

IV. ANNOUNCEMENT OF APPEAL²

Case: A-004-2021

Appellant: Bundesnetzagentur

Appeal received on:

Subject matter: Core Cost Sharing methodology

Keywords: Core; Cost Sharing; redispatch; counter trading; CACM

**Contested decision
Number:** No. 30/2020

Language of the case: English

Remedy sought by the Appellant: The Appellant requests the Board of Appeal to:

to **annul Decision No 30/2020 of ACER** of 30 November 2020 on the Core CCR TSOs' proposal for the methodology for cost sharing of redispatching and countertrading in its entirety and to remit the case to the competent body of ACER in accordance with Article 28(5) of the ACER Regulation;

or, in the event that the Board of Appeal does not annul the decision in its entirety,

to **annul the following provisions of Decision No 30/2020 of ACER** of 30 November 2020 on the Core CCR TSOs' proposal for the methodology for cost sharing of redispatching and countertrading:

- a. Article 2(2)(j) and Article 3 of its Annex I,
- b. Article 7 of its Annex I,
- c. Article 12(2) of its Annex I,
- d. All parts and clauses of Decision No 30/2020 of ACER and its Annex I, which make explicit reference to the provisions under a. to c.

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and to remit the case to the competent body of ACER in accordance with Article 28(5) of the ACER Regulation.

The Appellant includes the following procedural request:

The appellant requests that a hearing be held pursuant to Article 18 of the Rules of Procedure of the Board of Appeal.

Pleas in law and main arguments

The contested decision was adopted on 30 November 2020.

The Appellant contests the Agency's decision. The Appellant's claims and arguments can be summarised as follows:

1. **First plea:** Decision No 30/2020 stipulates a cost sharing methodology by which, when calculating the share of the total costs for remedial actions necessary to tackle cross-border relevant congestions, all redispatching and countertrading actions taken in order to address congestions on all network elements that belong to the grid of the Core capacity calculation region are potentially eligible for cost sharing. Such a lack of delimitation of the methodology leads to an eligibility of costs for remedial actions, which infringes the requirement to limit the cost-sharing solutions to actions of cross-border relevance laid down in the legal basis of the contested decision Article 74(2) of Regulation (EU) 2015/1222 (hereinafter "CACM Regulation"). Furthermore, it infringes the principle of conferral under Article 5(1) of the Treaty on the European Union and the requirement to provide incentives to the TSOs to invest effectively under Article 74(6)(a) of the CACM Regulation.
2. **Second plea:** By stipulating the prohibition of netting in the realm of cost sharing, Decision No 30/2020 does not adequately take into account neither the realities of physics nor the legal framework at hand. It therefore infringes the requirement to be consistent with the responsibility and liability of the TSOs to net under Article 74(6)(b) of the CACM Regulation in conjunction with Article 16(11) of Regulation (EU) 2019/943 (hereinafter "Electricity Regulation"). Secondly, it infringes the requirement to facilitate adherence to the netting principle as a general principle of congestion management under Article 74(6)(f) of the CACM Regulation in conjunction with Article 16(11) of the Electricity Regulation. Thirdly, it infringes the requirement to be consistent with the loop flow contribution verification standard and polluter-pays principle according to Article 74(6)(b) of the CACM Regulation in conjunction with Article 16(13) of the Electricity Regulation. In addition to that, the contested decision infringes the fair distribution of costs principle under Article 74(6)(c) of the CACM Regulation as well as the requirement to be consistent with the inter-TSO compensation mechanism according to Article 74(6)(d) of the CACM Regulation in conjunction with Articles 70 and 49 of the Electricity Regulation.

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3. **Third plea:** Decision No 30/2020 defines a common threshold as equal to 10% of the maximum capacity for each eligible cross-border relevant network element in accordance with the contested decision. This infringes the requirement to be consistent with the responsibility of the TSOs to use up to 30% of the capacity for loop flows under 74(6)(b) of the CACM Regulation in conjunction with Article 16(8) of the Electricity Regulation. It further infringes the requirement to facilitate adherence to the responsibility of the TSOs to use up to 30% of the capacity for loop flows under Article 74(6)(f) of the CACM Regulation in conjunction with Article 16(8) of the Electricity Regulation. Additionally, it infringes the requirement to be consistent with the responsibility and liability of the TSOs to define a legitimate level of loop flows under Article 74(6)(b) in conjunction with the second subparagraph of Article 16(13) of the Electricity Regulation and the principle of conferral under Article 5(1) of the Treaty on the European Union. Furthermore, the Core Cost Sharing Decision stipulates that all Core TSOs shall calculate an individual threshold for burdening loop flows for each bidding zone within the Core CCR for each eligible cross-border relevant network element (with contingency), by dividing the common threshold equally among all loop flows from bidding zones within the Core CCR. Such stipulation infringes the fair distribution of costs principle under Article 74(6)(c) of the CACM Regulation and the non-discrimination principle in accordance with Article 74(6)(i) and Article 3(e) of the CACM Regulation. It also infringes the requirement to facilitate adherence to the general principles of congestion management including the polluter-pays-principle under Article 74(6)(f) of the CACM Regulation in conjunction with Articles 70 and 16(8) and (13) of the Electricity Regulation.
4. **Fourth plea:** The appellant challenges the legality of the priority of loop flows from inside the Core CCR (flows of first priority) over internal flows that occur inside Core bidding zones (flows of second priority). These two flow components must be considered with equal priority in order to avoid violations of Union energy law. Decision No 30/2020 lacks consistency with the polluter-pays principle and the loop flow contribution verification standard under Article 74(6)(b) of the CACM Regulation in conjunction with Article 16(13) of the Electricity Regulation and under Article 74(6)(b) of the CACM Regulation in conjunction with Article 76(1)(b)(v) of Regulation (EU) 2017/1485. Furthermore, Decision No 30/2020 infringes the requirement to facilitate adherence to the loop flow contribution verification standard and the polluter-pays principle under Article 74(6)(f) of the CACM Regulation in conjunction with Article 16(13) of the Electricity Regulation, the fair distribution of costs principle under Article 74(6)(c) of the CACM Regulation and the non-discrimination principle under 74(6)(i) and Article 3(e) of the CACM Regulation. It is incoherent with the responsibility of the TSOs to use parts of the capacity for loop flows and internal flows alike under Article 74(6)(b) of the CACM Regulation in conjunction with Article 16(8) of the Electricity Regulation. Moreover, it violates the requirement to provide incentives to the TSOs to invest effectively under Article 74(6)(a) of the CACM Regulation and the requirement to give efficient economic signals addressing network congestions under Article 74(6)(f) of the CACM

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Regulation in conjunction with Article 70 and Article 16(1) of the Electricity Regulation. Additionally, it infringes the transparency principle under Article 74(3) and Article (6)(i) of the CACM Regulation, the requirement to limit the cost-sharing solutions to actions of cross-border relevance under Article 74(2) of the CACM Regulation as well as the Principle of Conferral under Article 5(1) of the Treaty on European Union.

5. **Fifth Plea:** Decision No 30/2020 infringes the Principle of Proportionality since it over-penalises loop flow emitting Core TSOs.

6. **Sixth Plea:** The obligation to propose an amendment to the cost sharing methodology infringes the Core TSOs' discretion with respect to initiating amendments under Article 74(6)(b) of the CACM Regulation in conjunction with Article 9(13) of the CACM Regulation and the principle of conferral under Article 5(1) of the Treaty on European Union.

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