

**DECISION No 38/2020
OF THE EUROPEAN UNION AGENCY
FOR THE COOPERATION OF ENERGY REGULATORS**

of 23 December 2020

**ON THE METHODOLOGY FOR THE USE OF CONGESTION INCOME FOR THE
PURPOSES REFERRED TO IN ARTICLE 19(2) OF REGULATION (EU) 2019/943
IN ACCORDANCE WITH ARTICLE 19(4) OF REGULATION (EU) 2019/943**

THE EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY
REGULATORS,

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

Having regard to Regulation (EU) 2019/942 of the European Parliament and of the Council
of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy
Regulators¹, and, in particular, Article 4(4) thereof,

Having regard to Regulation (EU) 2019/943 of the European Parliament and of the Council
of 5 June 2019 on the internal market for electricity², and, in particular, Article 19(4) thereof,

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

Having regard to the favourable opinion of the Board of Regulators of 16 December 2020,
delivered pursuant to Article 22(5)(a) of Regulation (EU) 2019/942,

Whereas:

1. INTRODUCTION

- (1) Article 19 of Regulation (EU) 2019/943 of the European Parliament and of the
Council of 5 June 2019 on the internal market for electricity (hereafter the
'Electricity Regulation') establishes rules for the use of congestion income generated
by the congestion management procedures.

¹ OJ L 158, 14.6.2019, p. 22.

² OJ L 158, 14.6.2019, p. 54.

- (2) Pursuant to Article 19(2) of the Electricity Regulation, the following objectives shall have priority with respect to the allocation of any income resulting from the allocation of cross-zonal capacity: (a) guaranteeing the actual availability of the allocated capacity including firmness compensation, or (b) maintaining or increasing cross-zonal capacities or covering the costs resulting from network investments that are relevant to reduce interconnector congestion.
- (3) Pursuant to Article 19(4) of the Electricity Regulation, TSOs shall propose a methodology for the use of income in accordance with the objectives laid down in Article 19(2) of that Regulation (hereafter the “UCI Methodology”), after consulting regulatory authorities and relevant stakeholders. The TSOs’ proposal had to be submitted to ACER by 5 July 2020.
- (4) Pursuant to Article 19(4) of the Electricity Regulation ACER shall decide on the TSOs’ proposal for the use of congestion income methodology within six months of receiving it.

2. PROCEDURE

- (5) On 3 July 2020, ENTSO-E submitted on behalf of the TSOs listed in Article 2 of this Decision a “TSOs’ proposal for Use of Congestion Income Methodology, in accordance with Article 19(4) of the Electricity Regulation” (the “Proposal”) to ACER and published it.
- (6) Having identified three certified TSOs not indicated by ENTSO-E as represented TSOs, namely Baltic Cable AB (“Baltic Cable”), a single-interconnector certified TSO in Germany, the Cypriot Transmission System Operator, a TSO member of ENTSO-E from Cyprus, and Eneco Valcanale S.r.l, a single-interconnector certified TSO in Austria, ACER consulted those TSOs from 30 July 2020 to 1 December 2020.
- (7) On 15 September 2020, Baltic Cable submitted comments on the Proposal and, on 25 November and 1 December 2020, provided further clarifications of its position.
- (8) On 9 October 2020, the Cypriot Transmission System Operator informed ACER that, in its view, Article 19 of the Electricity Regulation does not apply to Cyprus, as currently the Cyprus system is not interconnected. Therefore, the Cypriot Transmission System Operator did not provide any comments on the Proposal.
- (9) ACER did not receive comments from Eneco Valcanale S.r.l.
- (10) On 28 November 2020, ACER shared a draft of its decision to ENTSO-E (as the entity representing the submitting TSOs).
- (11) On 3 December 2020, ACER received ENTSO-E’s feedback indicating that, following an internal discussion, they had no substantial comments to the content of the draft decision.

3. ACER'S COMPETENCE TO DECIDE ON THE PROPOSAL

- (12) Pursuant to Article 4(4) of Regulation (EU) 2019/942 and Article 19(4) of the Electricity Regulation, ACER shall decide on the proposed methodology within six months of receiving it.
- (13) The TSOs, represented by ENTSO-E, submitted the Proposal on the basis of Article 19(4) of the Electricity Regulation on 3 July 2020.
- (14) Therefore, ACER is competent to decide on this Proposal according to Article 4(4) of Regulation (EU) 2019/942 and Article 19(4) of the Electricity Regulation.

4. SUMMARY OF THE PROPOSAL

- (15) The Proposal submitted to ACER consists of the following elements:

The “*Whereas*” section;

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| Article 1 | establishes the subject matter and scope of the Proposal, as well as the scope of application of the methodology. |
| Article 2 | includes the definitions and interpretations of the terms used in the Proposal. |
| Article 3 | sets the cost categories contributing to the priority objectives (a) and (b) of Article 19(2) of the Electricity Regulation. |
| Article 4 | contains details about the elements to be communicated by TSOs to the corresponding NRAs concerning the use of the congestion income for the next calendar year(s). |
| Article 5 | describes the congestion income allocation process, including the features of the separate internal account, the conditions for placing congestion income on a separate internal account, and details on handling the separate internal account. |
| Article 6 | sets the commencement dates of the implementation of the use of the congestion income methodology. |
| Article 7 | refers to the reference language for the methodology adopted, which shall be English. |

5. OBSERVATIONS RECEIVED BY ACER

5.1. Consultation of TSOs

- (16) ACER received comments from Baltic Cable and the Cyprus Transmissions System Operator.

- (17) The feedback provided by Baltic Cable is summarised and assessed in Annex II. As explained in that Annex, in ACER's view, the concerns expressed by Baltic Cable do not require an amendment of the Proposal.
- (18) The Cypriot Transmission System Operator only stated that it is not interconnected and that therefore Article 19 of the Electricity Regulation does not apply to it.
- (19) In that regard, it is to note that, currently, the provisions of the Electricity Regulation on the use of congestion income do not affect Cyprus, which has no interconnections with other systems, and do not affect Eneco Valcanale S.r.l, as "*in November 2010 Eneco Valcanale received an exemption from Article 6(6)(a) and (b) Regulation(EC) No 1228/2003³, the Second Energy Package Electricity Regulation, with regard to the use of congestion rents*"⁴.

5.2. Consultation of the AEWG

- (20) In its advice and comments on the draft decision on the methodology for the use of congestion income, the AEWG concluded that it broadly endorsed the consulted draft decision, remarking that a single interconnector should not be discriminated compared to other TSOs, that minor issues discussed at the AEWG meeting should be solved between ACER and the relevant regulatory authority bilaterally and that no further concerns were tabled during the AEWG meeting or in writing.

6. ASSESSMENT OF THE PROPOSAL

- (21) Article 19 of the Electricity Regulation provides the regulatory framework for the Proposal, including both procedural and substantive requirements.

6.1. Compliance with the procedural requirements

- (22) Regarding the procedural requirements, Article 19(4) of Electricity Regulation requires:
- the TSOs to consult the corresponding regulatory authorities and relevant stakeholders before adopting the proposed methodology for the use of congestion income methodology.
 - the TSOs to submit the proposed methodology to ACER by 5 July 2020.
- (23) The TSOs launched a public consultation on 20 March 2020 where all stakeholders were invited to submit their comments on the proposed draft methodology until 1 May 2020. In addition, TSOs organised a webinar on 15 April 2020 where they explained further the rationale of their draft methodology and replied to participants' questions. TSOs published their evaluation of stakeholders' comments received during the public consultation. Moreover, TSOs had several exchanges with ACER

³ Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity

⁴ As reported in the Commission Opinion of 5 March 2015 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC - Austria - Certification of Eneco Valcanale S.r.l.

and regulatory authorities during the drafting process.

- (24) Finally, on behalf of the TSOs, ENTSO-E submitted the Proposal to ACER on 3 July 2020.
- (25) Therefore, in ACER's view, the submitted Proposal has met the aforementioned procedural requirements of Article 19(4) of the Electricity Regulation.

6.2. Compliance with the substantive requirements

- (26) Regarding the substantive requirements, Article 19(4) of the Electricity Regulation determines that the methodology shall set out at least the conditions under which the income can be used for the purposes referred to in paragraph 2 of the same Regulation, as well as the conditions under which this income may be placed on a separate internal account line for future use for those purposes, and for how long this income may be placed on such an account line.
- (27) The Proposal includes, as stated in its Article 1(1) concerning the subject of matter and scope:
- the conditions under which congestion income may be used for the purposes referred to in Article 19(2) of the Electricity Regulation,
 - the conditions under which congestion income may be placed on a separate internal account line for future use for those purposes, and
 - for how long congestion income may be placed on such an internal account line.
- (28) Therefore, in ACER's view, the submitted Proposal has duly met the aforementioned substantive requirements laid down in Article 19(4) of the Electricity Regulation.

6.3. Assessment of the proposed implementation date

- (29) According to Article 6.2 of the Proposal, "*The UCI Methodology shall apply to CI collected from 1 January 2022*".
- (30) ACER considers that the proposed implementation is proportionate, as actions by TSOs and by regulatory authorities are due already in 2021 and they have to be carefully prepared, in order to facilitate a smooth implementation of the new provisions, which will be set out in the approved methodology.

7. CONCLUSION

- (31) For all the above reasons, ACER considers the TSOs' proposal for the use of congestion income methodology, as submitted and published by ENTSO-E, in line with the requirements of the Electricity Regulation.
- (32) Therefore, ACER deems appropriate to approve the Proposal,

HAS ADOPTED THIS DECISION:

Article 1

The Proposal for the Methodology for the Use of Congestion Income for the purposes referred to in Article 19(2) of Regulation (EU) 2019/943 in accordance with Article 19(4) of Regulation (EU) 2019/943 is approved as set out in Annex I to this Decision.

Article 2

This Decision is addressed to the following submitting TSOs:

50Hertz - 50Hertz Transmission GmbH
Amprion - Amprion GmbH
APG - Austrian Power Grid AG
Augstsprieguma tīkls - AS Augstsprieguma tīkls
BritNed - BritNed Development Limited;
ČEPS - ČEPS a.s.
CREOS Luxembourg - Creos Luxembourg S.A.
EirGrid - EirGrid plc
Eirgrid Interconnector - Eirgrid Interconnector DAC;
ElecLink - ElecLink Ltd
Elering - Elering AS
ELES - ELES, d.o.o.
Elia - Elia Transmission Belgium SA/NV
Energinet - Energinet
ESO - Electroenergien Systemen Operator EAD
Fingrid - Fingrid Oyj
HOPS - Croatian Transmission System Operator Ltd
IPTO - Independent Power Transmission Operator S.A.
Kraftnät Åland - Kraftnät Åland Ab
LITGRID - Litgrid AB
MAVIR ZRt. - MAVIR Magyar Villamosenergia-ipari Átviteli Rendszerirányító Zártkörűen Működő Részvénytársaság ZRt.
Moyle Interconnector - Moyle Interconnector Ltd;
National Grid ESO - National Grid ESO;
National Grid Interconnectors - National Grid Interconnectors Ltd;
PSE - Polskie Sieci Elektroenergetyczne S.A.
REE - Red Eléctrica de España S.A.
REN - Rede Eléctrica Nacional, S.A.
RTE - Réseau de Transport d'Electricité, S.A
SEPS - Slovenská elektrizačná prenosová sústava, a.s.
SONI - System Operator for Northern Ireland Ltd;
Svenska Kraftnät - Affärsverket svenska kraftnät
TenneT GER - TenneT TSO GmbH
TenneT TSO - TenneT TSO B.V.

Terna - Terna Rete Elettrica Nazionale S.p.A.
Transelectrica - National Power Grid Company Transelectrica S.A.
TransnetBW - TransnetBW GmbH
VÜEN - Vorarlberger Übertragungsnetz GmbH

Done at Ljubljana, on 23 December 2020.

- SIGNED -

*For the Agency
The Director*

C. ZINGLERSEN

Annexes:

Annex I: Methodology for the Use of Congestion Income according to article 19(4) of Regulation (EU) 2019/943

(separate file, as transmitted by ENTSO-E)

Annex II: Summary and assessment of the comments provided by Baltic Cable AB

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

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

Annex II: Summary and assessment of the comments provided by Baltic Cable AB

- (1) According to Baltic Cable, the Proposal does not distinguish between “regular” TSOs and single interconnector companies. According to Baltic Cable (section 1 and section 3.1.1 of its feedback of 15 September 2020), the European Court of Justice (“ECJ”) “*explicitly acknowledged the special situation of single interconnector companies (ECJ, decision of 11 March 2020, ref. no. Case C-454/18, recital 66-68). [...] It also follows from the ECJ ruling that single interconnector companies must be put in a position in which they are able to carry out their activities in financially acceptable conditions and that they are allowed to use congestion revenues for an appropriate profit (ECJ, decision of 11 March 2020, ref. no. Case C-454/18, recital 78, 79).*”
- (2) Regarding the claim that there is no distinction between “regular” TSOs and single interconnector companies in the Proposal, ACER notes that, pursuant to Article 43(1) of Directive (EU) 2019/944, “*each undertaking which owns a transmission system acts as a transmission system operator*”, unless an exemption from that provision is granted pursuant to Article 63 of the Electricity Regulation. This view is supported by the TSOs submitting the Proposal, which stated in the evaluation of stakeholder comments (page 2): “[single interconnector companies] *If not exempted, pursuant to Article 43(1)(a) of Directive EU 2019/944, act as a transmission system operator. Therefore, no special treatment is necessary for non-exempted SICs*”. Given that (non-exempted) single interconnectors shall act as TSOs, in ACER’s view, no grounds exist for differentiating single-interconnector TSOs and other TSOs in the methodology.
- (3) Regarding the observations on the Court of Justice’s judgment of 11 March 2020 in case C-454/18, ACER notes that this judgment pertains to the interpretation of Article 16(6) of Regulation (EC) No 714/2009⁵. According to Article 19(4) of Regulation (EU) 2019/943 (‘the Electricity Regulation’), the proposed methodology is due by 5 July 2020. After ACER’s approval, the methodology will apply, according to Article 6 of the Proposal, to congestion income collected from 1 January 2022. As Regulation (EC) No 714/2009 has been repealed by Article 70 of the Electricity Regulation, and as Article 19 of the Electricity Regulation introduced new provisions regarding the use of congestion income which apply from January 1, 2020 and differ in substance from Article 16(6) of Regulation (EC) No 714/2009, discussed in more detail in the paragraph below, the Court of Justice’s judgment in case C-454/18 does not pertain to the UCI Methodology, which is legally required to deal with the use of congestion income in accordance with Article 19(2) of the Electricity Regulation.
- (4) According to paragraph (63) of the Court’s judgment in case C-454/18, Article 16(6)(b) of Regulation (EC) No 714/2009 “*must be interpreted as meaning that, when a transmission system operator (TSO) merely operates a cross-border interconnector, the operation and maintenance costs of that interconnector cannot*

⁵ Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003

be regarded as network investments to maintain or increase interconnection capacities within the meaning of that provision.” However, Article 16(6)(b) of Regulation (EC) No 714/2009 has been replaced by Article 19(2)(b) of the Electricity Regulation, which includes as an allowed use of congestion income also “*covering costs resulting from network investments that are relevant to reduce interconnector congestion*”. The latter phrasing, in ACER’s view, allows the use of congestion income for covering maintenance and operating costs of interconnectors, as well as for appropriate capital remuneration, as decided by the relevant national regulatory authorities taking into account European and national laws and national regulatory practices.

- (5) This view is also reflected in Article 3.1.vii.a of the Proposal, where “*capital remuneration [...] related to investments which significantly contribute to maintaining or increasing cross-zonal capacity*” is included as an allowed use of congestion income, and in Article 3.1.viii.a of the Proposal, where “*maintenance and operating costs (OPEX) related to assets which significantly contribute to maintaining or increasing cross-zonal capacity*” are included as an allowed use of congestion income. Furthermore, in their evaluation of stakeholders’ comments (page 3) the “*TSOs note that Regulation 714/2009 and Regulation 2019/943 are not identical. In particular, Regulation 2019/943 additionally refers to “costs resulting from investment”. Operation and maintenance costs for a network investment are a result of that investment*”.
- (6) Therefore, in ACER’s view, the Proposal allows all TSOs to use congestion income to cover costs of interconnectors, including maintenance and operating costs and an appropriate capital remuneration, when such use is positively reviewed by the relevant national regulatory authority.
- (7) According to Baltic Cable’s comments in sections 3.1.2, 3.2.1 and 3.2.8 of its feedback of 15 September 2020, “*it should be clear that in cases where the single interconnector company’s sole source of income are congestion revenues, the separate line account – in case it is negative – cannot be “sent to zero” neither by congestion revenues nor via any additional cash flows but losses have to be carried forward.*” In that regard, Baltic Cable proposed that recital 5 of the methodology should be amended so that for single interconnector companies “*residual revenues shall be placed on a separate internal account line until such a time as it can be spent for the purposes set out in [Art. 19] paragraph 2 [Electricity Regulation].*”
- (8) In ACER’s view, given that Article 18(2) of the Electricity Regulation⁶ stipulates that “*Tariff methodologies shall reflect the fixed costs of transmission system operators*”, and single interconnector companies when not exempted (being TSOs) are not excluded from this stipulation, charges for access to network and for use of network in the connected Member States could be a source of income for a single interconnector TSO, as they are for any other TSO. In particular, such charges could be another source of income, while avoiding double remuneration, when deemed

⁶ Article 18(2) is part of Article 18 of the Electricity Regulation, headed “Charges for access to networks, use of networks and reinforcement”.

appropriate by the relevant NRA. These considerations appear to be supported by Annex 4 to the TSOs' Explanatory Document of 3 July 2020 submitted together with the Proposal. Annex 4 states that the socialisation of costs and risks of single interconnector companies without exemption (i.e. single interconnector TSOs) takes place "*partially, depending on the regulatory framework*". Therefore, the hypothesis of congestion income as a "*sole source of income*" of a TSO, as stated by Baltic Cable, is not applicable in the case of regulated assets. For this reason, in ACER's view, no distinction is necessary regarding the handling of the separate internal account line in the methodology. In addition, regarding the specific point raised by Baltic Cable of carrying forward deficits of congestion income on the internal account line, the methodology already provides that "*where the separate internal account line is for reporting purposes, the negative amount shall be carried forward to the next year(s)*."

- (9) In section 3.2.2 of its feedback of 15 September 2020, Baltic Cable asked for an amendment to recital 11 of the methodology⁷ on the ground that "*a single interconnector company such as Baltic Cable AB has no other revenues other than congestion revenues*".
- (10) ACER observes that paragraph 25 of the Court of Justice's judgment in case C-454/18 states that "*Baltic Cable claims that, since its congestion revenues represent around 70% of its revenues(...)*" Although Baltic Cable claim seems not in line with the ECJ observation, ACER had no ground to further investigate the statement made by Baltic Cable under paragraph (9) above because, for the reasons elaborated in paragraph (8) above, ACER deems the amendment requested to recital 11 of the methodology neither necessary, nor appropriate.
- (11) In section 3.2.3 of its feedback of 15 September 2020, Baltic Cable requested to make it clear in the methodology that "*the list of cost categories contributing to priority objectives as included in Art. 3 amended proposal is not conclusive*".
- (12) ACER sees no need for such clarification given that:
- the list of cost categories gives appropriate details to minimise possible uncertainties in the implementation of the methodology, while the words "*including inter alia*" do not pre-empt currently unforeseen circumstances originating further system operation costs or costs resulting from network investments;
 - category ix of Article 3.1 of the Proposal "*Other costs related to the optimisation of usage of new and existing assets which significantly contribute to maintaining or increasing cross-zonal capacity*" may already cover unforeseen costs by Article 3.1;
 - ACER is empowered to request updates of the UCI Methodology and can use

⁷ Recital 11 of the Proposal reads: "*Sources for covering costs related to the adequate fulfilment of priority objectives defined in the Article 19(2) of Regulation (EU) 2019/943 are many and vary across the jurisdictions. Such costs can be covered via CI or via network tariffs or other network charges, while avoiding any double remuneration. To fund new investments, TSOs can also resort to financing sources such as debt, equity or grants*".

such powers, where needed to expand the list of cost categories.

- (13) In section 3.2.4 of its feedback of 15 September 2020, Baltic Cable requested a distinction of single interconnector companies in the methodology regarding the “*significant*” contribution of assets to maintaining or increasing cross-zonal capacity, which is set as a prerequisite for the recognition of costs contributing to priority objectives. Baltic Cable “*assume[s], that this additional requirement was added in order to distinguish between relevant and irrelevant costs*”. Baltic Cable based this request on the ground that single interconnector companies “*cannot invest in any assets other than the interconnector itself*”.
- (14) In ACER’s view, the significant contribution of assets to cross-zonal capacity is meant to distinguish assets whose presence impacts significantly on the capacity from assets which do not impact on it. In ACER’s view, the requested clarification does not follow from the alleged reasoning. Furthermore, such distinction is not necessary as interconnectors contribute significantly to cross-zonal capacity.
- (15) In section 3.2.5 of its feedback of 15 September 2020, Baltic Cable requested “*to also be able to use congestion revenues to dismantle the interconnector at the end of the interconnector’s lifetime*” and noted that the “*proposal seems to only address dismantling costs in relation to maintaining or increasing cross-border capacity*”.
- (16) ACER notes that Article 3.1 of the Proposal already allows the use of congestion income, when such use is positively reviewed by the relevant national regulatory authority, for dismantling intended to renew, reinforce or refurbish an asset or a network. ACER cannot agree with the Baltic Cable’s request to further expand the scope of dismantling to actions reducing cross-border capacity: the sole dismantling of cross border assets at borders where the need to alleviate congestion remains and is not addressed by other network developments would increase the level of congestion and therefore would reduce market integration, contrary to the purpose of “*creating truly integrated competitive, consumer-centred, flexible, fair and transparent electricity markets in the Union*” (Article 1, first paragraph, of Directive (EU) 2019/944) and of setting “*fundamental principles for well-functioning, integrated electricity markets*” (Article 1(b) of the Electricity Regulation).
- (17) In section 3.2.6 of its feedback of 15 September 2020, Baltic Cable requested to clarify in the methodology that “*a single interconnector company cannot be obliged to invest into any (another TSO’s) internal assets*”.
- (18) ACER does not deem it necessary to include such clarification in the methodology since there is no reference or provision in the Proposal forcing the action envisaged by Baltic Cable and because the category “*Internal assets with cross-zonal relevance*” included in Article 3.2 of the Proposal does not impose any obligation on any TSO to invest on internal assets.
- (19) In section 3.2.7 of its feedback of 15 September 2020, Baltic Cable requested to clarify in the methodology under which criteria costs shall be considered “*efficient*” in the sense of Article 3.3 of the Proposal.

- (20) As laid down in Article 3.3 of the Proposal, it is up to the relevant regulatory authority to decide which incurred costs are considered efficient. Hence, in ACER's view, this definition is up to the relevant national regulatory authority and no further clarification, which would encroach upon the powers of the regulatory authorities, is appropriate in the methodology with regard to efficiently incurred costs.
- (21) In its feedback of 1 December 2020, Baltic Cable provided further clarifications of its position. In ACER's view, these clarifications do not provide additional new arguments compared to the ones provided in its feedback of 15 September 2020 and summarised and assessed above.