

**DECISION No 18/2023
OF THE EUROPEAN UNION AGENCY
FOR THE COOPERATION OF ENERGY REGULATORS**

of 22 December 2023

**on the TSOs' proposal for amendment of the harmonised allocation rules
for long-term transmission rights**

THE EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY
REGULATORS,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators¹, and, in particular, Article 5(2) thereof,

Having regard to Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation², and, in particular, Article 4(5), 6(d) and (12) and Article 51 thereof,

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

Having regard to the outcome of the consultation with ACER's Electricity Working Group ('AEWG'),

Having regard to the favourable opinion of the Board of Regulators of 13 December 2023, delivered pursuant to Article 22(5)(a) of Regulation (EU) 2019/942,

Whereas:

¹ OJ L158, 14.6.2019, p. 22.

² OJ L 259, 27.9.2016, p. 42.

1. INTRODUCTION

- (1) Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation (the ‘FCA Regulation’) laid down rules on cross-zonal capacity allocation in the forward markets. These rules include specific requirements for the development of harmonised allocation rules (‘HAR’).
- (2) The HAR was developed by the transmission system operators (‘TSOs’) and approved by ACER on 2 October 2017, following a referral from the regulatory authorities (ACER Decision No 03/2017). The HAR was later amended twice, in 2019 and 2021 (ACER Decisions No 14/2019 and No 15/2021 respectively).
- (3) Upon ACER’s request, on 1 March 2023, all TSOs submitted to ACER a proposal for amendment of the HAR. On 1 August 2023, the TSOs completed their submission with a proposal to amend the HAR provisions on collaterals.
- (4) The present Decision follows from the TSOs’ proposal to amend the HAR as approved by ACER Decision No 15/2021. Annex I to this Decision sets out the amended HAR, as approved by ACER.

2. PROCEDURE

- (5) In a letter dated 12 July 2021, ACER requested all TSOs under Article 4(12) of the FCA Regulation, to submit, as soon as possible, and no later than 1 June 2022, their proposals for amendments of the four methodologies listed in points (c), (d), (e) and (g) of Article 4(6) of the FCA Regulation for ACER’s approval. Amending the above methodologies, including the HAR, was necessary to allow for a timely implementation of the long-term flow-based auctions in the Core and Nordic capacity calculation regions (CCRs). The European Network of Transmission System Operators for Electricity (‘ENTSO-E’) asked ACER, on behalf of all TSOs, to postpone the submission date for the relevant proposals, to which ACER agreed in a letter dated 26 January 2022. The new submission date for the proposed amendments to the HAR methodology was 1 March 2023.
- (6) On 1 March 2023, ENTSO-E submitted, on behalf of all TSOs, to ACER an ‘All TSOs’ proposal for amendment of Harmonised allocation rules for long-term transmission rights in accordance with Article 51 of Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a Guideline on Forward Capacity Allocation’. On 1 August 2023, all TSOs completed their submission with a proposal for amendments to the HAR provisions on collaterals. This Decision is based on the TSOs’ amendment proposals of 1 March and 1 August 2023, which are collectively referred to as ‘**the Proposal**’.

- (7) On 29 August 2023, ACER launched a public consultation³ on the Proposal, inviting all market participants to submit their comments by 26 September 2023. The summary and evaluation of the responses received are presented in Annex II to this Decision.
- (8) In revising the Proposal, ACER cooperated closely with all regulatory authorities, all TSOs and ENTSO-E, and consulted them on its suggested revisions to the Proposal during teleconferences and exchanges of documents.
- (9) In particular, the following procedural steps have been taken in 2023:
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| 05 September | public workshop on the Proposal; |
| 19 September | discussion with the regulatory authorities at FCA task force meeting ⁴ ; |
| 21 September | discussion with the TSOs and the regulatory authorities; |
| 28 September | discussion with the TSOs and the regulatory authorities at the FCA coordination group meeting ⁵ ; |
| 05 October | orientation discussion at ACER's Electricity Working Group ('AEWG') meeting; |
| 05 October | discussion with the TSOs and the regulatory authorities; |
| 18 October | discussion with stakeholders, the TSOs and the regulatory authorities at the Market European Stakeholders Committee ('MESc') meeting; |
| 19 October | start of the hearing phase (ACER's preliminary position) |
| 10 November | oral hearing with the TSOs and the regulatory authorities |
| 13 November | closure of the hearing phase |
- (10) The AEWG was consulted between 14 and 20 November, and provided its advice on 22 November (see section 5.3).
- (11) On 13 December 2023, ACER's Board of Regulators provided a favourable opinion.

³ PC_2023_E_05, see ACER's consultation page: [PC_2023_E_05 - Public Consultation on the ACER Decision on harmonised allocation rules for long-term electricity transmission rights | www.acer.europa.eu](https://www.acer.europa.eu/PC_2023_E_05-Public_Consultation_on_the_ACER_Decision_on_harmonised_allocation_rules_for_long-term_electricity_transmission_rights)

⁴ ACER's platform to discuss the topics related to forward capacity allocation with the regulatory authorities.

⁵ Joint platform between ACER, the TSOs the European Commission and regulatory authorities for discussing topics related to the forward capacity allocation.

3. ACER'S COMPETENCE TO DECIDE ON THE PROPOSAL

- (12) According to Article 5(2)(b) of Regulation (EU) 2019/942, proposals for common terms and conditions or methodologies developed pursuant to network codes and guidelines adopted before 4 July 2019 which require the approval of all regulatory authorities, shall be submitted to ACER for revision and approval.
- (13) According to Article 4(5) and 4(6)(d) of the FCA Regulation, as initially adopted, namely as a guideline before 4 July 2019, the proposal for the HAR pursuant to Article 51 of the same Regulation, was subject to approval by all regulatory authorities. Following the amendment of these provisions by Commission Implementing Regulation (EU) 2021/2808, the proposal for the HAR and any amendments thereof have been explicitly subjected to approval by ACER.
- (14) According to Article 4(12) of the FCA Regulation, ACER may request proposals for amendments of those terms and conditions or methodologies, where ACER is responsible for their approval, and, in addition, the TSOs responsible for developing a proposal for the HAR may propose amendments thereto to ACER. Those proposals for amendments are to be approved in accordance with the procedure set out in Article 4 of the FCA Regulation.
- (15) According to Article 5(6) of Regulation (EU) 2019/942 and Article 4(5) of the FCA Regulation, ACER, before approving the terms and conditions or methodologies, shall revise the proposals where necessary, after consulting the respective TSOs, in order to ensure that they are in line with the purpose of the FCA Regulation and contribute to market integration, non-discrimination, effective competition and the proper functioning of the market.
- (16) On 12 July 2021, ACER requested all TSOs to propose amendments to the HAR. By submissions of 1 March and 1 August 2023, ENTSO-E, on behalf of all TSOs, submitted the Proposal to ACER for approval.
- (17) Therefore, based on Article 5(2)(b) of Regulation (EU) 2019/942 as well as Articles 4(5), 4(6)(d) and 4(12) of the FCA Regulation, ACER is competent to decide on the Proposal as submitted to ACER on 1 March and 1 August 2023.

4. SUMMARY OF THE PROPOSAL

- (18) The Proposal includes the following elements:
- a. 'Whereas' section;
 - b. general provisions, including scope of application, effective date and application of the HAR as well as harmonised definitions, in Title 1;
 - c. requirements and process for participation in auctions and transfer, including harmonised provisions on participation conditions, in Title 2;

- d. requirements for collaterals, including harmonised provisions on financial requirements, netting policies and financial collaterals for LTTRs, in Title 3;
 - e. provisions on auctions, including a description of the forward capacity allocation process, with auction specification, submission of bids, publication of auction results and contestation period, in Title 4;
 - f. harmonised provisions for the return of LTTRs, in Title 5;
 - g. harmonised provisions for the transfer of LTTRs, including their notification, in Title 6;
 - h. principles regarding the use and remuneration of LTTRs, including harmonised Use-It-Or-Sell-It (UIOSI) provisions in case of physical transmission rights, a description of the types of LTTRs which are offered, including the remuneration principles, as well as the description of the applicable nomination rules, in Title 7;
 - i. provisions on fallback procedures, in Title 8;
 - j. provisions on curtailment, including firmness and compensation rules, in Title 9;
 - k. provisions regarding invoicing and payment, including harmonised provisions on financial requirements and settlement, in Title 10; and
 - l. miscellaneous provisions, such as provisions on the contractual framework between the single allocation platform and the market participants, including applicable law, applicable language, confidentiality, dispute resolution, liability and force majeure, in Title 11.
- (19) The Proposal, therefore, consists of the complete HAR as set out in Annex I to ACER's Decision No 15/2021, with the following amendments proposed by the TSOs:
- a. 'Whereas' section: adding a description of the current amendment process;
 - b. Article 1 ('Subject matter and scope'): adding a reference to Annex 1 setting out a list of the TSOs which the HAR applies to;
 - c. Article 2 ('Definitions and interpretations'): adding a definition of a 'price cap';
 - d. Article 9 ('Submission of information'): clarifying the seat of the credit institution in which the applicant shall have a bank account for the purpose of the participation agreement;
 - e. Article 19 ('General provision'): specifying that the single allocation platform ('SAP') shall, in case of a payment incident use available collaterals to first settle outstanding amounts relating to ATC-based auctions;

- f. Article 20 ('Form of cash deposit'): clarifying the seat of the financial institution in which the registered participant shall deposit money for collaterals;
 - g. Article 21 ('Form of bank guarantee'): clarifying that the bank guarantee can be provided via SWIFT;
 - h. Article 29 ('Auction specification'): adding the conditions for the publication of auction specifications in the event of flow-based allocation;
 - i. Articles 29, 31, 33, 38, 52, 58: clarifying which conditions apply only in case of the ATC-based allocation or only in case of the flow-based allocation;
 - j. Article 34 ('Credit limit verification'): adding a description as to how the maximum payment obligations are calculated in case of flow-based allocation;
 - k. Article 49 ('Cap for the Remuneration of long-term transmission rights holders for non-nominated physical transmission rights and financial transmission rights'): introducing a cap on remuneration of LTTRs in case of fallback;
 - l. Articles 52 ('Fallback procedures'): clarifying the scope of application of the provisions on fallback procedures;
 - m. Article 52 and Article 54 ('Fallback procedures'): adding provisions on fallback procedures, in relation to the scope of application of these procedures and to clarify that requests for LTTRs returns shall be cancelled;
 - n. Article 66 ('Invoicing and payment conditions'): including different deadlines for when an erroneous invoice shall be settled;
 - o. Article 70 ('Liability'): amending SAP's liability;
 - p. Article 72 ('Suspension of the participation agreement'): clarifying the implications for the registered participant in case of suspension; and
 - q. Article 73 ('Termination of the participation agreement'): clarifying the term 'outstanding payment obligations' and including two new termination events;
- (20) The reasons for the proposed amendments are set out in the TSOs' Explanatory Note of 1 March 2023 and, with respect to collaterals, in the TSOs' Explanatory Note of 1 August 2023, submitted to ACER as part of the Proposal.

5. SUMMARY OF THE OBSERVATIONS RECEIVED BY ACER

5.1. Public consultation on the Proposal

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

5.2. Consultation on ACER's preliminary position

- (22) On 19 October 2023, ACER shared its preliminary position with the TSOs and invited them to provide their views on the revisions proposed by ACER. The following paragraphs provide a summary of the TSOs' views, including the TSOs' written response of 2 November 2023 and comments provided at the oral hearing of 10 November 2023.⁶
- (23) The TSOs asked ACER to accelerate the decision procedure and adopt the amended HAR already in November, instead of December 2023.
- (24) Regarding Article 9 ('Submission of information'), Article 20 ('Form of cash deposit') and Article 21 ('Form of bank guarantee'), the TSOs proposed to keep references to Switzerland, for consistency and since market participants participating to the auction are also allowed to have a bank account registered in Switzerland and bank guarantees from Switzerland are accepted by the SAP.
- (25) Regarding Article 29 ('Auction specification'), the TSOs:
- a. asked ACER to confirm that no external constraints are expected to be published for 2024 for cNTC based auctions;
 - b. highlighted that the SAP would not be able to publish external constraints for January 2024, while recognising that this parameter should be published in the future. The TSOs suggested to insert wording in the HAR which would allow for sufficient lead time for implementation.
 - c. suggested that the deadline for the publication of the calculated price cap coincides with the publication of final auction specification as initially proposed by the TSOs;
 - d. asked not to have returns included in the final offered capacity and explained what RAM should consist of; and
 - e. asked to delete paragraphs 2(c) and 3(d) referencing the publishing of offered capacity of 'already allocated capacity to registered participants suspended or terminated'.
- (26) Regarding Article 34 ('Credit limit verification'), the TSOs:
- a. proposed to either add the description of the option to calculate the cap in the border specific annexes or add both calculation methods in the HAR, and specify in the border specific Annexes which one would be used;

⁶ This is ACER's summary of key concerns and not to be considered a complete representation of the comments received.

- b. proposed that the description of the calculation of the price cap should remain high level in the HAR. In TSOs' view, it would be more appropriate to specify the calculation method in the SAP methodology;
 - c. pointed out that there is a high risk that the cap calculation as proposed by ACER cannot be implemented before November 2024 due to necessary alignments with external parties, vendors and the implementation of this new requirement. According to the TSOs, making the cap calculation as proposed by ACER mandatory before the go-live of the long-term flow-based allocation in the Core CCR would jeopardise the set go-live date;
 - d. requested to define sink zones and source zones in Article 2; and
 - e. proposed to delete paragraph (7) concerning the data service provider since, in their view, it is not relevant for the HAR.
- (27) Regarding Article 35 ('Auction results determination'), all TSOs proposed to add the definition of marginal price from the SAP methodology.
- (28) Regarding Article 36 ('Notification of provisional auction results'), the TSOs:
- a. proposed to remove the reference to 'per bidding zone' in paragraph (2)(g);
 - b. proposed to remove the publication of shadow prices and non-netted flows as part of the auction results because these are not mandatory for the auction validation and should not be linked to the auction results. The TSOs suggested to define the requirement to publish shadow prices and non-netted flows under a separate paragraph.
- (29) Regarding Article 52 ('Auction cancellation'), the TSOs proposed to replace the term 'subsequent auction' with 'fallback auction'.
- (30) Regarding Article 69 ('Liability'), the TSOs insisted on keeping paragraph (3) limiting SAP's liability for indirect damages but agreed that such limitation would also apply to the liability of market participants and reflected in paragraph (4).
- (31) Regarding Article 71 ('Suspension of the participation'), the TSOs proposed to keep the keep the wording as initially proposed by the TSOs.
- (32) Finally, the TSOs suggested several wording changes throughout the HAR such as ensuring that the HAR covers the current ATC auctions performed in the Core region, keeping references to 'hour' instead of 'MTU' as well as keeping all references to prices in EUR/MWh.

5.3. Consultation of the AEWG

- (33) The AEWG provided its advice on 22 November 2023, endorsing ACER's draft Decision.

- (34) In its advice, the AEWG also invited ACER to consider the comments raised by BNetzA during the AEWG's consultation period. BNetzA suggested a number of amendments to Article 34, 35 and 38 of the Proposal. These are further considered by ACER in section 6 and include:
- a. suggestions to introduce clarifications in Article 34(7)(a), points (i) and (iv), and Article 34(7)(d);
 - b. request to specify a monthly product duration instead of a duration 'shorter than a year' in Articles 34(7)(b) and 34(7)(c)(ii) to exclude quarterly/weekly products;
 - c. request to specify information on the forward price to be published by the single allocation platform, in Article 34(8); and
 - d. minor corrections in Articles 34(7)(c), points (i) and (ii), Article 34(7)(d), Article 35(2)(c) and Article 38(4)(a).
- (35) The AEWG's advice also included a summary of comments put forward by CRE at the AEWG meeting on 20 November. CRE expressed concerns regarding the solutions provided in the Decision (method of introducing a price cap) and highlighted the importance of taking sufficient time to find a mature and pragmatic solution accounting for stakeholders' input. CRE recognised that it is important to find a balance between the cost of delaying the implementation and finding an optimal solution. In CRE's view, implementation of long-term flow-based methodology poses several unresolved problems, resulting in a sharp drop in the capacity actually offered. CRE considers that if the flow-based methodology were to worsen the situation, it is needed to consider whether to postpone its application.
- (36) ACER's assessment and revisions of the price cap calculation method are discussed in section 6.2.4. ACER notes that the implementation of the long-term flow-based methodology has already been decided in ACER Decision No 16/2019 and ACER Decision No 14/2021, and therefore CRE's comment goes beyond the scope of this Decision.

6. ASSESSMENT OF THE PROPOSAL

6.1. Legal framework

- (37) Article 52 of the FCA Regulation sets out the content requirements for the HAR.
- (38) Article 52(1) of the FCA Regulation requires that the HAR cover physical transmission rights, FTRs-options and FTRs-obligations, and that the TSOs consider and duly take into account specificities related to the different types of products.
- (39) Article 52(2) of the FCA Regulation requires that the HAR follow the principles of non-discrimination and transparency and that they include, at minimum, the general content requirements listed in that Article. The HAR may also contain regional or

border zone specific requirements, such as those listed in Article 54(3) of the FCA Regulation.

- (40) As a general requirement, Article 4(8) of the FCA Regulation sets out that every proposal for terms and conditions or methodologies includes a proposed timescale for their implementation and a description of their expected impact on the objectives of the FCA Regulation.
- (41) Further, for coherence reasons and as confirmed by Article 4(8) of the FCA Regulation, the proposal for terms and conditions or methodologies must be in line with the objectives of the FCA Regulation defined in its Article 3.
- (42) In terms of procedure, Article 4(12) of the FCA Regulation requires that the TSOs' proposals for amendment to the terms and conditions or methodologies shall be subject to consultation in accordance with Article 6 of the FCA Regulation.

6.2. Assessment of the legal requirements

- (43) The Proposal consists of the entire HAR as set out in Annex I to ACER Decision No 15/2021 including the amendments proposed by the TSOs. To avoid duplication, ACER will focus on the TSOs' proposed amendments and will not reassess those parts of the Proposal which correspond to the approved HAR. In that respect, ACER refers to its previous decisions on the HAR referenced in paragraph (2) of this Decision. Therefore, the following paragraphs concern the TSOs' proposed amendments and the additional amendments made by ACER.

6.2.1. Requirements set out in Article 52 of the FCA Regulation

- (44) The proposed amendments update certain provisions concerning the requirements described in Article 52(1) and (2) of the FCA Regulation. However, these proposed amendments do not affect the finding in ACER Decision No 15/2021 that the requirements of Article 52(1) and (2) of the FCA Regulation are fulfilled, except the amendments introduced in Article 49 of the Proposal which, however, cannot be approved by ACER for the reasons explained in section 6.2.2 below.
- (45) Therefore, the Proposal, except for the TSOs' proposed amendments in Article 49, fulfils the requirements of Article 52(1) and (2) of the FCA Regulation.

6.2.2. Assessment of the proposed cap for the remuneration of LTTRs holders for non-nominated physical transmission rights and financial transmission rights

- (46) The TSOs proposed to introduce a cap on the remuneration of the LTTRs holders as specified in Article 49 of the Proposal ('Cap for the Remuneration of long-term transmission rights holders for non-nominated physical transmission rights and financial transmission rights'). Article 49 aims to apply a cap on the remuneration of the LTTRs holders in case of decoupling event in the day ahead market coupling.

- (47) ACER cannot approve this amendment because the proposed cap on the remuneration of LTTRs in case of decoupling event in the day ahead market coupling is not in line with the existing legal framework for LTTRs' remuneration pursuant to the FCA Regulation. ACER notes that a similar cap was proposed by the TSOs as part of the 2021 HAR amendment proposal and ACER's reasoning for not accepting the cap proposed in 2021 set out in detail in section 6.2.1 of [ACER Decision No 15/2021](#) also applies to the current cap proposal. To avoid duplication, this reasoning will not be repeated here.
- 6.2.3. Assessment of the auction specifications and the notification of provisional auction results
- (48) According to the TSOs' proposal, the SAP would publish the calculated price cap for bid collaterals (if applicable) together with the final auction specification at latest one (1) hour before the start of the bidding period of that auction.
- (49) In its preliminary position, ACER proposed that the calculated price cap should be published by the SAP five (5) working days before the start of the bidding period. ACER reasoned that the calculated price cap should be published sufficiently in advance of the publication of the final auction specifications in order to allow market participants to alter their credit limit. To this aim, ACER moved the reference to the price cap from point (c) of Article 29(3) of the Proposal to a new point (b) of the same article, requiring an earlier publication of the calculated price cap.
- (50) In their hearing input, the TSOs asked ACER to keep their initial proposal to publish the calculated price cap together with the final auction specifications. The TSOs expressed concerns that it would not be technically feasible for the SAP to publish the price cap five (5) working days before the start of the bidding period as the cap needs to be calculated and validated by the TSOs before being published by the SAP. The TSOs further argued that it would not be possible to comply with this deadline for any monthly auction with the current timings, providing an example with the Core monthly auctions. According to the TSOs, the SAP and the TSOs would need at least four (4) working days to perform the process for calculating and validating the price cap, and that this process can only start once the results of the last day of the month are calculated and processed in the SAP's system.
- (51) ACER notes the TSOs' concerns but considers that one (1) working day should be sufficient for calculating the price cap, as the calculation is not complex. ACER also considers that the TSOs do not have to validate the price cap and that the SAP should be responsible for calculating and publishing the price cap without the involvement of TSOs. At the oral hearing, the TSOs were not able to explain why they require four (4) working days for this process. ACER considers that one (1) working day should be sufficient for the calculation but considering the TSOs' concerns, ACER has decided to provide two (2) working days for this process in the HAR.
- (52) Aside of these operational aspects, to obtain possibly the most accurate price cap, it is necessary to use for its calculation a forward price settled as close to the auction as possible. Therefore, the timing of the publication of the price cap should strike a

balance between, on the one hand, providing the market participants with sufficient time to alter their credit limit and, on the other hand, ensuring that the highest possible accuracy of the price cap. ACER considers that publishing the price cap two (2) working days before the gate closure of the auction is a balanced solution since it still gives market participants sufficient time to alter their credit limit, while still ensuring a high accuracy of the calculation. By striking the balance, the proposed publication timing remains consistent with the objectives of the FCA Regulation, in particular that it ensures fair and non-discriminatory treatment of the TSOs and market participants (Article 3(d) of the FCA Regulation), as well as contributes to the promotion of efficient long-term cross-zonal trade with long-term cross-zonal hedging opportunities for market participants, and respects the need for an orderly price formation (Articles 3(a) and 3(d) of the FCA Regulation).

- (53) Given the above, ACER has changed the required timing for the publication of the calculated price cap in Article 29(3)(b) of the Proposal from five (5) working days before the start of the bidding period as proposed in ACER's preliminary position to two (2) working days before the gate closure of the auction, therefore leaving the TSOs two (2) working days to perform the calculation, and two (2) working days for the market participants to alter their credit limit.
- (54) In Article 29(3)(d) of the Proposal, ACER has inserted a requirement that the final offered capacity consists of the full set of flow-based input parameters. Publishing the full set of flow-based parameters would provide market participants with full transparency of network constraints and enable them to perform their own analyses of the long-term flow-based allocation. Enhancing transparency on network constraints and capacity allocation is consistent with the objective of ensuring and enhancing transparency and reliability of information on forward capacity allocation (Article 3(f) of the FCA Regulation) and ensuring fair treatment of the TSOs and market participants (Article 3(d) of the FCA Regulation).
- (55) The TSOs' comments on the publication of external constraints, in Article 29, (explained in Recital (25)) are discussed at the oral hearing with TSOs. ACER explained that it does not require from the Core and Nordic CCRs (currently applying NTC-based allocation and planning to switch to flow-based allocation), to establish temporary publication of the information on external constraints. Current practice of publication of corresponding data (such as combined profiles at Polish borders) is sufficient for the transition period until the switch to the flow-based allocation.
- (56) ACER discussed the TSOs' concerns regarding the publication of the capacities by returns and the capacities by the suspended participants (explained in Recital (25)). ACER has agreed to remove the requirement for publication of the returns for the flow-based allocation, being already a part of RAM. ACER has also agreed ACER has agreed to remove the requirement for publication of the capacities by suspended participants for both the cNTC-based and flow-based allocation, as the reallocation of capacity of the suspended market participants on a monthly timeframe is not possible.
- (57) As proposed by the TSOs during the hearing phase (see Recitals (27) – (28)), ACER has:

- a. added the definition of marginal price for the flow-based allocation in Article 35 of the Proposal;
- b. removed the reference ‘per bidding zone’ from Article 36(2)(g) of the Proposal, related to the publication of congestion income information, and specified in Article 36(2) that the provisional auction results, including congestion income, should be published per oriented bidding zone border;
- c. added a new paragraph (3) in Article 36 of the Proposal, specifying a requirement to publish shadow prices and non-netted flows.

(58) Based on BNetzA’s comment (see Recital (34)), ACER has re-introduced the word ‘border’ in Article 35(2)(c), accidentally removed in the revision of the Proposal;

6.2.4. Assessment of the credit limit verification

(59) The TSOs propose that the bid price which is used for the calculation of the maximum payment obligation (‘MPO’) for flow-based allocation shall be subject to a price cap (Article 34 of the Proposal). While ACER largely agrees with the proposed application of a price cap to the MPO calculation, ACER has introduced amendments to the way in which the price cap is calculated in order to allow for a more accurate forecast of the auction price compared to the calculation proposed by TSOs.

(60) As explained in ACER’s preliminary position, ACER considers that applying a price cap for the calculation of the MPO can be a good approach to address the challenge with increased collateral requirements for market participants in the auctions with LTFBA. How successful applying a price cap is, will depend on how similar the cap will be to the expected auction price, and this depends on how the price cap is calculated. ACER considers that using the historical day-ahead market spread to calculate the price cap, as proposed by TSOs, will not provide the most accurate forecast of the auction price. An approach which would provide a better forecast would be to use the forward prices as a basis to calculate the price cap as proposed by market participants. However, one challenge with using the forward prices is the complexity of transforming forward market spread (based on futures prices) which includes both positive and negative price differences between two markets into an intrinsic value of FTR options which is equal to positive price differences between two markets in a given direction of an FTR. ACER have slightly adjusted the proposal from TSOs to accomplish a more accurate forecast of the intrinsic FTR value, providing a cap that is closer to the expected auction price than only using the historical market spread will. The proposal from ACER is to calculate the forecasted hourly price curves in all bidding zones by using the historical day-ahead prices for the same period as proposed by TSOs and scale them so that their average equals the forward price.

(61) A more accurate forecast of the auction price will, in ACER’s view, better contribute to the objectives listed in Article 3 of the FCA Regulation. In particular, it would contribute to the objective of promoting effective long-term cross-zonal trade with long-term cross-zonal hedging opportunities for market participants (point (a)), the

objective of respecting the need for a fair and orderly forward capacity allocation and orderly price formation (point (e)), the objective of ensuring and enhancing the transparency and reliability of information on forward capacity allocation (point (f)) and finally, the objective of the efficient long-term operation and development of the electricity transmission system and electricity sector in the Union (point (g)).

- (62) In their hearing input, the TSOs expressed concerns that ACER's proposal on how to calculate the price cap might not be implemented in time for the go-live of the long-term flow-based allocation in the Core CCR. Considering this, ACER has amended Article 34(7)(d) specifying solutions which the SAP can apply in cases where the SAP has no access to forward prices or, where there are no reference forward prices available in a bidding zone or, where the SAP cannot use the forward prices to calculate the price cap.
- (63) In ACER's preliminary position, ACER proposed to clarify in Article 34(7) that the SAP shall find a data service provider of its choice who will provide the required price data. TSOs proposed in their hearing input that this provision should be taken out of the HAR. ACER has accepted this suggestion from TSOs as it is agreed that this provision is not relevant to include in the HAR. ACER does not consider it to be necessary to regulate how the SAP will access the forward prices to calculate the price cap and has therefore removed proposed Article 34(8).
- (64) For transparency and to ensure that market participants are informed and accept the forward price that the SAP will use to calculate the price cap, ACER has included a provision, in Article 34(8), stating that the SAP shall publish on their website information on the forward price they use and which provider they access it from. Additionally, it is required that the SAP shall publish this on their website after consulting stakeholders. ACER considers that this will ensure that market participants are informed. This provision is in line with the objectives of the FCA Regulation
- (65) ACER notes CRE's concerns about the application of the proposed calculation method expressed at the AEWG meeting (see Recital (35)). While the calculation method based on forward prices and scaling is, in ACER's view, sufficiently accurate and, at the same time, feasible to implement in the context of the current amendments, this method should be subject to further evaluation by the TSOs following the implementation of the long-term flow-based capacity allocation in the Core CCR. For this reason, Article 68(6) of the HAR requires that the TSOs evaluate this method and explore more efficient methods for calculating the MPO, once the long-term flow-based capacity allocation is implemented. If the TSOs' analysis shows that more efficient methods can be implemented, the TSOs may propose relevant amendments to the HAR.
- (66) Based on the comments of BNetzA provided during the AEWG consultation (see Recital (34)) ACER has clarified, further specified or corrected wording in the respective provisions of Article 34(7) and Article 34(8) of the Proposal.
- (67) ACER does not agree with BNetzA's suggestion to restrict the product duration to 'monthly duration' in Article 34(7), points (b) and (c)(ii). Pursuant to Article 31(2) of

the FCA Regulation, the TSOs in each CCR may jointly propose to offer long-term cross-zonal capacity on additional time frames (other than annual and monthly). As such, product duration in Article 34(7) should not be limited to monthly duration only.

6.2.5. Assessment of the settling of erroneous invoices

(68) The TSOs have proposed to provide different deadlines for when an erroneous invoice should be settled depending on the reason for why the erroneous invoice has occurred. ACER has accepted the proposed maximum timeframes (30, 90, 180 working days) for correcting and settling the erroneous invoices. As explained by the TSOs, the aim of the two longer periods proposed (90 and 180 days) is to minimise the SAP's financial risk in situations where the SAP would be dependent on a third party, either for obtaining necessary information or for resolving e.g. a technical issue which would allow the SAP to correct the invoices. On the other hand, the proposed maximum timeframes raised no concerns from the market participants during the TSOs' and ACER's public consultations. As such, ACER sees no reason to object to the maximum timeframes proposed by the TSOs.

(69) However, ACER notes that these are not standard timeframes to settle the erroneous invoices but 'maximum' allowed timeframes. The SAP is expected to correct and settle the amount to the registered participant as soon as possible. ACER has therefore specified in Article 65(14) of the HAR (points (a), (b) and (c)) that the correction of invoices should be completed as soon as possible. This specification is in line with the objectives set out in Article 3 of the FCA Regulation, in particular, ensuring fair treatment of market participants (point (d)) as well as ensuring and enhancing transparency and reliability of information on forward capacity allocation (point (f)).

6.2.6. Assessment of the provisions on liability

(70) The TSOs proposed to change SAP's liability regime in Article 69 of the Proposal by:

- a. adding the concept of 'best efforts' in Article 69(1) according to which the SAP would only be held liable provided that the registered participants demonstrate that the SAP has not provided its best efforts, diligence and care in performing its obligations;
- b. excluding SAP's liability for indirect, consequential damages in Article 69(3);
- c. clarifying that SAP's liability for damages suffered by registered participants as a result of technical problems are also excluded unless they are a result of fraud, negligence or wilful misconduct.

(71) Regarding the concept of 'best efforts', the TSOs stated that this concept should be added to the HAR rules because it is present in industry standard rules, referencing the case of power exchanges as an example. Having reviewed the liability regimes of the nominated electricity market operators, ACER does not consider that the 'best efforts' clause, while present in some liability regimes, can be considered an industry standard. More importantly, ensuring a fair and non-discriminatory treatment of the

TSOs and market participants is one of the objectives of the FCA Regulation (Article 3(d) of the FCA Regulation). ACER considers that it would not be fair to shift the burden of proof of the registered participants in a way which makes it disproportionately difficult for them to recover the damage caused by the instances under Article 69(2) of the HAR, and would not be in line with Article 3(d) of the FCA Regulation. Therefore, ACER has deleted the proposed reference to the concept of ‘best efforts’.

- (72) Regarding SAP’s liability for indirect damages, ACER initially did not accept the proposed exclusion. In its preliminary position, ACER argued that this approach would introduce a major imbalance between the liability of the SAP and the liability of the registered participant (which remain liable for any and all loss (whether direct or indirect), and would be inconsistent with the objective of the FCA Regulation to ensure fair and non-discriminatory treatment of the TSOs and market participants (Article 3(d) of the FCA Regulation). ACER noted that it could consider such a limitation of SAP’s liability for indirect/consequential damages only if a corresponding limitation was applied to the liability of the registered participants (i.e. ensuring ‘equality of arms’) in line with the objective of the FCA Regulation referenced above. The TSOs agreed with ACER’s proposed approach in their hearing input. Based on the above, ACER accepted the proposed exclusion of SAP’s liability for indirect/consequential damages and mirrored it in the liability of the registered participants by amending Article 69(5) of the Proposal. Moreover, since – as confirmed by the TSOs – the exclusion of liability for indirect/consequential damages is in any case not possible in case of death or personal injury under the applicable law, ACER clarified that such exclusion would only concern the case defined in Article 69(2)(a) of the Proposal.
- (73) ACER does not object to the proposed clarifications in Article 69(4) of the Proposal, since they do not change the scope of SAP’s liability, i.e. SAP remains liable for damages suffered by registered participants as a result of technical problems if such act or omission is a result of fraud, gross negligence or wilful misconduct.

6.2.7. Assessment of the suspension of the participation agreement in case of non-payment

- (74) In its preliminary position, ACER proposed a stricter sanctioning regime in case a participant has not settled the payment of their LTTRs. According to ACER’s proposal, the suspension of the participation agreement due to non-payment (i.e. case defined in Article 71(1)(a) of the Proposal) would result in a suspension of the registered participant’s participation in all auctions and in the transfer or return of LTTRs for ninety (90) calendar days after the payment of the LTTR has been fully settled. ACER reasoned that the stricter regime aims to balance the increased risk that can occur due to the new requirements on the calculation of the MPO implemented through the present amendment.
- (75) In their hearing input and in the oral hearing, the TSOs expressed concerns that ACER’s proposal would have a significant system impact. In particular, the TSOs noted that the existing suspension regime in the HAR is aligned with other SAP’s allocation rulesets (approximately 20) and that changing the regime for the HAR

would also require amending these other rules, which would require a lot of time and resources to accommodate this change. In view of the TSOs' concerns, ACER has removed its proposed restriction from Article 71 of the Proposal, also considering the low likelihood of such incidents occurring. Even if such incidents may occur, a registered participant would still be suspended from the auctions until it fully settles its payment or fully secures it by a collateral.

- (76) In their hearing input, the TSOs also proposed to further specify the term 'use' in Article 71(3) by adding "(nominate or get remunerated)" in brackets. ACER has provided this clarification as suggested by the TSOs.

6.2.8. Other amendments to the Proposal

- (77) In the 'Whereas' section, ACER has shortened the description of the process leading to the current amendment (Recital (2)), since procedural details are already described in section 1 and 2 of this Decision.
- (78) In Article 51(3) of the Proposal, ACER has restricted the scope of application of the exemption to the case of flow-based allocation only. ACER considers that this exemption in case of fallback procedures may be needed in cases with flow-based allocation due to the time constraints of the auctions. Such a time constraint does not exist in case of cNTC-based allocation, therefore the exemption should only apply in case of flow-based allocation, as also confirmed by the TSOs.
- (79) ACER has introduced several editorial amendments to improve the wording and clarity of the Proposal, while preserving the intended meaning of the content. This includes:
- a. aligning the definitions in the HAR in Article 2 of the Proposal with the amended SAP methodology (ACER Decision No 05/2023);
 - b. removing the definition of 'interconnector' from Article 2 to avoid duplication, since 'interconnector' is already defined in Article 2 of Regulation (EU) 2019/943, which applies to the HAR;
 - c. defining 'sink zone' and 'source zone' in Article 2 of the Proposal, as requested by the TSOs;
 - d. defining 'cNTC-based allocation' in Article 2 of the Proposal in order to clarify that it allocates ATC values and that it covers the allocation of the ATC values calculated with the NTC-based approach (such as the Core CCR before applying the flow-based allocation);
 - e. defining 'flow-based allocation' in Article 2 of the Proposal so that it extends to the available cross-zonal capacities provided for the evolved flow-based approach;

- f. removing references to ‘European Union’ in Articles 9(1)(h), 20(1)(a) and 21(1)(h) of the Proposal, since European Union is covered by the term ‘European Economic Area’.
- g. aligning references in Articles 9(1)(h), 20(1)(h) and 21(1)(h) of the Proposal regarding the countries where the banks or credit institutions relevant to the HAR can be established, considering the TSOs’ hearing input;
- h. restructuring Article 38(4) of the Proposal to clarify the difference between the cNTC-based and flow-based allocation regarding the returned LTTRs, and rephrasing based on the comment from BNetzA (see Recital (34));
- i. cross-referring in Article 51(4) of the Proposal to Articles 36(1) and 29(3)(a) which contain the requirements for setting the original timings by the SAP, for the avoidance of doubt.
- j. clarifying, in Article 52 of the Proposal that Article 52(1) applies only in case of allocation with cNTC approach, while deleting the corresponding clarification from Article 52(2) of the Proposal;
- k. accepting the TSOs’ proposal to replace the term ‘subsequent auction’ with ‘fallback auction’ in Article 52(2) of the Proposal, the latter being a more precise term.
- l. merging paragraphs (10) and (11) into a single paragraph (10) in Article 57 of the Proposal to clarify the difference between the cNTC-based and flow-based allocation regarding the deadline for cancelling the return of LTTRs.
- m. inserting, where relevant in the Proposal, references to ‘MTU’ which can in principle differ from ‘hour’. However, the amounts of energy are still defined in MWh values, and the prices are defined in EUR/MW or EUR/MWh values.

6.2.9. Assessment of the requirements in Article 4(8) of the FCA Regulation

- (80) Article 68 of the Proposal includes a general timescale for the implementation of amendments to the HAR. The implementation aspects of the current amendments are further discussed in the Explanatory Notes submitted to ACER.
- (81) Recitals (4) to (15) of the ‘Whereas’ section of the Proposal include a description of the expected impact of the HAR on the objectives of the FCA Regulation. Certain impacts related to the proposed amendments are also described in the Explanatory Notes submitted to ACER.
- (82) Based on the above, ACER considers that the Proposal complies with Article 4(8) of the FCA Regulation.

6.2.10. Assessment of the requirements for consultation

- (83) The TSOs held two public (web-based, via ENTSO-E) consultations on their proposed amendments. The amendments included in the submission of 1 March 2023 were

consulted with stakeholders between 7 December 2022 and 16 January 2023, and the amendments included in the submission of 1 August 2023 were consulted with stakeholders between 8 June and 8 July 2023. During the public consultations, for both submissions, ENTSO-E received responses from 6 stakeholders. The documents submitted to ACER on 1 March and 1 August included a summary of stakeholders' comments and all TSOs' assessment of these comments.

- (84) Therefore, ACER considers that the Proposal meets the consultation requirements provided in Article 4(12) and Article 6 of the FCA Regulation.

7. CONCLUSION

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

- (86) 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 harmonised allocation rules for long-term transmission rights pursuant to Article 51 of Regulation (EU) 2016/1719 are amended and approved as set out in Annex I to this Decision.

Article 2

This Decision is addressed to:

50Hertz – 50Hertz Transmission GmbH

Amprion – Amprion GmbH

APG – Austrian Power Grid AG

Augstsprieguma tīkls – AS Augstsprieguma tīkls

BCAB – Baltic Cable AB

ČEPS – ČEPS a.s.

CREOS Luxembourg – CREOS Luxembourg S.A.

CNTEE Transelectrica SA – Compania Nationala de Transport al Energiei Electrice.

Croatian Transmission System Operator Plc. (HOPS d.d.)
Eirgrid – Eirgrid plc.
Elering – Elering AS.
ELES – ELES, d.o.o.
Elia – Elia Transmission Belgium SA/N.
Energinet – Energinet.
ESO - Electroenergien Systemen Operator EAD.
Fingrid – Fingrid Oyj.
IPTO – Independent Power Transmission Operator S.A.
Kraftnät Åland – Kraftnät Åland Ab.
LITGRID – LITGRID AB.
MAVIR ZRt. – MAVIR Magyar Villamosenergia-ipari Átviteli Rendszerirányító Zártkörűen Működő Részvénytársaság ZRt.
PSE – Polskie Sieci Elektroenergetyczne S.A.
REE – Red Eléctrica de España S.A.
REN – Rede Eléctrica Nacional, S.A.
RTE – Réseau de Transport d'Electricité, S.A.
SEPS – Slovenská elektrizačná prenosová sústava, a.s.
SONI – System Operator for Northern Ireland Lt.
Svenska Kraftnät – Affärsverket Svenska Kraftnät
TenneT GER – TenneT TSO GmbH.
TenneT TSO – TenneT TSO B.V.
Terna S.p.A.
TransnetBW – TransnetBW GmbH.

Done at Ljubljana, on 22 December 2023.

- SIGNED -

*For the Agency
The Director*

C. ZINGLERSEN

Annexes:

- Annex I Harmonised allocation rules for long-term transmission rights, as amended and approved by ACER.
- Annex Ia Harmonised allocation rules for long-term transmission rights, with amendments shown in track-changes (for information only)
- Annex II Evaluation of responses to the public consultation on the proposal for the amendments to the harmonised allocation rules for long-term transmission rights

In accordance with Article 28 of Regulation (EU) 2019/942, the addressee(s) may appeal against this Decision by filing an appeal, together with the statement of grounds, in writing at the Board of Appeal of the Agency within two months of the day of notification of this Decision.

In accordance with Article 29 of Regulation (EU) 2019/942, the addressee(s) may bring an action for the annulment before the Court of Justice only after the exhaustion of the appeal procedure referred to in Article 28 of that Regulation.