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Ljubljana
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Request for ACER's Opinion concerning the Curtailment of the Forward Transmission Rights and the interpretation of force majeure provisions

Dear Mr Zinglensen,

According to Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (hereinafter ACER Regulation)¹ Article 6 (7) where, in a specific case, a regulatory authority encounters difficulties with the application of the network codes and guidelines referred to in Regulation (EU) 2019/943, Regulation (EC) No 715/2009, Directive (EU) 2019/944 or Directive 2009/73/EC it may request ACER to provide an opinion. According to the rules, ACER delivers its opinion, after consulting the Commission, within three months of the date of receipt of such a request.

As the issue is important and to some extent urgent, we kindly request ACER to provide an opinion in at their earliest convenience regarding the application of Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation (hereinafter FCA or FCA Regulation)², as referred to in Regulation (EU) 2019/943. Furthermore, the ECA seeks clarification on the Harmonised allocation rules for long-term transmission rights in accordance with Article 51 of the FCA Regulation (hereinafter HAR)³, which is approved by ACER.

Background

In June 2021, Finnish and Estonian national regulatory authorities (Energy Authority of Finland and Estonian Competition Authority, hereinafter ECA) requested Finnish and Estonian transmission system operators (Fingrid Oy and Elering AS, hereinafter the TSOs), to start issuing long-term transmission rights on the Finnish-Estonian bidding zone border. This request was made in accordance with Article 30 of the FCA. Following this request and the preparatory work carried out by the TSOs, monthly and yearly products of financial transmission rights (hereinafter FTR) have been auctioned since 2023 on the Finnish-Estonian bidding zone border, in the direction from Finland to Estonia, via Single Allocation Platform (hereinafter SAP).

¹ Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02019R0942-20240804>

² Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016R1719-20210315>

³ Available: https://www.acer.europa.eu/sites/default/files/documents/Individual%20Decisions_annex/ACER_Decision_18-2023_HAR-AnnexI.pdf

Finnish and Estonian bidding zones are connected by two HVDC sub-marine cables: EstLink 1 (358 MW) and EstLink 2 (658 MW). Principles for splitting of long-term cross-zonal capacity for the purpose of allocating FTRs in Finnish-Estonian bidding zone border is set out in Article 4 of bilateral methodology for determining and splitting the long-term cross-zonal capacity for the purpose of allocating long-term transmission rights on the Finnish–Estonian bidding zone border (hereinafter Bilateral Methodology)⁴. Based on these cross-border transfer capacities, the amount of auctioned yearly FTR product is up to 350 MW, and the monthly FTR product up to 300 MW, depending on the actual availability of the net transfer capacity (hereinafter NTC) known at the time of the auctioning of the relevant product. This opinion request concerns the following allocated FTR capacities:

- Yearly products: 2024Y 350 MW and 2025Y 350 MW;
- Monthly products: 2024M December 300MW, 2025M January 322MW (including 22MW of returned and reallocated yearly product capacity).

On 25 December 2024, the EstLink 2 submarine cable was damaged by a ship's anchor, resulting to its operational failure. Repairs are expected to be completed by the end of July 2025. Hence, the NTC between Finnish and Estonian bidding zones has been decreased to 358 MW, which is less than already allocated total amount of FTRs (650 MW).

In line with published UMM⁵ on Nord Pool's dedicated platform, the TSOs have published notification⁶ on SAP to curtail the already allocated FTRs starting from 27 December 2024 (from 650 MW to 342 MW) until the end of December 2025 and from 1 January 2025 until the end of January 2025 (from 650 MW to 337 MW). Triggering event was defined as "*Curtailment due to Force Majeure*". However, several Estonian market participants have objected to the described curtailment of already allocated FTR products, claiming that required preconditions for triggering the *force majeure* event have not been met.

Legal principles

Chapter 6 of the FCA Regulation on the firmness of allocated cross-zonal capacity outlines two distinct legal bases under which TSOs are entitled to curtail already allocated FTRs:

Article 53 (1): "*All TSOs shall be entitled to curtail long-term transmission rights to ensure operation remains within operational security limits prior to the day-ahead firmness deadline.*"

Article 56 (1): "*In the event of force majeure, TSOs may curtail long-term transmission rights. Such curtailment shall be undertaken in a coordinated manner following liaison with all TSOs directly affected.*"

If the reason for curtailment is "to ensure that operation remains within operational security limits," the FCA Regulation foresees the following:

Article 52 (2) (k): "*The harmonised allocation rules for long-term transmission rights shall follow the principles of non-discrimination and transparency and contain the provisions on firmness and compensation rules pursuant to Article 53 and Article 55.*"

If the reason for the curtailment is "*force majeure*," the FCA Regulation foresees the following:

⁴ Available: <https://www.elering.ee/sites/default/files/2022-09/FI-EE%20bilateral%20methodology%20for%20FTR%20capacity%20split.pdf>

⁵ Available: <https://umm.nordpoolgroup.com/#/messages/79210ee1-3395-4f75-a972-7b03888b107a/5>

⁶ Available: <https://www.jao.eu/news/capacity-curtailment-fi-ee-border-delivery-period-2>

Article 56 (3): *“In the event of curtailment due to force majeure the concerned holders of long-term transmission rights shall receive compensation for the period of that force majeure by the TSO which invoked the force majeure. In this case, the compensation shall be equal to the amount initially paid for the concerned long-term transmission right during the forward allocation process.”*

Article 56 (4): *“The TSO which invokes a force majeure shall make every possible effort to limit the consequences and duration of the force majeure.”*

HAR, as approved by ACER, defines the *force majeure* event, its application and compensation rules in general as follows:

Article 2 (2) (u): *“‘force majeure’ means any unforeseeable or unusual event or situation beyond the reasonable control of a party and/or the relevant TSOs, and not due to a fault of the party and/or the relevant TSOs, which cannot be avoided or overcome with reasonable foresight and diligence, which cannot be solved by measures which are from a technical, financial or economic point of view reasonably possible for the party and/or the relevant TSOs, which has actually happened and is objectively verifiable, and which makes it impossible for the party and/or the relevant TSOs to fulfil, temporarily or permanently, its obligations;”*

Article 56 (1): *“Long-term transmission rights irrespective of the product period may be curtailed in the event of force majeure, or to ensure operation remains within operational security limits before the day-ahead firmness deadline.”*

Article 56 (5): *“In case of curtailment, the affected Registered Participant is entitled to receive reimbursement or compensation according to Article 59 to Article 60 and where applicable Article 61.”*

Article 57 (7): *“Compensation rules according to Article 59 and Article 59 and where applicable Article 61 also apply if offered day-ahead cross zonal capacities are lower than the amount of non-nominated long-term transmission rights in case of physical transmission rights and the total amount of long-term transmission rights in the case of financial transmission rights.”*

Specific compensation rules for curtailments triggered by the event to ensure operation remains within operational security limits are described by HAR as follows:

Article 59 (2): *“If specified in the relevant annexes to these HAR, a cap shall be applied to the compensations on specific bidding zone borders. The cap shall be determined as the total amount of congestion income collected by the concerned TSOs on the respective bidding zone border in the relevant calendar year, deducting all remunerations...”*

Article 59 (3): *“In case of direct current interconnectors, the cap shall be determined as the total amount of congestion income collected by the concerned TSOs on the bidding zone border in the relevant month, deducting all remunerations paid according to Article 40 and Article 48 and compensations paid according to Article 60 and where applicable Article 61 for the considered month. The total amount of congestion income in one month is defined as the sum of a twelfth of the revenues raised at yearly auction on the concerned bidding zone border and the revenues generated by the monthly auction and congestion income from other timeframes which occurred during this month on the concerned bidding zone border.”*

Article 59 (4): *“If, before application of the relevant cap described in paragraph 2 or paragraph 3 of this Article, the total calculated compensations of curtailed long-term transmission rights exceed the relevant cap, the compensations of curtailed long-term transmission rights shall be reduced on a pro rata basis.”*

Baltic Capacity Calculation Region's Regional Specific Annex to the Harmonised Allocation Rules for long-term transmission rights in accordance with Article 52 of the FCA Regulation (hereinafter Regional Specific Annex)⁷, approved by relevant regulatory authorities, stipulates the bidding zone borders, where cap on compensation is applicable as follows:

Article 4 (2): “*A cap on compensation shall be applicable to the FI-EE bidding zone border in accordance with Article 59(3) of the HAR.*”

Specific reimbursement rules for curtailments due to *force majeure* are described by HAR as follows:

Article 60 (1): “*In the case of force majeure before the day ahead firmness deadline, holders of curtailed long term transmission rights shall be entitled to receive a reimbursement equal to the price of the long-term transmission rights set during the long-term transmission rights allocation process...*”

Issues of concern

Article 2 point (u) of the HAR, which stipulates the definition of *force majeure* can be broken down into the following sections::

- 1) any unforeseeable or unusual event or situation beyond the reasonable control of a party and/or the relevant TSOs, and not due to a fault of the party and/or the relevant TSOs,
- 2) which cannot be avoided or overcome with reasonable foresight and diligence,
- 3) which cannot be solved by measures which are from a technical, financial or economic point of view reasonably possible for the party and/or the relevant TSOs,
- 4) which has actually happened and is objectively verifiable, and
- 5) which makes it impossible for the party and/or the relevant TSOs to fulfil, temporarily or permanently, its obligations.

Estonian and Finnish TSOs maintain that the volume of already allocated FTRs should be directly linked to the physical electricity transmission capacity (meaning, the NTC on FI-EE bidding zone border). According to TSOs an event causing physical damage to cable (for example damage by a ship's anchor) qualifies as an (1) “*unforeseeable or unusual event or situation beyond the reasonable control of the relevant TSOs, ... which cannot be avoided ...*”. Therefore, TSOs initiated curtailment of already allocated FTRs, citing “*force majeure*” as soon as the details of the event have been determined.

[REDACTED]

According to the Regional Specific Annex Article 4 (2), a cap on compensations shall be applicable to the FI-EE bidding zone border in accordance with Article 59(3) of the HAR.

[REDACTED]

⁷ Available: <https://www.elering.ee/sites/default/files/2022-09/Baltic%20CCR%20Regional%20Annex%202022.pdf>

According to Article 56(4) of the FCA Regulation, “*the TSO that invokes force majeure shall make every possible effort to limit the consequences and duration of the force majeure*”. Based on this provision, ECA raises the question of whether in the occurrence of an event, which is beyond the control of TSO, the TSOs should not be curtailing the already allocated FTRs and continue remunerating market participants FTRs from already collected congestion income (until the set cap is exhausted) to limit the *force majeure* consequences? It should be noted that as the amount of collected congestion income depends on the actual power flows and price difference between the bidding zones on the day-ahead market, which is calculated for each hour, the amount of TSOs actually collected congestion income will be known only after the end of FTR product period (month and year in this case).

ECA hereby highlights that depending on the spread between the FTR auction price and the actual day-ahead price difference, the consequences for market participants may vary. If the FTR price exceeds the actual price difference, market participants incur higher cost by purchasing the FTRs than they would have if they had not purchased them. Therefore, the curtailment of FTRs due to *force majeure* may have both positive and negative impacts on market participants, which according to ECA’s understanding will only be known after the end of the period.

Also, according to ECA’s interpretation, if the decision on whether the curtailment reason can be defined as *force majeure* event also depends on application of the “*measures that are, from an economic point of view, reasonably possible for the TSOs*” and “*limiting the consequences,*” it is impossible for the TSOs to decide on the curtailment reason before the end of the FTR product period.

Furthermore, Article 25 (1) of the Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation (hereinafter SOGL Regulation) stipulates the following:

“Each TSO shall specify the operational security limits for each element of its transmission system, taking into account at least the following physical characteristics:

- (a) voltage limits in accordance with Article 27;*
- (b) short-circuit current limits according to Article 30; and*
- (c) current limits in terms of thermal rating including the transitory admissible overloads.”*

This indicates that such limits are related to physical characteristics. Hence, in ECA’s view, this is not a situation where cross-border capacity is limited as a result of a specific incident in the network to ensure operation within security limits. Instead, this is a case of a complete outage of a cross-border connection (due to reasons beyond the TSOs’ control), which leads to a reduction in cross-border NTC. This prompts ECA to question whether, in such a case, the allocated FTR quantities should be directly tied to the available NTC between the relevant bidding zones. Furthermore, in this particular scenario, could the TSOs legitimately apply the “*to ensure operation remains within operational security limits*” clause to curtail FTRs, given that this clause refers to the physical characteristics? In this case, TSOs are not deliberately limiting NTC to ensure the system operates within security limits from a physical characteristics perspective; rather, a certain amount of cross-border NTC is simply unavailable due to reasons beyond the TSOs’ control.

Request for ACER's opinion

ECA hereby requests ACER's opinion on the application of Articles 52, 53, and 56 of the FCA, as well as Articles 2 (2), 56, 57, 59, and 60 of the HAR. Based on the aforementioned legal principles and issues of concern, ECA is formally inquiring ACER's opinion regarding the appropriate FTRs curtailment clause in this particular situation. Whether the TSOs' obligation towards allocated FTRs is physical or financial, and what should TSOs take into consideration while initiating curtailment of already allocated FTRs and deciding whether the triggering event for this situation FTRs' curtailment can be classified as *force majeure* event. Specifically, we are asking:

1. Should the amounts of already allocated FTRs be directly dependent from the value of net transfer capacity between the bidding zones, considering the particular situation and SOGL Regulation definition of operational security limits? Also, if the TSOs are not deliberately limiting NTC (of cross-border connection) to ensure the system operates within security limits from a physical characteristics perspective, but a certain amount of cross-border NTC is unavailable due to reasons beyond the TSOs' control, particularly due to the occurrence of "*an unforeseeable or unusual event or situation beyond the reasonable control of the relevant TSOs, which cannot be avoided*", then, in such a case, are the TSOs even permitted to invoke the clause "*to ensure operation remains within operational security limits*" for curtailing FTRs?
2. If the value of net transfer capacity between bidding zones should significantly decrease due to occurrence of "*an unforeseeable or unusual event or situation beyond the reasonable control of the relevant TSOs, which cannot be avoided*", then would occurrence of such an event provide sufficient cause for TSOs for curtailing the amounts of already allocated FTRs with reference to *force majeure* event?
3. Or alternatively if the FTRs are purely financial instruments, then mere occurrence of "*an unforeseeable or unusual event or situation beyond the reasonable control of the relevant TSOs, which cannot be avoided*", which results in significant reduction of net transfer capacity between bidding zones, cannot provide sufficient cause for TSOs for curtailment of already allocated FTRs with reference to *force majeure* event, unless the TSOs have exhausted a cap on compensations which is applicable in accordance with Article 59 (3) of the HAR?

If you have any questions regarding the circumstances of the described situation, please do not hesitate to contact us at your earliest convenience. We look forward to receiving ACER's opinion as soon as possible.

Sincerely,

Evelin Pärn-Lee
Director General