

Annex 1

Position paper on the assessment of amendment proposal to the Methodology on the market-based allocation process of cross-zonal capacity for the exchange of balancing capacity for the Nordic CCR

Information on the initiation of enforcement procedures vis-à-vis the CCR Nordic TSOs for lack of compliance with ACER Decision 22/2020

Introduction and legal context

This document constitutes an agreement of the Regulatory Authorities of the CCR Nordic (hereafter referred to as “NRAs”), agreed on 7 December 2021, on the transmission system operators of the Nordic CCR (hereinafter referred to as “TSOs”) proposal for an amendment to the methodology approved by ACER in its Decision 22/2020 (the Methodology) for the market-based allocation process of cross-zonal capacity for the exchange of balancing capacity for the Nordic CCR in accordance with Article 41(1) of Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing (EB Regulation) as submitted to the last of the NRAs on 14 July 2021 (the Proposal).

This agreement of NRAs provides evidence that 1) the NRAs cannot approve the Proposal, 2) the NRAs find that the TSOs have not complied with ACER’s Decision 22/2020, and 3) that each of the NRAs will initiate enforcement procedures vis-à-vis the TSO falling under their jurisdiction pursuant to Article 59(1)(b) of the Electricity Market Directive (Directive 2019/944).

This agreement of NRAs provides evidence that a decision on the Proposal does not need to be adopted by ACER pursuant to Article 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 (Regulation 2019/942) as a result of lack of agreement among the NRAs as referred to in Article 5(7) in the EB Regulation.

The Proposal and the procedure

The Proposal was submitted to the NRAs and the last competent NRA received the Proposal on 14 July 2021.

When comparing the Proposal with the Methodology, the only amendment in the operational part (i.e. the articles), is a deletion of Article 6(4) in the Methodology whereby Articles 6(5), 6(6) and 6(7) in the Methodology become, respectively, Articles 6(4), 6(5) and 6(6) in the Proposal.

Article 6(4) in the Methodology reads:

No later than 12 months after approval of this methodology, TSOs shall submit an amendment to this methodology based on one of the alternative principles pursuant to Article 39(5). This amendment shall at least include a calculation of a dynamic mark-up value, for each bidding zone border and for each direction, replacing paragraph 3 and 4, and shall be supported by an assessment that shows at least:

(a) the accuracy of the forecasted market value when applying different ranges of historical time series as input data for determining the mark-ups, per bidding zone border and per direction;

(b) the accuracy of the forecasted market value when applying different time intervals for defining and updating the mark-ups, per bidding zone border and per direction;

(c) the accuracy of the forecasted market value when applying different reference days;

(d) the accuracy of the forecasted market value when applying additional relevant factors influencing demand and generation patterns in the different bidding zones;

(e) the estimated welfare effect for a range of confidence levels of the positive forecast errors, per bidding zone border and per direction

The NRAs have discussed the Proposal with the TSOs at meetings on 30 August, 5 October (following a number of questions sent to the TSOs on 1 October), and 15 November 2021.

The NRAs have indicated to the TSOs that:

- the Proposal seems to lack any legal content,
- the NRAs therefore cannot see how the proposal can be approved,
- it can be argued that the TSOs have not complied with Article 6(4) in the Methodology,
- the NRAs have the duty to ensure the compliance with ACER decisions addressed to “their TSOs”, cf. Article 59(1)(b) of the Electricity Market Directive,
- the NRAs therefore have to consider how to ensure such compliance, i.a. by taking appropriate steps vis-à-vis their respective TSOs, and that
- NRAs will coordinate closely when doing so, involving the Norwegian Energy Regulatory Authority (NVE-RME) informally in the process.

The considerations of the NRAs

The NRAs have coordinated closely involving NVE-RME informally when assessing the Proposal and considering what appropriate steps to take to ensure compliance with the Methodology and, as such, with ACER Decision 22/2020.

The NRAs find that an amendment of a proposal with no legal content makes no sense.

Moreover, the NRAs find that extending the 12 month deadline on the Methodology is no viable option. The TSOs did not appeal ACER Decision 22/2020 with the 2 month deadline for doing so according to Article 28(2) in Regulation 2019/942 even though, at the time of the ACER Decision, the TSOs could not expect that 12 months after ACER’s decision on 5 August 2020 the market would have gone live due to the link between the go live of the market and the implementation of the flow-based CCM as a consequence of the constraints following from Article 38(5) of the EB Regulation.

Conclusion

The NRAs have assessed, consulted, and closely cooperated and coordinated to reach the agreement that the Proposal cannot be approved and that enforcement procedures will be initiated by the Danish Utility Regulator, Finnish Energy Authority, and the Swedish Energy Markets Inspectorate vis-à-vis, respectively, Energinet, Fingrid, and Svenska kraftnät aiming at those TSOs complying with Article 6(4) of the Methodology in substance within a given deadline. The deadline should be based on the assessments by the three NRAs as to when Energinet, Fingrid, and Svenska kraftnät can submit an amendment required by Article 6(4) of the Methodology and, thus comply with ACER's Decision with the shortest delay possible.

The NRAs have considered that given the 12 months deadline in the Methodology as just explained above, the deadline for the TSOs to submit a proposal and thereby comply with ACER's Decision, albeit with a delay, could well be set prior to the expected go live date of the Nordic aFRR capacity market.

The NRAs will coordinate closely in their upcoming enforcement steps within the possibilities given in the administrative law framework governing each of the NRAs, taking into account that the robustness of these enforcement steps, to a large extent, depends on how far they are and can be coordinated between the NRAs.

The NRAs will inform ACER on the initiation of enforcement procedures and will keep ACER updated as part of the NRAs' obligation to ensure the compliance with ACER decision 22/2022.

Appendix

Article 59(1)(b) of the Electricity Market Directive (2019/944)

The regulatory authority shall have the following duties:

[...]

(b) ensuring the compliance of transmission system operators and distribution system operators and, where relevant, system owners, as well as the compliance of any electricity undertakings and other market participants, with their obligations under this Directive, Regulation (EU) 2019/943, the network codes and the guidelines adopted pursuant to Articles 59, 60 and 61 of Regulation (EU) 2019/943, and other relevant Union law, including as regards cross-border issues, as well as with ACER's decisions;

Select articles from the ACER Regulation (Regulation 2019/942)

Article 5(6)

Before approving the terms and conditions or methodologies referred to in paragraphs 2 and 3, the regulatory authorities, or, where competent, ACER, shall revise them where necessary, after consulting the ENTSO for Electricity, the ENTSO for Gas or the EU DSO entity, in order to ensure that they are in line with the purpose of the network code or guideline and contribute to market integration, non-discrimination, effective competition and the proper functioning of the market. ACER shall take a decision on the approval within the period specified in the relevant network codes and guidelines. That period shall begin on the day following that on which the proposal was referred to ACER.

Article 28(2)

The appeal shall include a statement of the grounds for appeal and shall be filed in writing at ACER within two months of the notification of the decision to the person concerned, or, in the absence thereof, within two months of the date on which ACER published its decision. The Board of Appeal shall decide upon the appeal within four months of the lodging of the appeal.

Select articles from the EB Regulation (Regulation 2017/2195 as amended by Regulation 2021/280)

Article 4(7)

Where TSOs fail to submit an initial or amended proposal for terms and conditions or methodologies to the relevant regulatory authorities or the Agency in accordance with Articles 5 and 6 within the deadlines set out in this Regulation, they shall provide the relevant regulatory authorities and the Agency with the relevant drafts of the proposals for terms and conditions or methodologies and explain why an agreement has not been reached. The Agency, all relevant regulatory authorities jointly, or the relevant regulatory authority shall take the appropriate steps for the adoption of the required terms and conditions or methodologies in accordance with Article 5, for instance by requesting amendments or revising and completing the drafts pursuant to this paragraph, including where no drafts have been submitted, and approve them.

Article 6(1)

Where the Agency, all relevant regulatory authorities jointly or the relevant regulatory authority require an amendment in order to approve the terms and conditions or methodologies submitted in accordance with Article 5(2), (3) and (4) respectively, the relevant TSOs shall submit a proposal for amended terms and conditions or methodologies for approval within 2 months following the request from the Agency or the relevant regulatory

authorities. The Agency or the relevant regulatory authorities shall decide on the amended terms and conditions or methodologies within 2 months following their submission.

Article 38(3)

By five years after entry into force of this Regulation, all TSOs shall 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 and, where relevant, pursuant to Articles 41 and 42.

Article 41(1)

By two years after entry into force of this Regulation, all TSOs of a capacity calculation region may develop a proposal for a methodology for a market-based allocation process of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves. This methodology shall apply for the exchange of balancing capacity or sharing of reserves with a contracting period of not more than one day and where the contracting is done not more than one week in advance of the provision of the balancing capacity. The methodology shall include:

- (a) the notification process for the use of the market-based allocation process;*
- (b) a detailed description of how to determine the actual market value of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves, and the forecasted market value of cross-zonal capacity for the exchange of energy, and if applicable the actual market value of cross-zonal capacity for exchanges of energy and the forecasted market value of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves;*
- (c) 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 via the market-based allocation process;*
- (d) the process to define the maximum volume of allocated cross-zonal capacity for the exchange of balancing capacity or sharing of reserves pursuant to paragraph 2.*