

## IV. ANNOUNCEMENT OF APPEAL<sup>1</sup>

**Case:** A-005-2021

**Appellant:** TenneT TSO GmbH and TenneT TSO B.V.

**Appeal received on:**

**Subject matter:** ACER's introduction of a methodology for cost-sharing of redispatching and countertrading

**Keywords:** CACM Regulation, Electricity Regulation, cost-sharing, flow decomposition, redispatching, countertrading, Polluter-Pays-Principle, Causer's Principle, Power Flow Colouring, Full Line Decomposition, Generation Shift Key, Netting, Loop flow threshold

**Contested decision Number:** ACER Decision 30/2020

**Language of the case:** English

### Remedy sought by the Appellant (including procedural requests)

The Appellant requests the Board of Appeal to:

- **Annul** ACER Decision 30/2020.

The Appellant includes the following procedural requests:

- Request for an **Oral Hearing** pursuant to Article 18(1) and 18(7) of Decision BoA No1-2011 Laying down the rules of organisation and procedure of the Board of Appeal of the Agency for the Cooperation of the Energy Regulators.

### Pleas in law and main arguments

The contested decision was adopted on 30 November 2020. The Appellants contests the Agency's decision. The Appellants' claims and arguments can be summarised as follows:

In its Decision 30/2020, ACER has set the methodology for cost-sharing of redispatching and countertrading (**cost-sharing methodology**) in the capacity calculation region (**CCR**) Core. The Appellants hold that this Decision is unlawful, mainly because of the following reasons:

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<sup>1</sup> Announcement published in accordance with Article 9 of Decision BoA No1-2011 Laying down the rules of organisation and procedure of the Board of Appeal of the Agency for the Cooperation of the Energy Regulators.

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1. **First plea: The scope of the cost-sharing methodology, whereas "all cross-border relevant network elements shall be eligible for cost sharing violates Article 16 Electricity Regulation, Article 74 CACM Regulation and Article 291 TFEU.**

- The Decision leads to the application of the methodology to all cross-border relevant network elements, even if they are not relevant for capacity calculation (Article 3(4) of Annex I to the Decision). This violates the Causer`s Principle of Article 16(13) Electricity Regulation as this only allows passing on redispatching costs relating to small tie-lines located in remote areas to TSOs in other bidding zones.
- Article 74(2) CACM Regulation does not support ACER`s view to apply the same cost-sharing principles to all cross-border relevant network elements.
- Including all cross-border relevant network elements in the cost-sharing methodology contradicts Article 291 TFEU as this exceeds the European Commission's competence to regulate details of electricity trading.

2. **Second plea: Flow Decomposition is unlawful**

The Decision implements the Power Flow Colouring (*PFC*) method and rejects the Full Line Decomposition (*FLD*) method. It further applies assumptions with regard to High Voltage Direct Current (*HVDC*) lines and the netting of flow types. The PFC method, its components (in particular the Generator Shift Key (*GSK*)) and the assumptions applied to HVDC lines and netting lead to a situation, where physically inexistent flows become the basis for the cost allocation of the methodology. This is contrary to the statutory requirements and violates, in particular, Article 16(13) Electricity Regulation.

➤ **First sub-plea: PFC ignores electrical distance, creates fictional flows and thereby obstructs any reasonable cost-attribution**

- The cost-sharing methodology violates Article 16(13) Electricity Regulation due to technically unjustified cost burdening. The superposition approach and the zonal aggregation approach, as utilized by the PFC method, produce arbitrary results.
- Contrary to Article 74(6)(d) CACM Regulation, the cost-sharing methodology is inconsistent with related mechanisms, namely with the cost-sharing mechanism for costs resulting from multilateral remedial actions (Article 76(1)(b)(v) SO Regulation) and the Inter-TSO-mechanism (Article 49 Electricity Regulation and Commission Regulation (EU) No 838/2010).
- The cost-sharing methodology violates further statutory requirements, namely Article 74(6)(a), (c) (e), (g) and (i) CACM Regulation, as it sets wrong incentives to invest effectively, constitutes an unfair distribution of costs between the TSOs involved in cost-sharing, does not facilitate the efficient long-term development and operation of the pan-European interconnected system, and does not allow reasonable financial planning. The PFC method is further intransparent and discriminatory.
- The "consistency" with the zonal market model and capacity calculation, which ACER claims, does not justify the incorrect flow results as Article 74 CACM Regulation does not require "consistency" with the zonal market model or the capacity calculation process.

➤ **Second sub-plea: Usage of Generation Shift Keys (GSK) is unlawful**

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- The application of GSKs for means of flow decomposition is distortive and violates Article 16(13) Electricity Regulation due to a further deviation from physical reality. In particular, the application of this approximate parameter is incompatible with the purpose of the flow decomposition, because the GSK is based on the Two-days-ahead network model (as utilized in the capacity calculation process).
  - The use of GSKs further infringes Article 16(4) Electricity Regulation because not in any case the maximum level of capacity may be made available to the market. ACER suggests to adjust GSK parameters with regard to the flow decomposition, acknowledging that an unmodified use of GSK parameters leads to incorrect results. However, this causes repercussion for the capacity calculation, where the same GSK has to be used.
  - The use of GSKs further violates (i) Article 74(3) CACM Regulation, because it does not determine costs in a transparent and auditable manner, (ii) Article 4(6)(c) CACM Regulation, because no fair distribution of costs is established, and (iii) Article 76(6)(i) CACM Regulation, because the use of GSKs does not comply with the principles of transparency and non-discrimination. The main reason for this is that different methodologies may be applied by the TSOs with unspecified margin, leading to different results and impacting the cost burdening.
- **Third sub-plea: Procedural violations in choosing the PFC over the FLD method**
- TenneT raises procedural concerns regarding ACER`s choice for the PFC method, including the application of GSKs. In particular, ACER does not take the FLD method sufficiently into account and violated its obligation to duly reason its decision as requested by Article 14 (7) ACER Regulation, Article 296 TFEU and the general principles of EU Law including Article 41(2)(c) of the Charter of Fundamental Rights.
  - The reasoning for choosing the PFC over the FLD method is incorrect for various reasons and does not disclose severe deficiencies of the PFC method.
  - Another decision would have been taken if procedural obligations would have been respected.
- **Fourth sub-plea: Restrictions made regarding the power flow via HVDC elements unlawful**
- The restrictive assumptions made for HVDC elements violate Article 16(13) Electricity Regulation and Article 74(6)(c) CACM Regulation, as it considers costs induced by flows that are not a reason for structural congestion.
  - By disadvantaging HVDC elements over other network elements, ACER`s approach might further encourage TSOs to implement less efficient technology such as AC technology, instead of HVDC elements. This violates Article 74(6)(a) CACM Regulation.
  - The restrictions to HVDC elements do not sufficiently reflect the efficient long-term development and operation of the pan-European interconnected system and electricity market contrary to Article 74(6)(e) CACM Regulation.
  - ACER`s restrictions to HVDC elements do not comply with Article 74(6)(i) CACM Regulation as they are treating HVDC and other network elements such as AC lines different without any justification.
  - By excluding certain types of flows ACER further infringes the requirements set out

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in Article 2(3) and Article 3(h) Electricity Regulation, as ACER's assumptions predefine certain types of flows and are not based on physical flows.

➤ **Fifth sub-plea: Netting approach is unlawful**

- The netting approach of the cost-sharing methodology lead to results which significantly differ from physical reality and, thus, violates Article 16(13) Electricity Regulation. By not aggregating physically existent flows, incorrect results are created.
- ACER aggregates all individual contributions (burdening and relieving) of the respective flow types per network element, but excludes certain loop flows. This results in an undue discrimination of loop flows and creates non-transparent results contrary to Article 3(e) and Article 74(6)(i) CACM Regulation.
- Further, the netting approach violates Article 74(5)(e) CACM Regulation by disabling the competent regulatory authorities to undertake any significant monitoring regarding the causes or origins of physical congestions on network elements.
- Hence, contrary to Article 74(6)(a) CACM Regulation, no efficient investment signals can arise and the methodology does not facilitate the long-term development of the European grid and electricity market contrary to Article 74(6)(e) CACM Regulation.

3. **Third plea: Common threshold for loop flows is unlawful**

- By imposing a common threshold for loop flows of 10 % on all eligible network elements, ACER infringes Article 16(8) Electricity Regulation and Article 16(13) Electricity Regulation.
- Article 16(8) Electricity Regulation requires a 30 % threshold for capacity calculation. The 10 % threshold determined by ACER undermines Article 16(8) Electricity Regulation as it results in TSOs facing higher cost shares, i.e. being penalised, for the use of interconnector capacity for loop flows above the 10 % threshold, although the European legislator considers a use of interconnection capacity of up to 30 % for loop flows to be appropriate and legitimate. ACER deviates from the 30 % threshold without any technical justification.
- This leads also to a violation of Article 15(2) Electricity Regulation as a fixed threshold obstructs the opportunity to reach the minimum capacity of Article 16(8) Electricity Regulation by a gradual linear trajectory of an action plan.
- A fix and identical loop flow threshold per bidding zone infringes Article 16(13) Electricity Regulation which foresees the definition of a threshold for each individual bidding zone border per TSO, subject to approval of the competent national regulatory authorities.
- Furthermore, the threshold violates the principle of proportionality as it is not appropriate to attain the objective of the cost-sharing methodology pursuant to Article 74 CACM Regulation.
- In addition, ACER has made an error of assessment and has infringed the appellant's right to be heard when setting the threshold.

**Further information**

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More information on the appeal procedure can be found on the 'Appeals' section of the Agency's website:

[https://www.acer.europa.eu/en/The\\_agency/Organisation/Board\\_of\\_Appeal/Pages/Procedural-Documents.aspx](https://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Pages/Procedural-Documents.aspx)

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