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

of 29 APRIL 2022

Case number:	A-013-2021
Language of the case:	English
Appellant:	*Bundesnetzagentur* ("BNetzA") Represented by: J. HOMANN, President
Defendant:	*European Union Agency for the Cooperation of Energy Regulators* ("ACER") Represented by: C. ZINGLERSEN and its legal representatives P. GOFFINET and M. SHEHU (Strelia cvba/scrl)
Application for:	annulment of Articles 3(5) and 10(3) of Annex I, and of any provision referring to those Articles, of Decision No 11/2021 of 13 August 2021 on the market-based allocation process of cross-zonal capacity for the exchange of balancing capacity for the Core CCR; remittal of the case to the competent body of ACER;
Board composition:	K. SARDI (Rapporteur), A. BIONDI (Rapporteur), K. WIDEGREN, P. EECKHOUT, M. SUPPONEN, and M. PREK (Chair)

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

HAS ADOPTED THIS DECISION

I. Procedural steps in the appeal procedure

1 On 13 October 2021, Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, the National Regulatory Authority of Germany (hereafter "the Appellant), via its legal representative, Mr. J. HOMANN submitted an appeal, in German, against "Entscheidung Nr. 13/2021 der Agentur für die Zusammenarbeit der Energieregulierungsbehörden (ACER) vom 13.08.2021 über den Vorschlag der Übertragungsnetzbetreiber der "Core Kapazitätsberechnungsregion für eine Methode für ein marktbasiertes Verfahren zur Zuweisung grenzüberschreitender Übertragungskapazität für den Austausch von Regelleistung (Core MB CZCA)".

2 On 21 October 2021, the Appellant submitted, on its own motion, a language waiver, agreeing English to be the language of the case and waiving its right to have German as the language of the case.

3 On 9 November 2021, the Appellant was requested to regularise the notice of appeal by confirming the English official translation of the notice of appeal, provided by the Translation Centre for the Bodies of the European union, and clarifying that the notice of appeal was directed against Decision No 13/2021 of ACER of 13 August 2021 on the suggestion of the transmission system operator of the 'Core' capacity calculation region for a method for a market-based allocation process of cross-zonal capacity for the exchange of balancing capacity.

4 On 15 November 2021, the Appellant submitted a revised coversheet, however leaving uncertainty as to whether the notice of appeal was directed against Decision No 13/2021 of ACER of 13 August 2021 on the suggestion of the transmission system operator of the 'Core' capacity calculation region for a method for a market-based allocation process of cross-zonal capacity for the exchange of balancing capacity or rather against the Decision No 11/2021.

5 On 16 November 2021, the Registry informed the Appellant that, in the absence of any reaction from the latter within the prescribed timeframe, for the purpose of the appeal proceeding, the English official translation of the notice of appeal, provided by the Translation Centre for the Bodies of the European union, would have been employed as notice of appeal. In addition, within the same communication, the Registry reiterated the request for clarification regarding the identification of the contested decision.

6 On 19 November 2021, the Appellant submitted a revised coversheet, however maintaining uncertainty as to whether the notice of appeal was directed against Decision No 13/2021 of ACER of 13 August 2021 on the suggestion of the transmission system operator of the 'Core' capacity calculation region for a method for a

market-based allocation process of cross-zonal capacity for the exchange of balancing capacity or against Decision No 11/2021.

7 On 29 November 2021, ACER (hereafter the "Defendant") was notified with the notice of appeal.

8 On the same date, the announcement of appeal was published on ACER website and all addressees of Decision No 11/2021 and Decision No 13/2021 were notified accordingly. The parties were also informed of the composition of the Board of Appeal hearing the case.

9 On 29 November 2021, the Appellant submitted, on its own motion, a revised notice of appeal indicating Decision No 11/2021 on the market-based allocation process of cross-zonal capacity for the exchange of balancing capacity for the Core CCR of 13 August 2021 as the contested decision.

10 On 2 December 2021, the Appellant notified the Defendant with the latest submission.

11 On 4 January 2022, the Defendant filed its defence with the Registry requesting the Board of Appeal to dismiss all the pleas and further seeking procedural measures with regard to access to the contract on the Austrian-German balancing cooperation, as signed by the concerned Austrian and German TSOs.

12 Upon request of 5 January 2022, on 10 January 2022, the Appellant submitted its observations regarding the request of procedural measures filed by the Defendant.

13 On 13 January 2022, the Appellant and the Defendant were summoned to the oral hearing to be held on 24 January 2022.

14 On 24 January 2022, the Appellant requested the postponement of the oral hearing stating the impossibility of ensuring effective representation due to the absence of one of its three representatives because of Covid-19. The request was accepted by the Chair of the Board of Appeal and the new date for the oral hearing was fixed.

15 On 10 February 2022, the oral hearing took place.

II. Legal Context

16 Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing (hereafter the "EB Regulation") provides for a series of requirements for electricity balancing, for the exchange of balancing capacity, as well as for pricing and settlement of balancing capacity.

17 These requirements include the possibility for the transmission system operators (TSOs) of a capacity calculation region (CCR) to develop a methodology for a market-based allocation process of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves.

18 Pursuant to Articles 4(1) and 5(3)(h) of the EB Regulation, TSOs of a CCR may agree on a common proposal for the market-based allocation process of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves in accordance with Article 41 of the EB Regulation and submit it to the national regulatory authorities (NRAs) of that CCR for approval. Pursuant to Article 5(6) of the EB Regulation, NRAs shall reach an agreement and take a decision within six months after the receipt of the proposal by the last NRA.

19 NRAs can require an amendment to the proposal in accordance with Article 6(1) of the EB Regulation and TSOs have two months to submit an amended proposal to NRAs. Then, NRAs have then two months to decide on the amended proposal. When NRAs fail to reach an agreement within the two months period after the submission of the amended proposal or upon their joint request, pursuant to Article 6(2) of the EB Regulation, ACER shall adopt a decision concerning the proposal in accordance with point (b) of the second subparagraph of Article 6(10) of Regulation (EU) 2019/94 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (hereafter the "ACER Regulation").

III. Procedure leading to the adoption of the Contested Decision

20 On 20 September 2019, Core CCR TSOs published the draft proposal for the 'Core CCR TSOs' Methodology for a market-based allocation process of cross zonal capacity for the exchange of balancing capacity or sharing of reserves, in accordance with Article 41 of the EB Regulation, for public consultation. The consultation lasted from 20 September 2019 to 21 October 2019.

21 On 18 December 2019, Core CCR TSOs submitted to the Core NRAs a 'Core CCR TSOs' Methodology for a market-based allocation process of cross zonal capacity for the exchange of balancing capacity or sharing of

reserves in accordance with Article 41 of the EB Regulation', which was received by the last Core CCR NRA on 2 March 2020.

22 On 4 December 2020, Core CCR TSOs resubmitted the amended 'Core CCR TSOs' Methodology for a market-based allocation process of cross zonal capacity for the exchange of balancing capacity or sharing of reserves in accordance with Article 41 of the EB Regulation' to the Core NRAs (the "TSOs Proposal"). The last Core NRA received the TSOs Proposal on 22 December 2020. Therefore, the new deadline for approval by the Core NRAs was 22 February 2021.

23 On 22 February 2021, the Defendant was notified that the Core NRAs were not able to reach an agreement within the two months deadline and requested the Defendant to adopt a decision on the TSOs Proposal pursuant to Article 6(10) of the ACER Regulation. The notification stated that the NRAs could not agree on:

a. the proposed determination of the forecasted market value of cross-zonal capacity for the exchange of energy due to the lack of detail and the insufficiently proven impact on the day-ahead market;

b. the pricing principle for the market-based allocation process; and

c. provisions related to transparency, non-discrimination and specifications related to the market value of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves.

24 Between 12 April and 2 May 2021, the Defendant held a public consultation on the TSOs Proposal, seeking views from all interested parties. Between 22 February 2021 and 1 June 2021, the Defendant engaged in discussions with the Core CCR TSOs and Core NRAs. These discussions involved several conference calls and electronic exchange of documents. Between 1 and 14 June 2021, the Defendant consulted Core CCR TSOs and Core NRAs on its preliminary position by sharing an updated version of the TSOs Proposal setting out its suggested amendments and reasoning for these amendments. The consulted parties provided their views by 14 June 2021. The Defendant considered all the written comments received on its preliminary position and further discussed them with the individual stakeholders, where necessary. In particular, on 11 June 2021, the Defendant held an oral hearing, requested by Core CCR TSOs. Following this process, the Defendant introduced further amendments to the TSOs Proposal to take into account certain issues raised by the consulted parties.

25 The Defendant's Electricity Working Group (hereafter the 'AEWG') was consulted between 17 and 24 June 2021, and it provided its advice on 24 June 2021. Following some changes, the AEWG was consulted again between 26 and 28 July 2021, and it provided its advice on 28 July 2021. On 12 August 2021, the Defendant's Board of Regulators issued a favourable opinion pursuant to Article 22(5)(a) of the ACER Regulation.

26 ACER Decision No 11/2021 on the market-based allocation process of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves for the Core CCR (hereafter the "Contested Decision") was then published on 13 August 2021. Annex I of the Contested Decision sets out the methodology pursuant to Article 41 of the EB Regulation (hereafter the "Core MB CZCA Methodology").

IV. The Contested Decision

27 The Contested Decision provides a methodology for a market-based allocation process of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves in accordance with Article 41 of the EB Regulation and is applicable to the bidding zone borders of the Core CCR.

28 The methodology is based on the comparison of the forecasted market value of cross-zonal capacity for the exchange of energy and the actual market value of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves.

29 The forecasted market value for the exchange of energy per day-ahead market time unit shall be equal to the product of the initial forecasted market value and an adjustment factor calculated pursuant the provisions of Article 6 of the Core MB CZCA Methodology.

30 The actual market value of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves between all bidding zones where this market-based capacity allocation methodology is applied shall be, pursuant to the provisions of Article 7 of the Core MB CZCA Methodology, (i) equal to the change of economic surplus from the exchange of balancing capacity or sharing of reserves per MW of cross-zonal capacity allocated; (ii) defined per day-ahead market time unit; (iii) calculated per standard balancing capacity product, separately; (iv) calculated based on the standard upward balancing capacity bids or standard downward balancing capacity bids; and (v) calculated based on TSO demand.

31 The methodology also includes the algorithm principles for the cross-zonal capacity allocation function. The inputs and constraints to the algorithm are defined in Article 8 of the Core MB CZCA Methodology. The

objective of the cross-zonal capacity allocation function shall be the maximization, per trading day, of the sum of: (a) the expected economic surplus for the single day-ahead coupling (hereafter 'SDAC') based on the forecasted market value for the exchange of energy, and (b) the economic surplus from the exchange of balancing capacity or sharing of reserves based on the actual market value for the exchange of balancing capacity or sharing of reserves. The SDAC is included in Commission Regulation (EU) 2015/1222 (hereafter the 'CACM Regulation').

32 The guiding principles for applying a market-based cross-zonal capacity allocation process are listed in Article 3 of Core MB CZCA Methodology:

a) the market-based capacity allocation process shall be executed by the cross-zonal capacity allocation function and shall determine the amount of cross-zonal capacities to be allocated to the exchange of standard balancing capacity products or sharing of reserves for each day ahead market time unit (Article 3.1). The cross-zonal capacity allocated for the exchange of balancing capacity or sharing of reserves shall be firm after the optimisation by the cross-zonal capacity allocation function pursuant to the provisions of Article 9 of the Core MB CZCA Methodology;

b) TSOs shall use standard balancing capacity products for frequency restoration reserves and replacement reserves and submit all balancing capacity bids from standard balancing capacity products to the capacity procurement optimisation function. TSOs shall not modify or withhold any balancing capacity bids and shall include them in the procurement process, except under conditions set out in Article 26 and Article 27 of the EB Regulation (Article 3.2);

c) a single gate closure time shall apply for all balancing capacity markets where this methodology is applied irrespective of time zone differences (Article 3.3);

d) the validity period of standard balancing capacity bids shall be equal to or a multiple of the day-ahead market time unit and shall be less or equal to the total amount of day-ahead market time unit of the concerned day (Article 3.4);

e) the pricing principle used for the settlement of standard balancing capacity bids for each application of this methodology for market-based allocation between TSOs and balancing service providers (hereafter "BSPs") shall be based on cross-zonal marginal pricing (pay-as-cleared) (Article 3.5);

f) the cross-zonal capacity allocation function shall allow linking of bids which participate in the market based cross-zonal capacity allocation (Article 3.6);

g) all TSOs applying this market-based process shall ensure compatibility between the cross-zonal capacity allocation function and the capacity procurement optimisation function, including the selection of standard balancing capacity bids which determine the output of the cross-zonal capacity allocation function (Article 3.7);

h) cross-zonal capacities allocated to the exchange of standard balancing capacity products or sharing of reserves shall: (a) until all TSOs of a bidding zone border are connected to the respective platform, be provided exclusively to the cross-border FRR control processes; (b) after all TSOs of a bidding zone border are connected to the respective platform, be provided exclusively to the respective platform of the standard balancing capacity products it was as allocated for starting from the connection of the TSOs from the concerned bidding zone border to the respective platform (Article 3.8);

i) the process of releasing allocated cross-zonal capacity for the exchange of balancing capacity or sharing of reserves shall be: (a) until the connection of the TSOs to the platforms, coordinated by the cross-border control process in accordance with Article 149 of Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation (hereafter "SO Regulation"); (b) after the connection of the TSOs to the platforms, coordinated between the platforms for balancing energy (Article 3.9).

33 Article 10 of the Core MB CZCA Methodology provides that the Core CCR TSOs allocating cross-zonal capacity for the exchange of balancing capacity or sharing of reserves shall calculate the cross-zonal capacity price for the volume of cross-zonal capacity that is allocated for the exchange of balancing capacity or sharing of reserves. The same Article also provides that the price of cross-zonal capacity allocated for the exchange of balancing capacity or sharing of reserves shall be calculated separately for each market time unit and each standard balancing capacity product. Finally, Article 10(3) specifies that the prices in EUR/MW of cross-zonal capacity per day-ahead market time unit in each direction shall be equivalent to the difference in cross-zonal marginal prices of a standard balancing capacity product in bidding zones applying the market-based allocation process pursuant to Article 38(1) of the EB Regulation.

34 The congestion income shall be calculated based on the application of the market-based allocation process and day-ahead market time unit and shall be equal to the difference between the balancing capacity price multiplied by TSO demand in the respective bidding zone and the balancing capacity price multiplied by the volume of accepted bids of the BSPs in a bidding zone pursuant to the provisions of Article 11 of the Core MB CZCA Methodology and shared in accordance with the methodology of Article 73 of the CACM Regulation.

V. Forms of order sought by the parties

35 The Appellant contends that the Defendant, by prescribing in the Contested Decision the use of a specific pricing methodology as the sole pricing method for balancing capacity collaborations in the Core CCR (hereafter "marginal pricing" or "pay-as-cleared") violated EU law and in particular several provisions of the EB Regulation. The Appellant seeks in its Notice of Appeal to remit the Contested Decision to the competent body of the Defendant and more specifically to rescind the following:

- Article 3(5) of the Core MB CZCA Methodology reproduced above;
- Article 10(3) of the Core MB CZCA Methodology reproduced above;
- all sections and provisions of the Contested Decision and Annex I thereof that explicitly or implicitly refer to the provisions of Article 3(5) and Article 10(3) of the Core MB CZCA Methodology.

36 The Defendant requests the Board of Appeal to declare the appeal admissible and dismiss the appeal in its entirety as unfounded.

37 Concomitantly to its Defence, the Defendant submitted an application for procedural measures, requesting the Chair of the Board of Appeal to prescribe to the Appellant the production of the contract signed between the German and Austrian TSOs on the Austrian-German balancing cooperation and to be granted access to this document (hereafter the "AG agreement").

VI. The Grounds of Appeal

38 The grounds of appeal relied upon by the Appellant may be classified in two groups: the first concerns the alleged lack of legal basis of the Contested Decision in making the marginal pricing mandatory for the exchange of balancing capacity or sharing of reserves. The second concerns the use of discretion as according to the Appellant, the Defendant disregarded the limits of its discretion.

39 The Appellant claims that the Contested Decision does not have adequate legal basis and it infringes the principle of conferral. The Appellant further contends that, if such legal basis should exist, the Defendant went beyond the limits of its discretion by imposing the use of marginal pricing in the market-based allocation process of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves, as Article 30(1)(a) of the EB Regulation specifies that marginal pricing should be used only for balancing energy products and Article 32 of the EB Regulation does not specify a specific method for the allocation of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves. Further the Contested Decision infringes the principle of optimization laid down in Article 3(2) of the EB Regulation and it fails to consider that the principle of equal treatment of Article 41(4) of the EB Regulation can be ensured even if different pricing methods are used. The Appellant also contends that Contested Decision also breaches the Defendant's duty to ensure that the relevant terms and conditions or methodologies should be "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" (Article 5(6) of the ACER Regulation).

40 The Defendant rejects those pleas and submits that the Contested Decision is based on a proper legal basis and that the Defendant has correctly exercised its discretion within the limits of its conferred powers. The Defendant requests the Board of Appeal to dismiss the Appellant's appeal in its entirety as unfounded.

First plea: lack of legal basis for mandating the marginal pricing in balancing capacity markets

Arguments of the Parties

41 The Appellant contends that the Defendant, by making marginal pricing mandatory for the allocation of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves or by restricting the option for balancing capacity collaborations to choose the pricing method, goes against what is required by EU law, in particular the EB Regulation. The Appellant submits that whilst the EB Regulation mandates a specific pricing principle for balancing energy, it does not do so for the allocation of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves. According to the Appellant, the EB Regulation is silent on the

methodology to be adopted for the allocation of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves.

42 The Appellant refers to Article 30(1)(a) of the EB Regulation according to which "pricing for energy balancing shall be based on a methodology based on marginal pricing (pay-as-cleared)" and argues that Article 32 of the EB Regulation only specifies the framework for procuring balancing capacity, without setting any requirements for its pricing. This deliberate decision by the European legislature must be respected, and the Defendant should not - indirectly and in breach of its powers - circumvent it by means of the Contested Decision. It follows, according to the Appellant, that the European legislature chose purposely not to deal with the issue of pricing cross-zonal capacity for the exchange of balancing capacity or sharing of reserves; on the contrary, the EU legislature granted the TSOs the option of establishing in balancing capacity collaborations, an alternative pricing method to the one applicable for energy balancing, i.e., the marginal pricing. The Appellant further argues that the implementation of the Contested Decision de facto requires adoption of the marginal pricing methodology in the national balancing capacity market. This is contrary to Article 32 of the EB Regulation, which does not prescribe any pricing principle when dealing with the national procurement market for balancing capacity.

43 The Defendant argues that it did not indirectly circumvent the law applicable to the national (procurement) market for balancing capacity. According to the Defendant, it is true that the principle for balancing energy prices is set out in Article 30(1)(a) of the EB Regulation, because the EB Regulation provides for an integrated balancing energy market. On the other hand, the Defendant argues that Article 32 of the EB Regulation governs the national (procurement) market for balancing capacity and does not prescribe any pricing principle. According to the Defendant, the Contested Decision mandates the pricing principle for exchanging balancing capacity or sharing of reserves in a specific situation: the market-based allocation process of Article 41 of the EB Regulation.

44 The Defendant contends that it follows from Article 33(4) of the EB Regulation that there are two alternative ways for TSOs to exchange balancing capacity or sharing of reserves and to ensure the availability of cross-zonal capacity: either (a) through the probabilistic approach pursuant to Article 33(6) of the EB Regulation or (b) by allocating cross-zonal capacity to the balancing timeframe in accordance with the methodologies pursuant to Articles 40, 41 and 42 of the EB Regulation. The EB Regulation, and in particular Article 33(4), does not impose one option over another so that in this respect, TSOs are completely free to choose between the two alternative options (a) and (b) referred above; in case where TSOs exchange balancing capacity or sharing of reserves under option (b), they may again choose between alternative options including the market-based allocation process pursuant to Article 41 of the EB Regulation. In other words, if two or more Core CCR TSOs choose to exchange balancing capacity or sharing of reserves by adopting a probabilistic approach under option (a) above (Article 33(4.a) and Article 33(6) of the EB Regulation) or by allocating cross-zonal capacity pursuant to Articles 40, 41 and 42 of the EB Regulation, the methodology of the Contested Decision does not apply. Alternatively, Core CCR TSOs may not exchange balancing capacity or sharing of reserves at all, in which case the Contested Decision does not apply either; however, should two or more Core CCR TSOs however choose to apply a specific cross-zonal allocation process, all the specific provisions contained in the EB Regulation will be applicable.

Assessment by the Board of Appeal

45 Whilst it is true that the EB Regulation expressly prescribes a specific pricing principle for balancing energy only, the aim of the Regulation is to foster market integration in the procurement and the use of balancing capacity in an efficient, economic and market based manner (Recital 15 and Article 3(a) and (e) of the EB Regulation).

46 As provided by Article 33(4) of the EB Regulation "All TSOs exchanging balancing capacity shall ensure both the availability of cross-zonal capacity and that the operational security requirements set out in Regulation (EU) 2017/1485 are met, either by: (a) the methodology for calculating the probability of available cross zonal capacity after intraday cross zonal gate closure time pursuant to paragraph 6 (b) the methodologies for allocating cross zonal capacities to the balancing timeframe pursuant to Chapter 2 of Title IV."

47 Thus, if two or more TSOs decide to exchange capacity or share reserves, they are free to choose either the probabilistic approach pursuant to Article 33(6) of the EB Regulation or the allocation of cross-zonal capacity in accordance with the methodologies pursuant to Articles 40, 41 and 42 of the EB Regulation. The Contested Decision does not restrict the options of balancing collaborations to choose their pricing method, i.e. to choose one of the methods available under Article 33(4) of the EB Regulation.

48 In the present case, TSOs from the Core CCR jointly developed proposals for a market-based allocation process for the exchange of balancing capacity or sharing of reserves. According to Article 5(3)(h) of the EB Regulation, TSOs' proposals are subject to the conditions laid down in Article 41 of the EB Regulation. The

requirements of Article 41 of the EB Regulation are to be applied where NRAs fail to reach an agreement and consequently the Defendant, pursuant to Article 6(2) of the EB Regulation, is called upon to adopt a decision concerning the TSOs proposal on the market allocation methodology.

49 Article 41 of the EB Regulation lists a series of criteria that the market-based allocation process methodology needs to include. Article 41(1)(c) explicitly requires 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."

50 It follows from the above that the legal basis mentioned in the Contested Decision is correctly identified as Article 41 of the EB Regulation, which requires a determination of pricing methodology and defines the conditions under which the Defendant is bound to act.

51 It must be further noted that the Contested Decision makes the principle of marginal pricing mandatory only for TSOs that decide to exchange balancing capacity or sharing of reserves and pursue the market-based allocation process according to Article 41 of the EB Regulation (section 98 of the Contested Decision).

52 The Applicant warned about the possible negative repercussions on national procurement markets and on the possible "indirect" effect that the Contested Decision would produce, if implemented, and therefore a possible violation of Article 32 of the EB Regulation, first in the process leading to the adoption of the Contested Decision and subsequently in the Notice of Appeal as well as during the oral hearing.

53 The Appellant presented the core of those arguments already in the procedure that led to the adoption of the Contested Decision and to which the Defendant adequately responded in sections 5.3, 5.4 and 6.2 of the Contested Decision. However, the Appellant did not consider necessary to adduce further evidence to support the arguments that the Contested Decision would have negative repercussions on the national procurement market.

54 The first plea put forward by the Appellant is dismissed as unfounded.

Second plea: no legal basis under Article 41(4) of the EB Regulation

Arguments of the Parties

55 In the associated claim, formulated under several headings, the Appellant argues that nowhere in the EB Regulation there is a requirement to adopt a single methodology for the allocation of cross-zonal capacity exchange of energy and balancing capacity or sharing of reserves. On the contrary, the EB Regulation suggests that other possible methodologies should be considered or allowed. The Appellant acknowledges that Article 41(3) of the EB Regulation requires that cross-zonal transmission capacity allocation should generally take place where it can be used most efficiently (for either energy or power exchange), that is where it can generate the greatest economic surplus. The Appellant contends that had the EB Regulation intended to prescribe marginal pricing as the only methodology available, it would have done so explicitly. The Appellant argues that the Defendant based the Contested Decision on an incorrect interpretation of Article 41(4) of the EB Regulation. The Appellant claims that by simply extending the same pricing methodology to cross-zonal capacity allocated for the exchange of energy to the cross-zonal capacity allocated for the exchange of balancing capacity or sharing of reserves, the Defendant failed to comply with Article 41(4) of the EB Regulation. The Appellant specifically objects to the Defendant's determination to rely on Article 38(1)(b) of the CACM Regulation, which provides that the SDAC which allocates cross zonal capacities to energy exchange be based on marginal pricing. The CACM Regulation precedes the EB Regulation so that, if the purpose of imposing the marginal pricing for the allocation process of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves was considered by the EU legislature, this would have been reflected in the EB Regulation.

56 The Defendant contends that, if two or more TSOs choose to apply a cross-zonal allocation process, then they need to respect all the legal requirements set out by the respective articles of the EB Regulation regarding the methodology to be developed by the TSOs for this specific process, and they may choose from any methodology in Article 33(4) of the EB Regulation. As the Core CCR TSOs developed a proposal for a market-based allocation, then Article 41 of the EB Regulation is applicable. That Article mandates that the methodology shall include:

- 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 (Article 41(1)(b));
- 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 (Article 41(1)(c));

– the process to define the maximum volume of allocated cross-zonal capacity for the exchange of balancing capacity or sharing of reserves (Article 41(1)(d));

– a pricing method which shall ensure equal treatment with the cross-zonal capacity allocated for the exchange of energy (Article 41(4) EB Regulation).

57 The Defendant contends that the equal treatment requirements consist of assessing whether the benefits for allocating cross-zonal capacity for the exchange of balancing capacity or sharing of reserves are higher than the benefits that would be gained if the cross-zonal capacity was allocated for the exchange of energy. The choice of the pricing principle fundamentally affects the calculation of the economic surplus, which is used as a basis for the determination of the volume of the allocated cross-zonal capacity for the exchange of balancing capacity or sharing of reserves, and thus the possibility to guarantee equal treatment with the cross-zonal capacity allocated for the exchange of energy. The Defendant argues that the Contested Decision sets the principle to use marginal pricing (pay-as-cleared) for the purpose of allocating cross-zonal capacity or sharing of reserves by calculating the change in economic surplus from the exchange of balancing capacity or sharing of reserves, and not for the purpose of exchanging balancing capacity or sharing of reserves. This economic surplus from the exchange of balancing capacity means "the sum for the relevant time period of (i) the buyers surplus (TSOs' demand) for the exchange of balancing capacity or sharing of reserves, (ii) the BSPs' surplus for the exchange of balancing capacity or sharing of reserves and (iii) the congestion income". The Defendant contends by way of example that if the pay-as-bid were chosen as a method to determine the balancing capacity value for the purpose of allocating cross-zonal capacity, the BSPs' surplus (the producers' surplus) would not be correctly identified as the submitted bids would not reflect the BSPs marginal costs. This would have a significant impact on the way to calculate the change in economic surplus to allocate cross-zonal capacity. Under pay-as-cleared pricing, the BSPs bid at their marginal costs whereas under pay-as-bid pricing, producers will change their bidding behaviour: instead of bidding at their marginal cost they will bid at what they expect will turn out to be the market-clearing price. Support to this argument is provided also by reference to publications available in the literature. The Defendant stresses that in order to ensure equal treatment, as required by Article 41(4) of the EB Regulation, the pricing method applied for the cross-zonal capacity or sharing of reserves should be the same under the two processes, i.e., (i) the market-based process (Article 41(1) of the EB Regulation) and (ii) the SDAC (Article 38(1) of the CACM Regulation) and that the allocation of the cross-zonal capacity cannot favour the exchange of balancing capacity or sharing of reserves at the expense of the exchange of energy.

Assessment by the Board of Appeal

58 In addition to the findings about the existence of the legal basis in the context of the first plea (see above paragraphs 43 to 48), there are essentially two distinct questions in the arguments of the Appellant that need to be addressed within the assessment of the present plea. The first is whether the Defendant can legitimately rely on prior provisions of the CACM Regulation when adopting the Contested Decision on the basis of the Article 41 of the EB Regulation. In the Appellant's view, the fact that the CACM Regulation is not mentioned anywhere in the EB Regulation clearly shows the intention of the EU legislature of excluding a possible application of the CACM Regulation provisions to the EB Regulation.

59 The second question is whether the mere extension of the specific provisions on pricing methodology on the cross-zonal capacity allocated for the exchange of energy contained in the CACM Regulation to the cross-zonal capacity for the exchange of balancing capacity or sharing of reserves via the market-based allocation process of Article 41 of the EB Regulation ensures respect for the principle of equality.

60 In relation to the first question, whilst it is true that the CACM Regulation is not mentioned in the EB Regulation, the Appellant failed to provide any kind of evidence (e.g. preparatory memoranda and other information from the process of adoption of the EB Regulation) that there was a specific and unquestionable will of the legislature to exclude any relevance of the CACM Regulation in applying the EB Regulation. There are also no express references in the EB Regulation that the application of the CACM Regulation should be excluded. In any case, both regulations are constitutive elements of the valid EU legal order and both of them were adopted by the same institution, the European Commission.

61 Further, although the CACM Regulation and the EB Regulation subject matters are different, every provision of EU law must be placed in its context, and interpreted in light of the provisions of EU law as a whole, having regard to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied (Judgement of 7 June 2005, VEMW and Others, C-17/03, EU: C: 2005:362, paragraph 41). EU policies must also be interpreted consistently in order to achieve their objectives. As both the CACM Regulation and the EB Regulation require the attainment of an efficient and integrated energy market, in order to uphold the effectiveness of the EB Regulation, the Contested Decision legitimately takes into account principles deriving from the "various network codes established by means of Commission regulations" (Judgment of 2

September 2021, Commission v Germany, Case C-718/18, EU: C: 2021:662, paragraph 122 and to that effect Judgment of 3 December 2020, Commission v Belgium (Electricity and natural gas markets), C-767/19, EU: C: 2020:984, paragraph 112).

62 With regard to the alleged violation of the principle of equal treatment it is to be recalled in the context of market regulatory policies, if different rules are laid down for similar situations, "the result is not just inequality before the law, but also inevitably distortions of competition which are absolutely irreconcilable with the fundamental philosophy of the common market" (Opinion of AG Tesauro delivered on the 23 January 1991 in Case C-63/89, Assurances du Credit v Council and Commission ECLI: EU: C: 1991:152, pag.1829).

63 In order to assess whether the Contested Decision is capable of ensuring a level playing field, the objectives and the language of Article 41(4) of the EB should be considered. The Core MB CZCA Methodology in its Preamble states that the methodology for market-based capacity allocation is to be compliant with fostering effective competition in a non-discriminatory and transparent way in balancing markets (Article 3(1)(a) of the EB Regulation), enhancing the efficiency of balancing as well as the efficiency of European and national balancing markets (Article 3(1)(b) of the EB Regulation) and should contribute to the objective of integrating balancing markets and promoting the possibilities for exchanges of balancing services while contributing to operational security (Article 3(1)(c) of the EB Regulation). As for the language, Article 41(4) of the EB Regulation provides that: "the pricing method, the firmness regime and the sharing of congestion income for cross-zonal capacity that has been allocated for the exchange of balancing capacity or sharing of reserves via the market-based process shall ensure equal treatment with the cross-zonal capacity allocated for the exchange of energy". This provision thus expressly requires that in applying the market-based allocation methodology equal treatment with the cross-zonal capacity allocated for the exchange of energy should be ensured.

64 In this regard, the equal treatment is then precisely the effect of the Contested Decision and that effect is justified by the objectives of the measure at stake. Thus, the level playing field imperative is satisfied by the imposition of a single pricing methodology, specifically listed in Article 3 (5) of the Core MB CZCA Methodology as one of the guiding principles to be followed in determining the market allocation methodology.

65 The objective of the "cross-zonal capacity allocation function" is to maximize the sum of welfare of the balancing capacity market and the energy market. As a result, incremental cross-zonal capacity may be allocated for the exchange of balancing capacity or sharing of reserves if the incremental market value of cross-zonal capacity for the exchange of balancing capacity exceeds the incremental market value of cross-zonal capacity for the energy market.

66 The Board of Appeal agrees with the Defendant's argument summarised in paragraphs 54 and 55 above and detailed in paragraphs 44 and 64 of the Defence that it is not possible to correctly identify the producers' surplus under the pay-as-bid pricing principle, because producers under pay-as-bid will change their bidding behaviour: instead of bidding at their marginal costs they will bid at what they expect will turn out to be the market-clearing price. On the contrary, under marginal pricing, the producers bid at their marginal costs and the market value of cross-zonal capacity consists of identifiable (i) consumer surplus, (ii) producer surplus and (iii) congestion rent. The Contested Decision sets the principle of the marginal pricing for the purpose of allocating cross-zonal capacity by calculating the change in economic surplus from the exchange of balancing capacity. The marginal pricing method for cross-zonal capacity allocation for the exchange of balancing capacity allows the calculation of the change in the economic surplus and thus ensures equal treatment with the cross-zonal capacity allocated for the exchange of energy. As in Core CCR, the market clearing for the balancing capacity market takes place before the market clearing for the energy market, the actual market value of cross-zonal capacity for the exchange of balancing capacity is compared with the forecasted market value of cross-zonal capacity for the exchange of energy for the purpose of allocation of cross-zonal capacity.

67 The Appellant in its submission does not present a convincing argument on why the marginal pricing is not an appropriate method to guarantee equal treatment between the exchange of balancing capacity and the exchange of energy. It also fails to demonstrate how the legal requirement of Article 41(4) prescribing an equal treatment can be achieved with the existence of two different pricing principles in both markets (pay-as-cleared in the energy market and pay-as-bid in the balancing capacity market). The Appellant contends that the existing collaboration between Germany and Austria, although it is based on the pay-as-bid pricing, increases generally the economic surplus (in comparison to the case of no collaboration); however, the Appellant does not substantiate how the allocation of the cross-zonal capacity in the existing collaboration ensures the equal treatment between the exchange of balancing capacity or sharing of reserves and the exchange of energy.

68 The Appellant's plea must be dismissed as unfounded.

Third Plea: Violation of Principle of Conferral from Article 5 TEU

Arguments of the Parties

69 The Appellant submits that the Defendant violated the principle of conferral enshrined in Article 5(1) and (2) of the TEU by requiring marginal pricing method for balancing capacity products or for restricting the option of the pricing method for balancing capacity collaboration. Consequently, the Contested Decision lacks a proper legal basis and should be considered to have been adopted outside the limits of the competences allocated to the Defendant.

70 The Defendant disputes this argument, contending that the specific provisions of both the ACER Regulation and the EB Regulation, most notably Article 6 of the ACER Regulation and Articles 5(3)(h) and 6(2) of the EB Regulation, confer specific prerogatives on the Defendant.

Assessment by the Board of Appeal

71 It follows from the decisions of the Board of Appeal that the principle of conferral set out in Article 5(1) and (2) TEU is a fundamental principle of EU law, according to which the EU acts only within the limits of the competences that EU Member States have conferred upon it in the Treaties. The principle of conferral implies that every secondary legal act must have a legal basis in specific Treaty articles or primary EU law, subject to control by the European Courts. Under the principle of conferral, energy is a shared competence (Article 4 TFEU): the EU and its Member States are able to legislate and adopt legally binding acts. Member States exercise their own competence where the EU does not exercise, or has decided not to exercise, its own competence. ACER´s competences are shared competences within the meaning of Article 4 TFEU. When exercising these EU competences, it is subject to two fundamental principles laid down in Article 5 TEU, namely the principle of proportionality (the content and scope of EU action may not go beyond what is necessary to achieve the objectives of the Treaties) and the principle of subsidiarity, according to which in the area of its non-exclusive competences, the EU may act only if – and in so far as – the objective of a proposed action cannot be sufficiently achieved by the Member States, and it could be better achieved at EU level (Decision of the Board of Appeal of 28 May 2021 in Case A-001-2021 (cons.), paragraphs 1133- 1136, pp. 202-204).

72 Although energy, as also confirmed by Article 194 TFEU, is an area of shared competence, the EU legislature has nevertheless specifically attributed competences and powers to regulatory authorities in that area. In the exercise of regulatory powers, those authorities are subject to principles and rules established by an equally detailed legislative framework at EU level, which limit their discretion and prevent them from making political choices (Case C-718/18 Commission v Germany, cit. above paragraph 59, paragraph 132).

73 The powers reserved to the Defendant are clearly delineated by the relevant legislative and implementing acts circumscribing its competence.

74 In particular, according to Article 6 (10) of the ACER Regulation, "the Defendant shall be competent to adopt individual decisions on regulatory issues having effects on cross-border trade or cross border system security which require a joint decision by at least two regulatory authorities, […]". Article 6(2) of the EB Regulation also specifies that "[w] here the relevant regulatory authorities have not been able to reach an agreement on terms and conditions or methodologies within the two months deadline, or upon their joint request, or upon the Agency's request according to the third subparagraph of Article 5(3) of Regulation (EU) 2019/942, the Agency shall adopt a decision concerning the amended terms and conditions or methodologies within 6 months, in accordance with Article 5(3) and the second subparagraph of Article 6(10) of Regulation (EU) 2019/942. If the relevant TSOs fail to submit a proposal for amended terms and conditions or methodologies, the procedure provided for in Article 4 shall apply".

75 The Appellant's arguments that the Contested Decision is outside the competence of the Defendant are formulated in a very general, and for their most part, unsubstantiated form. They cannot therefore be upheld.

76 Accordingly, the Appellant's plea must be dismissed as unfounded.

77 In light of the foregoing considerations, the Appellant's pleas concerning the legal basis cannot be upheld.

Fourth Plea: Disregard of limits of discretionary powers in setting the marginal pricing regime for balancing capacity markets

Breach of Article 41(4) of the EB Regulation

Arguments of the Parties

78 The Appellant argues that the Defendant violated Article 41(4) of the EB Regulation. The Appellant argues that even if the Defendant has an effective legal basis, the Defendant has exceeded its margin of discretion by focusing exclusively on marginal pricing as a way of ensuring equal treatment. The Appellant contends that the objectives of the EB Regulation, and in particular those listed in Article 41(4), can be equally achieved by relying on different pricing methodologies; in fact, if equality could be achieved only through the imposition

of the marginal pricing, the EU legislation would have made it mandatory and that is not the case. The Appellant also argues that such an argument is corroborated by the fact that the only current cross-zonal capacity collaboration, which is between Austria and Germany, is based on a different methodology, i.e. pay-as-bid.

79 The Defendant contends that only marginal pricing can ensure equal treatment of cross-zonal capacity between the allocation for the exchange of balancing capacity or sharing of reserves and the allocation for the exchange of energy and that the pay-as-bid principle is not compliant with Article 41(4) of the EB Regulation. In particular, Article 41(4) of the EB Regulation should be construed as explicitly mandating that in the context of the market-based process, the allocation of cross-zonal capacity cannot favour the exchange of balancing capacity or sharing of reserves at the expense of the exchange of energy. As far as the AG Agreement is concerned, the Defendant argues that it should not be considered as relevant as it is not compliant with the requirements of Article 41 of the EB Regulation for the following reasons: (i) the allocation of cross-zonal capacity or sharing of reserves in the context of this cooperation is done on a monthly basis with a weekly re-evaluation for the purpose of releasing to the intra-day segment of the energy market what is not needed; (ii) the economic surplus generated by this bilateral cooperation for the exchange of balancing capacity or sharing of reserves is not compared to the loss of (day-ahead) economic surplus for the exchange of energy, as it is based on a contract that arbitrarily sets a maximum value for the allocated cross-zonal capacity (80 MW) and (iii) there is no comparison with an accurately forecasted market value of the cross-zonal capacity for the exchange of energy or sharing of reserves. The Defendant contends that one cannot look at the isolated generation of economic surplus resulting from the exchange of balancing capacity or sharing of reserves as argued by the Appellant, because the question related to the equal treatment consists of assessing whether the benefits for allocating cross-zonal capacity for the exchange of balancing capacity or sharing of reserves are higher than the benefits that would be gained if the cross-zonal capacity was allocated for the exchange of energy.

Assessment by the Board of Appeal

80 As the Board of Appeal has already established for the reasons developed above in paragraphs 43 to 48 that the Defendant relied on the correct legal basis for the adoption of the Contested Decision, the next question to be examined is whether the Defendant acted within the limits of such legal basis, and if the choice made among the equally appropriate options available was a correct one, which is only possible if the Contested Decision was provided with reasons and if that reasoning was adequate in the circumstances of the case.

81 It should be recalled that in order to implement EU policies by the administration, the delegation of certain strictly delineated powers and the framing of discretion in the forms of the power of appraisal and of the margin of appreciation to EU administrative actors is often necessary.

82 As the Court of Justice of the European Union stated in Meroni, a delegation of the margin of appreciation cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the power of appraisal, since it replaces the choices of the delegator by the choices of the delegate, brings about an 'actual transfer of responsibility' (Judgment of 13 June 1958, Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community, Case C-10/56, EU:C:1958:7.27, pag. 152). The Court also specified that EU Agencies' autonomous powers cannot go beyond the boundaries of the relevant regulatory framework (Judgement of 22 January 2014, United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union, Case C-270/12, EU: C: 2014:18, paragraphs 43, 45 and 53).

83 As held above in paragraphs 71 and 72, the Defendant's general powers are directly conferred on it by the relevant legislation, in particular by the ACER Regulation. The latter circumscribes the Defendant's powers by specifying that the Defendant decision-making competences have been conferred upon the Defendant "under clearly specified conditions, [and] cover technical and regulatory issues which require regional coordination, in particular those concerning the implementation of network codes and guidelines cooperation within regional coordination centres, the regulatory decisions necessary to effectively monitor wholesale energy market integrity and transparency, decisions concerning electricity and natural gas infrastructure that connects or that might connect at least two Member States and, as a last resort, exemptions from the internal market rules for new electricity interconnectors and new gas infrastructure located in more than one Member State" (Recital 16 of the ACER Regulation).

84 The Defendant's margin of appreciation is limited by various conditions and criteria (see BoA Case A-001-2017, paragraph 67). The Contested Decision clearly covers the technical and regulatory issues related to the application of the EB Regulation and it has been adopted under the process laid down in Article 6(10) of the ACER Regulation, following a referral by all Core NRAs under Article 6(2) of the EB Regulation.

85 Furthermore, the Defendant is bound by a strict timeline of six months as per Article 6(12) of the ACER Regulation and would not have been able to adopt the Contested Decision without the favourable opinion of the Board of Regulators, requiring a two-third majority within the said Board, composed of all NRAs.

86 As per Articles 28 and 29 of the ACER Regulation, the Contested Decision is amenable to review by the Board of Appeal and the EU courts, in the light of the objectives established by the EB Regulation.

87 Furthermore, the Defendant, as any other EU agency, enjoys "a broad discretion in a sphere, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments" (Judgment of 7 March 2013, Rütgers Germany e.a. v ECHA, Case T-96/10, ECLI EU: T: 2013:109, paragraph 134).

88 The main argument of the Appellant within this plea can be summarised as purporting to demonstrate that the example of the AG Agreement would be one of the possible alternatives to the method, chosen by the Defendant, within its discretion.

89 Firstly, it has to be noted that the AG Agreement has been extensively discussed already in the process of the adoption of the Contested Decision and the Defendant took position on it as it is also referred to in several provisions of the Contested Decision, and second, that the Appellant did not pursue the argument relying on the AG Agreement.

90 Secondly, following the Defendant's Application for a Procedural Measure, in which it requested a copy of the AG Agreement, the Appellant, in an email dated 10 January 2022, stated that this Agreement is "not crucial for the legally relevant question whether and to which extent the Defendant has overstepped its competences".

91 Thirdly, at the oral hearing, the Appellant did not present any specific new arguments based on the AG Agreement, except for warning against possible negative economic repercussions for the parties to this agreement and the relevant market. The arguments presented were a repetition of those invoked in the procedure of the adoption of the Contested Decision (sections 5.3, 5.4 and 6.2.), which the Board of Appeal has already examined above in paragraphs 50 and 51.

92 With respect to the burden of proof, any party asserting a particular claim or defence has the "duty to provide the necessary evidences in the appeal proceeding" (Decision of the Board of Appeal of 17 March 2017 in Case A-001-2017, paragraph 111). The Board of Appeal consequently concludes that the Appellant did not submit any evidence substantiating its claim beyond the arguments presented in the earlier stages of the procedure. Those arguments were already examined by the Defendant and sufficient reasoning was provided in the relevant parts of the Contested Decision to understand the reasons for the selection of the marginal pricing method and for the Board of Appeal to exercise its control.

93 Irrespective of the fact that the AG Agreement is qualified as "not crucial for the legally relevant question whether and to which extent ACER has overstepped its competences" by the Applicant in its response to the Application for a Procedural Measure, it should be nonetheless noted that the AG Agreement is not based on a comparison between the economic surplus for the allocation of capacity and the allocation of energy, but rather the reserved cross-zonal capacity for balancing is directly deducted from monthly long term transmission rights and limited to 80 MW. Furthermore, the AG Agreement is also not based on a comparison of 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 was concluded outside the legal framework of the processes for allocation of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves based on Article 41 of the EB Regulation.

94 Article 41(1) of the EB Regulation specifies that the methodology for the exchange of balancing capacity or sharing of reserves in the market allocation process refers to contracting periods 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. In this regard, it is clear that the allocation of cross-zonal capacity in the context of the AG Agreement - which is done on a monthly basis with a weekly re-evaluation - is an overall different process, distinct from the legal requirements of the market-based process pursuant to Article 41 of the EB Regulation.

95 Furthermore, it is observed that the AG Agreement predates the entry into force of the EB Regulation. In this respect, it is to be noted that Article 30 of the EB Regulation requires all TSOs to develop a proposal for a methodology to determine prices for the balancing of energy within one year after the entry into force of the same Regulation. The EB Regulation provides that all current arrangements would have to be subject to adjustment to new rules, as the EB Regulation ultimately aims at providing a more efficient and uniform system of balancing capacity.

96 It follows from the above considerations that the Defendant exercised its powers in relation to factual technical assessments that were precisely delineated and amenable to review, in light of the objectives established by the

delegating authority. These powers did not involve a very large measure of discretion that could be deemed as incompatible with the Treaties or the secondary legislation (see, in this sense, Case C-270/12, United Kingdom v Parliament and Council, cited above at paragraph 80, paragraphs 52 to 54).

97 The objective of the EB Regulation is "the development of harmonised methodologies for the allocation of cross-zonal transmission capacity for balancing purposes". Since Article 41 of the same Regulation lays down specific criteria to follow once the market allocation methodology is chosen by the TSO, and for the reasons contained in paragraphs 82 to 85 above, the Board of Appeal considers that the Defendant did not go beyond the limits of its discretion in considering the adoption of a single and clear methodology to achieve such harmonization. The Defendant's use of discretion as assessed above was thus within the delineated legal framework and is adequately reasoned.

98 The fourth plea must therefore be dismissed as unfounded.

Fifth Plea: Breach of Article 3(2) of the EB Regulation

Arguments of the Parties

99 The Appellant contends that the principle of optimization of resources contained in Article 3(2) of the EB Regulation has been violated. The Appellant specifically contends violation of Article 3(2)(c) of the EB Regulation, which mandates Member States, NRAs and TSOs, to apply the principle of optimization between the highest overall efficiency and lowest total costs for all parties involved, when applying the EB Regulation. The Appellant contends that the evidence of a breach of the optimization principle would be the disruption of the collaboration between Germany and Austria that the adoption of the Contested Decision would cause. This would consequently erase any economic surplus generated by the AG Agreement; in fact, in order to continue the collaboration, Germany would have to introduce marginal pricing on the national market. Further, the Appellant argues that the Defendant violated the optimization principle by not paying due regard to the possibility that other Core CCR TSOs could have joined the existing cooperation, which would have improved the overall efficiency of the market and minimized the overall costs.

100 The Defendant acknowledges that the cooperation between Germany and Austria is the only existing cooperation for the exchange of balancing capacity; nevertheless, it reiterates its irrelevance to the Contested Decision, in particular due to the fact that the Appellant fails to provide a comparison between the economic surplus for the allocation of balancing capacity or sharing of reserves and the allocation of energy. The Defendant underlines that the AG Agreement was made outside the legal framework of the processes for allocation of cross-zonal capacity for the exchange of balancing capacity or sharing of reserves and thus, it does not fulfil the legal requirements of the market-based process pursuant to Article 41 of the EB Regulation or any other process. The Defendant further contends that during the various stages of consultation, it fully took into account all other arguments put forward.

Assessment by the Board of Appeal

101 For the considerations developed above in paragraphs 87 to 93, the argument of the possible impact on any economic surplus generated by the AG Agreement should be dismissed as unfounded.

102 Article 38(1) of the EB Regulation specifies that cross-zonal capacity allocated for the exchange of balancing capacity or sharing of reserves before the entry into force of this Regulation may continue to be used for that purpose until the expiry of the contracting period. Thus, upon its expiration, balancing capacity collaborations need inevitably to be brought in line with the requirements of the EB Regulation.

103 The Board of Appeal notes that the Defendant took into account, at several stages in the course of the adoption of the Contested Decision, the arguments presented by the Appellant. In particular, it agreed to alleviate the possible impact of the Contested Decision (section 58 and Article 13 of the Core MB CZCA Methodology) in two ways. Firstly, it proceeded to extend the implementation timeline of the methodology to no later than 24 months after its approval (Article 13(1) of the Core MB CZCA Methodology). In addition, the Defendant allowed for an early implementation of the market-based allocation process without the consideration of all relevant requirements (Article 13(3)). In fact, at section 58, the Contested Decision explicitly states that such provision (i.e., Article 13(3)) "allows also the existing cooperation for the exchange of a FRR balancing capacity between German and Austrian TSOs to continue, based on an early implemented market-based allocation process". As soon as the Core MB CZCA Methodology is fully implemented (i.e., on 18 August 2023), all the requirements set therein are to be respected, including those concerning the marginal pricing principle.

104 With respect to the principle of optimization of resources contained in Article 3(2) of the EB Regulation, the Appellant argued in general terms that the Contested Decision will eliminate the only example of bilateral collaboration but did not provide evidence of a potential disruption of the collaboration between Germany and

Austria because one or both TSOs involved in the cooperation would be unable to abide by the Contested Decision.

105 The Board of Appeal notes that on the basis of the rules concerning the burden of proof, any party asserting or affirming a particular claim or defence has the "duty to provide the necessary evidence in the appeal proceeding" (see above, paragraph 90). The Board of Appeal concludes that the Appellant did not submit any evidence to substantiate its claim.

106 The observations dismissing the relevance of the AG agreement developed above in paragraphs 91 to 93 are also equally applicable to the arguments relied upon by the Appellant to prove a violation of Article 3(2) of the EB Regulation.

107 The fifth plea must therefore be dismissed as unfounded.

Sixth Plea: Breach of Article 5(6)(1) of the ACER Regulation

Arguments of the Parties

108 The Appellant contends that the Contested Decision breaches the provisions of the ACER Regulation, which in its Article 5(6)(1) requires that, "[b]efore approving the terms and conditions or methodologies […] the Defendant shall revise them where necessary, […] 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". The Appellant further contends that the Contested Decision is not in line with the stated objectives listed in Recital 15 and Recital 1 of the EB Regulation, namely the strengthening of integration of balancing markets and a fully functioning internal energy market. The fact that the Contested Decision endangers the AG Agreement is evidence that the integration of the balancing market is at risk.

109 The Defendant refers to Recital 6(3) of the Core MB CZCA Methodology that specifies the objectives served and attained by the Contested Decision. Recital 6(3) is reliant on Article 3 of the EB Regulation that lists a series of objectives and regulatory aspects that are the same as those contained in Article 5(6)(1) of the ACER Regulation.

Assessment by the Board of Appeal

110 Article 5 of the ACER Regulation lists the tasks assigned to the Defendant. Article 5 (6)(1) places a specific duty on the Defendant to ensure the consistency of its decision making with the relevant EU policy objectives.

111 In essence, this duty translates into an obligation to identify the proper legal basis and to the duty to state reasons as to why a certain term, condition or methodology has been adopted (see Judgment of the 1 October 2009, Commission v Council, Case C-370/07, EU: C: 2009:590, paragraphs 37 to 39).

112 Having regard to Recital 6(3) of the Core MB CZCA Methodology and the corresponding provisions of the Contested Decision, the Board of Appeal considers that the Contested Decision has adequately stated the reasoning followed by the Defendant in a clear and unequivocal manner. By explaining both in the body of the Contested Decision and in its Annex I, the various procedural steps and the arguments assessed as well as the objectives pursued, which was done before approving the terms and conditions and the disputed methodology, the Defendant did in fact revise them where necessary, in order to ensure that they were in line with the purpose of the network code or guideline and they contributed to market integration, non-discrimination, effective competition and the proper functioning of the market.

113 The arguments presented by the Appellant cannot therefore be accepted, as the Appellant based its interpretation of the internal market in a very limited way, focusing only on the respective Austrian and German markets and making abstract arguments in relation to the rest of the electricity market. In addition and as explained above, the Appellant did not provide any evidence substantiating the arguments based on the AG Agreement.

114 The procedural steps and the manner in which the Defendant, according to Article 5(6)(1) of the ACER Regulation, shall revise the methodologies where necessary, 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, can be apprehended by both examining the relevant procedural and substantive parts of the Contested Decision. In addition, albeit the Annexes II and III do not formally form part of the Contested Decision, they illustrate the evolution of the Contested Decision and its methodology, in which the Appellant, in its capacity as NRA was closely and intrinsically involved and made an active contribution to it.

115 The Appellant's plea must therefore be dismissed as unfounded.

116 Concerning the Application for a Procedural Measure, submitted by the Defendant concomitantly with its Defence, requesting the Chair of the Board of Appeal to prescribe the Appellant the production of the AG agreement, the Defendant withdrew its Application at the oral hearing. Following its withdrawal, there is no need to take further action with regard to this Application.

117 Having assessed the arguments put forward by the Appellant and having concluded that they are unable to demonstrate that the Contested Decision is vitiated by an error, and having rejected all the Appellant's pleas, the Appeal must be dismissed in its entirety as unfounded and the Contested Decision must be confirmed.

118 As the pleas against Articles 3(5) and 10(3) of the Core MB CZCA Methodology are dismissed in their entirety, there is no need to examine the "sections and provisions of the Contested Decision and Annex I thereof that explicitly or implicitly refer to the provisions of Article 3(5) and Article 10(3) of Annex" and therefore there is no need to assess their potential inadmissibility for lack of clarity and precision.

For the above reasons, the Board of Appeal hereby:

1. dismisses the Appeal and confirms the Contested Decision.
2. establishes that there is no need to decide on the Application for procedural measures as lodged by the Defendant.

For the Board of Appeal
The Chairperson
M. PREK

For the Registry
The Registrar
S. VAONA

This decision may be challenged pursuant to Article 263 of the Treaty on the Functioning of the European Union and Article 29 of Regulation (EU) 2019/942 within two months of its publication on the Agency website or of its notification to the Appellant as the case may be.