordance with Article 12(1) of the CACM Regulation, Core TSOs held a public consultation from 24 July 2020 to 24 August 2020.

- (6) On 18 September 2020, the Core TSOs submitted to the Core regulatory authorities the ‘1st amendment of the Core CCR fallback procedures in accordance with Article 44 of the Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management’ (‘the Proposal’). This Proposal was received by the last Core regulatory authority on 20 October 2020. The Shadow Allocation Rules were annexed to the Proposal.

## **2.2. Proceedings before ACER**

- (7) In a letter dated 4 December 2020 and received by ACER on the same day, the Chair of the Core Energy Regulators’ Regional Forum<sup>4</sup>, on behalf of the Core regulatory authorities, informed ACER that the Core regulatory authorities agreed to request ACER to adopt a decision on the Proposal, pursuant to Article 9(11) of the CACM Regulation.
- (8) This letter explains that the Core regulatory authorities have not been able to agree on the approval of the fallback procedures. The approval was opposed by one regulatory authority on the grounds that it does not have the authority to approve the Proposal, since the Shadow Allocation Rules are annexed to it. According to this regulatory authority, this regulatory authority cannot approve documents that have the characteristics of terms and conditions under private law and define liability rules.
- (9) ACER closely cooperated with Core regulatory authorities and TSOs and consulted on the Proposal through exchanges of draft amendments to the Proposal as suggested by ACER.

## **3. ACER’S COMPETENCE TO DECIDE ON THE PROPOSAL**

- (10) Pursuant to point (b) of the first subparagraph of Article 5(3) of Regulation (EU) 2019/942, all regulatory authorities of the region concerned shall unanimously agree on proposals for terms and condition or methodologies for the implementation of those network codes or guidelines that were adopted before 4 July 2019 and require the approval of all the regulatory authorities of the region concerned; pursuant to the second subparagraph of Article 5(3) of Regulation (EU) 2019/942, those regulatory authorities may refer the proposals to ACER for approval pursuant to point (b) of the second subparagraph of Article 6(10) of Regulation (EU) 2019/942, and they shall do so pursuant to point (a) of the second subparagraph of Article 6(10) of that Regulation where they did not reach a unanimous agreement.

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<sup>4</sup> This Forum is the Core CCR regulatory authorities’ platform to consult and cooperate for reaching a unanimous agreement on NEMO’s and TSOs’ proposals.

- (11) Pursuant to Article 9(7)(e) of the CACM Regulation, which has been adopted as a guideline before 4 July 2019, the proposal for fallback procedures in accordance with Article 44 of that Regulation shall be subject to approval by all regulatory authorities of the concerned region.
- (12) According to Article 9(10) of the CACM Regulation, where the approval of the terms and conditions or methodologies requires a decision by more than one regulatory authority, the competent regulatory authorities shall consult and closely cooperate and coordinate with each other in order to reach an agreement, and they shall take decisions concerning the submitted terms and conditions or methodologies in accordance with paragraphs 6, 7 and 8, within six months following the receipt of the terms and conditions or methodologies by the last regulatory authority concerned.
- (13) According to Article 9(11) of the CACM Regulation, where the regulatory authorities have not been able to reach an agreement on the terms and conditions or methodologies within the six-month deadline, ACER shall adopt a decision concerning the submitted proposal for terms and conditions or methodologies within six months, in accordance with Article 6(10) of Regulation (EU) 2019/942.
- (14) In a letter from the Chair of the Core Energy Regulators' Regional Forum of 4 December 2020, on behalf of all Core regulatory authorities, Core regulatory authorities agreed to request ACER to adopt a decision on the fallback procedures pursuant to Article 9(11) of the CACM Regulation.
- (15) Therefore, in accordance with point (b) of the first subparagraph of Article 5(3), the second subparagraph of Article 5(3), and point (b) of the second subparagraph of Article 6(10) of Regulation (EU) 2019/942 as well as with Article 9(11) of the CACM Regulation, ACER became responsible to adopt a decision by 4 June 2021 concerning the submitted Proposal on 4 December 2020.

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

- (16) The Proposal includes the following elements:
  - (a) The 'Whereas' section;
  - (b) Article 1 contains changes to the main body of the Fallback Procedures of the Core CCR;
  - (c) Article 2 contains provisions regarding the amended Annex of the Fallback Procedures of the Core CCR;
  - (d) Article 3 contains information on the publication and implementation of the Amendment of Fallback Procedures; and

- (e) Article 4 contains information on the entry into force of the Amendment of Fallback Procedures.

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

### **5.1. Initial observations of regulatory authorities**

- (17) According to the email of the Chair of the Core Energy Regulators' Regional Forum of 4 December 2020, Core regulatory authorities were not able to reach an agreement to approve or request an amendment to the Proposal within the deadline of six months.
- (18) The Chair of the Core Energy Regulators' Regional Forum informed ACER that the Proposal could not be approved by one regulatory authority that is stating that is not able to approve documents that have the characteristics of terms and conditions under private law and define liability rules.
- (19) The Core regulatory authorities agreed that ACER should take a decision on the Proposal.

### **5.2. Hearing phase**

- (20) ACER initiated a hearing phase for Core TSOs and regulatory authorities on 28 January 2021 by providing them with a near final draft of the Amendment of Fallback Procedures, as well as the reasoning for the introduced changes by ACER. The changes introduced by ACER were mainly of editorial nature and did not change the meaning of the Proposal. The hearing phase lasted until 10 February 2021.
- (21) During this time, ACER received no written responses from Core regulatory authorities nor from Core TSOs.

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

### **6.1. Legal framework**

- (22) Article 9(7)(e) of the CACM Regulation requires TSOs to provide the fallback procedures in accordance with Article 44 of the CACM Regulation to all regulatory authorities of the concerned region for their approval.
- (23) According to Article 44 of the CACM Regulation, a proposal for robust and timely fallback procedures needs to be developed by all TSOs of each CCR within 16 months after the entry into force of the CACM Regulation. These fallback procedures should ensure efficient, transparent and non-discriminatory capacity allocation in the event that the single day-ahead coupling process is unable to produce results. The proposal for the fallback procedures should be consulted in accordance with Article 12 of the CACM Regulation.

- (24) As a general requirement, Article 9(9) of the CACM Regulation demands that every proposal for terms and conditions or methodologies includes a proposed timescale for their implementation and a description of their expected impact on the objectives set out in Article 3 of the CACM Regulation.

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

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

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

- (25) The Proposal fulfils the requirements of Article 44 of the CACM Regulation, as all Core TSOs jointly developed a Proposal and submitted it for the approval to Core regulatory authorities.
- (26) The requirement to submit a proposal by 16 months after the entry into force of the CACM Regulation is not relevant for this Proposal as it was submitted pursuant to Article 9(13) of CACM Regulation.

#### **6.2.1.2. Description of the expected impact on the objectives of the CACM Regulation**

- (27) This Proposal includes an explanation that it does not change the impact of the previously approved Fallback Procedures of the Core CCR on the objectives of the CACM Regulation. The evaluation of the impact on the objectives of the CACM Regulation contained in the already approved Core CCR Fallback Procedures is therefore also valid for this amendment. ACER agrees with this assessment because the proposed amendments have no impact on the objectives of the CACM Regulation. Thus, the Proposal meets the criteria of Article 9(9) of the CACM Regulation.

### **6.2.2. Assessment of the requirement of Article 44 of the CACM Regulation**

- (28) The Proposal only contains one change to the previously approved Annex I of the Fallback Procedures of the Core CCR. This is namely a change of the publication deadline on the website of the single allocation platform operator of the shadow auction results from 13:50 CET to 14:00 CET on the day preceding delivery. This change is a result of a change in the Single Day Ahead Coupling operational timings in order to allow more time for the price coupling algorithm to calculate day-ahead results.
- (29) Annex II (Shadow Allocation Rules) of previously approved Fallback Procedures of the Core CCR has been replaced by new Shadow Allocation Rules. Changes made to the Shadow Allocation Rules contain addition of new applicable bidding zone borders, addition of a new definition of ‘Use It Or Lose It’, changes to timings of the Participation Agreement conclusion, updates to legal references and few other changes to improve processes and clarity.

(30) For the above reasons, ACER considers that those amendments do not affect in any way the efficient, transparent and non-discriminatory capacity allocation in case the fallback procedures are applied.

(31) Therefore, the Proposal is compliant with the objectives of the fallback procedures to ensure efficient, transparent and non-discriminatory capacity allocation in the event that the single day-ahead coupling process is unable to produce results.

6.2.3. Assessment of the requirements for the public consultation

(32) The Core TSOs publicly consulted on the draft Proposal from 24 July 2020 to 24 August 2020. Therefore, they fulfilled the requirements of Article 12 of the CACM Regulation.

6.2.4. Assessment of the requirements on the implementation

(33) The Proposal provided the description of implementation in Article 3, “Publication and implementation of the fallback procedures”. The Proposal does not, however, specify the exact date or deadline for the implementation.

(34) ACER consulted with Core TSOs on when the exact implementation date could be achieved. TSOs informed ACER that they have planned to implement the change specified in paragraph (28) as early as it could happen in order to allow more time for the price coupling algorithm to calculate results of the day-ahead coupling and in that way, remove a certain level of pressure from the algorithm that has to cope with increasing performance requirements.

(35) Core TSOs also expressed the importance that the implementation date of the Amendment of the Fallback Procedures in Core CCR is coordinated with the equivalent amendment of the Fallback Procedures in other CCRs. To this end, ACER and all regulatory authorities agreed on the need to align the implementation date of the Fallback Procedures across all CCRs in order to apply new Single Day Ahead Coupling operational timings from the same date onwards throughout the whole EU in the case of a decoupling event.

(36) Therefore, ACER in coordination with all regulatory authorities, decided to define an implementation time in a form of time window lasting from 1 April 2021 till 1 July 2021 during which the Amendment of the Fallback Procedures needs to be implemented. In order to provide further clarity, ACER added that the Amendment of the Fallback Procedures shall coincide with the implementation of the new Single Day Ahead Coupling operational timings and that the exact date of this implementation needs to be published at least one month before the implementation date. This provides some flexibility to TSOs on when to apply the Amendment of the Fallback Procedures, but still provides sufficient certainty on the timely implementation of the Amendment of the Fallback Procedures.

### **6.3. Assessment of the point of disagreement among Core CCR regulatory authorities**

- (37) The Proposal was referred to ACER for the same reason as the previous proposal for the Fallback Procedures of the Core CCR which were adopted by ACER in the ACER Decision No 10/2018<sup>3</sup>). The reason was that one regulatory authority considers that it cannot approve the Shadow Allocation Rules annexed to this Proposal because they contain provisions on liability rules, which are usually governed by private law.
- (38) As already outlined in the ACER Decision No 10/2018, Article 44 of the CACM Regulation does not specifically refer to the above private law aspects as a content requirement of the fallback procedures.
- (39) In view of the absence of an express reference to private law aspects in the wording of Article 44 of the CACM Regulation, ACER understands the concerns of the regulatory authority opposing the approval of the Proposal with regard to its approval competence.
- (40) On the other hand, ACER agrees that the shadow allocation rules are an essential component of the fallback procedures. As such, their inclusion can be considered as inherently covered by Article 44 of the CACM Regulation. This is also supported by the fact that, in accordance with Article 59(7)(c) of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity, regulatory authorities are responsible for fixing or approving methodologies used to calculate or establish the terms and conditions for access to cross-border infrastructures, including the procedures for the allocation of capacity and congestion management, and, in that context, can and also do regulate aspects which are otherwise governed by private law. Similarly, the methodology for the establishment of a single allocation platform<sup>5</sup> in accordance with Article 49 of the FCA Regulation sets an example of a methodology approved by all regulatory authorities, which includes similar provisions governing private law aspects (e.g. liability), though not explicitly required by the FCA Regulation.
- (41) For all these reasons, ACER is of the opinion that the shadow allocation rules should be annexed to the Core CCR fallback procedures and can be subject to regulatory approval.

## **7. CONCLUSION**

- (42) For all the above reasons, ACER considers the Proposal in line with the requirements of the CACM Regulation, provided that the amendments described in this Decision are integrated in the Proposal, as presented in Annex I to this Decision. The amendments ensure that the Proposal is in line with the purpose of the CACM Regulation and

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<sup>5</sup> <https://www.acer.europa.eu/en/Electricity/MARKET-CODES/FORWARD-CAPACITY-ALLOCATION/03%20SAP/Action%201%20-%20SAP%20proposal%20approved.pdf>

contributes to market integration, non-discrimination, effective competition and the proper functioning of the market.

- (43) Therefore ACER approves the Proposal subject to the necessary 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 Amendment of the Fallback Procedures of the Core Capacity Calculation Region including its annexed Shadow Allocation Rules, developed pursuant to Article 44 of Regulation (EU) 2015/1222, are adopted as set out in Annex I and Annex II to this Decision.

*Article 2*

This Decision is addressed to:

50Hertz Transmission GmbH,  
Amprion GmbH,  
Austrian Power Grid AG,  
C.N.T.E.E. Transelectrica S.A.,  
ČEPS a.s.,  
Creos Luxembourg S.A.,  
ELES, d.o.o.,  
Elia System Operator SA,  
HOPS d.o.o., Hrvatski operator prijenosnog sustava,  
MAVIR ZRt,  
Polskie Sieci Elektroenergetyczne,  
Réseau de Transport d'Electricité,  
Slovenská elektrizačná prenosová sústava, a.s.,  
TenneT TSO B.V.,  
TenneT TSO GmbH and  
TransnetBW GmbH.

Done at Ljubljana, on 30 March 2021.

**- SIGNED -**

*For the Agency  
The Director*

C. ZINGLERSEN

Annexes:

Annex I – Amendment of the Fallback Procedures in Core Capacity Calculation Region in accordance with Article 44 of the Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management

Annex Ia – Amendment of the Fallback Procedures in Core Capacity Calculation Region in accordance with Article 44 of the Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management in track change compared to the Proposal (for information only)

Annex II - Annex to the Amendment of the Fallback Procedures in Core Capacity Calculation Region: Shadow Allocation Rules

Annex IIa - Annex to the Amendment of the Fallback Procedures in Core Capacity Calculation Region: Shadow Allocation Rules in track change (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.*