ALL NEMO COMMITTEE

NEMO Committee's reply to European Commission's Consultation on the revision of the Capacity Allocation and Congestion Management Regulation

Contents

1 Introduction

Please find below the NEMO Committee reply to European Commission's Consultation on the revision of the Capacity Allocation and Congestion Management Regulation. Please note that it lists of two parts, the Legal assessment of the establishment of a Single Legal Entity and Answers to the questions included in the targeted Stakeholder Consultation Paper.

Please note that throughout our response, we often refer to the joint NEMO-TSOs Advocacy paper, which is available here: https://nemo-committee.eu/publication-detail/joint-tso-nemos-cacm-20-amendment-advocacy-report for ease of reference.

2 Legal assessment of the establishment of a Single Legal Entity

According to ACER's proposal for the amendment of CACM Regulation (CACM 2.0), in particular Article 14 of Annex 1 of the ACER Recommendation N. 02/2021, all NEMOs and all TSOs will have the legal obligation to establish one Single Legal Entity to perform all the MCO tasks. Besides the complete lack of any cost-benefit analysis in ACER's recommendation, the proposal to establish such Single Legal Entity neither allows to assess the corporate, operational and financial consequences of a proposal described only in its abstract features, nor reflects the potential infringements of the European Law.
Regarding this second point, NEMOs consider that, if the proposal of the Single Legal Entity in the CACM 2.0 would be effectively introduced in the recast of CACM by EC, it could be challenged

- by the committee established pursuant to Article 5 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the European Commission's exercise of implementing powers,

and/or

- before the European Court of Justice (CJEU) on the basis of Article 263 of the TFUE against the Article 291 of the TFUE,

with respect to the following legal issues.

2.1 Legal Issue No 1 – Lack of competence and Infringement of a rule of law relating to the application of the Treaties

1. The principal legal basis for the cooperation between NEMOs and TSOs in respect of the SIDC and the SDAC is Article 7 of the Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (Regulation 2019/943) which states the following:

*"**Transmission system operators and NEMOs shall jointly organise the management of the integrated day-ahead and intraday markets in accordance with Regulation (EU) 2015/1222.** Transmission system operators and NEMOs shall cooperate at Union level or, where more appropriate, at a regional level in order to maximise the efficiency and effectiveness of Union electricity day-ahead and intraday trading. The obligation to cooperate shall be without prejudice to the application of Union competition law. In their functions relating to electricity trading, transmission system operators and NEMOs shall be subject to regulatory oversight by the regulatory authorities pursuant to Article 59 of Directive (EU) 2019/944 and ACER pursuant to Articles 4 and 8 of Regulation (EU) 2019/942."*

2. According to Article 58.1 of the Regulation 2019/943:

"*The Commission may, subject to the empowerments in Articles 59, 60 and 61, adopt implementing or delegated acts. Such acts may either be adopted as network codes on the basis of text proposals developed by the ENTSO for Electricity, or, where so provided for in the priority list pursuant to Article 59(3), by the EU DSO entity, where relevant in cooperation with the ENTSO for Electricity, and ACER pursuant to the procedure in Article 59, or as guidelines pursuant to the procedure in Article 61*."
Such network codes and guidelines must comply with the conditions set forth in article 58.2 of the Regulation 2019/943, namely:

1) *ensure that they provide the minimum degree of harmonisation required to achieve the aims of this Regulation;*
2) *take into account regional specificities, where appropriate;*
3) *not go beyond what is necessary for the purposes of point (1); and*
4) *be without prejudice to the Member States' right to establish national network codes which do not affect cross-zonal trade.*

3. ACER and the European Commission notified their intention to amend the CACM on the basis of Article 60(3) of the Electricity Regulation[1]. Such legal basis indicates the amended CACM will take the form of a network code pursuant to article 59 of the Regulation 2019/943. Such legal basis is confirmed in the ACER Recommendation which state that the "CACM Regulation relates to the area of 'capacity allocation and congestion-management rules' under 59(1)(b) of the Electricity Regulation"[2].

4. Article 59 of the Regulation 2019/943 determines in which areas the European Commission (EC) is empowered to adopt implementing acts, by establishing network codes, in order to ensure uniform conditions for the implementation of the Regulation 2019/943.

Article 59.1 (b) of the Regulation 2019/943 refers to the following area:

[1] See the letter 'Results of the scoping phase for the ACER recommendation on reasoned proposals for amendments to the CACM Regulation', from ACER to European Commission, 23 December 2020, Ref. acer.ele.dir(2020)8790419 and the letter 'Request for ACER recommendations on reasoned proposals for amendment to the CACM Regulation', from European Commission to ACER, 20 January 2021.

[2] Paragraph 21 of Recommendation N° 02/2021 of ACER of 17 December 2021 on reasoned proposals for amendments to the Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (https://extranet.acer.europa.eu//Official_documents/Acts_of_the_Agency/Recommendations/ACER%20Recommendation%2002-2021%20on%20CACM.pdf).

"*capacity-allocation and congestion-management rules implementing Article 6 of Directive (EU) 2019/944 and Article 7 to 10, Articles 13 to 17 and Articles 35 to 37 of this Regulation, including rules on day-ahead, intraday and forward capacity calculation methodologies and processes, grid models, bidding zone configuration, redispatching and countertrading, trading algorithms, single day-ahead and intraday coupling, the firmness of allocated cross-zonal capacity, congestion income distribution, cross-zonal transmission risk hedging, nomination procedures, and capacity allocation and congestion management cost recovery*;" (our emphasis).

5. Implementing acts are binding acts that enable the EC to set conditions that ensure that EU laws are applied uniformly[3]. Their only aim is to set uniform conditions for the implementation of the act which empowers the EC to adopt implementing acts (art. 291 TFEU).

6. The nature of implementing acts was clearly described by Advocate-General Cruz Villalon in its opinion of 19 December 2013[4] :

"*48. Third, in a similar way to the delegation to the Commission under Article 290 TFEU of regulatory powers that prima facie belong to the domain of legislative acts, in this case the ability to adopt implementing acts is given to the Commission as a result of the need to lay down 'uniform conditions for [implementation]' across the whole extent of the European Union. In fact, in the normal course of events, implementing powers belong mainly to the Member States. They may be used by the European Union, and within the Union by the Commission as the institution which has 'coordinating, executive and management functions, as laid down in the Treaties' (Article 17(1) TEU), (19) only in a subsidiary capacity (under Article 5(1) TEU).*

49. Article 291(2) TFEU is therefore primarily a rule that empowers the European Union, through the Commission, to use, in a subsidiary manner, a competence that belongs to the Member States.

50. Unlike the case of Article 290 TFEU, this empowering is not triggered merely by a decision of the legislature but by an objective cause: the need for uniform conditions for implementing legally binding EU acts. This need makes it possible, in terms of subsidiarity, for the institutions to adopt implementing measures that, in principle, fall within the remit of the Member States. "

In its decision of 5 September 2012[5] the European Court of Justice (CJEU) decided the following in this respect:

"64 According to settled case-law, the adoption of rules essential to the subject-matter envisaged is reserved to the legislature of the European Union (see, to that effect, Germany v Commission, paragraph 36; Case C-104/97 P Atlanta v European Community [1999] ECR I-6983, paragraph 76; and C-356/97 Molkereigenossenschaft Wiedergeltingen [2000] ECR I-5461, paragraph 21). The essential rules governing the matter in question must be laid down in the basic legislation and may not be delegated (see, to that effect, Case C-156/93 Parliament v Commission [1995] ECR I-2019,

[3] See L. HANCHER and A.-M. KEHOE JULIUS RUMPF, "The EU electricity network codes and guidelines: a legal perspective", available via fsr-the-eu-electricity-network-codes.pdf (apren.pt) [chapter 2.3, p.12ff]

[4] Opinion of Adv.-Gen Cruz Villalon, 19 December 2013, C-427/12, EC v European Parliament – Council of the European Union, available via https://curia.europa.eu/juris/document/document.jsf?text=%2522implementing%2Bact%2522&docid=145883&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1646170#ctx1.

[5] C-355/10 European Parliament v Council and Commission.

paragraph 18; Parliament v Council, paragraph 23; Case C-48/98 Söhl & Söhlke [1999] ECR I-7877, paragraph 34; and Case C-133/06 Parliament v Council [2008] ECR I-3189, paragraph 45).

65 Thus, provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature cannot be delegated.

66 It follows from this that implementing measures cannot amend essential elements of basic legislation or supplement it by new essential elements."

In addition, in its decision of 15 October 2014[6] the European Court of Justice (CJEU) further decided the following in this respect:

"44 […] it is settled case-law that, within the framework of the Commission's implementing power, the limits of which must be determined by reference amongst other things to the essential general aims of the legislative act in question, the Commission is authorised to adopt all the measures which are necessary or appropriate for the implementation of that act, provided that they are not contrary to it (judgments in Netherlands v Commission, C-478/93, EU:C:1995:324, paragraphs 30 and 31; Portugal v Commission, C-159/96, EU:C:1998:550, paragraphs 40 and 41; Parliament v Commission, C-403/05, EU:C:2007:624, paragraph 51; and Parliament and Denmark v Commission, C-14/06 and C-295/06, EU:C:2008:176, paragraph 52).

45 Furthermore, it follows from Article 290(1) TFEU in conjunction with Article 291(2) TFEU that in exercising an implementing power, the Commission may neither amend nor supplement the legislative act, even as to its non-essential elements."

The above quoted articles and jurisprudence show that implementing acts can thus only impose measures as far as such measures are needed to achieve harmonization amongst Member States and they cannot amend or supplement the act on which they are based.[7]

7. It follows from the aforementioned quoted articles that where the EC would adopt an act (whether a network code or a guideline) to regulate capacity allocation and congestion management, such act can only be an "implementing act", in which only Member States are involved in the approval process without the participation of the European Parliament.

[6] C-65/13, European Parliament vs European Commission, 'EURES Network', 15 October 2014.

[7] They are to be distinguished from delegated acts. Pursuant to Article 290.1 a legislative act may delegate to the EC the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. In this case, the EC is entitled to amend certain elements of the legislative act, but only to the extent they are non-essential. As well known, there is a substantial difference between "implementing acts" and "delegated acts" with regard to the magnitude of the changes that the each of these two kinds of act is allowed to implement. In fact, while Member States (MS) and the European Parliament (EP) both play a role in approving the "delegated acts", only MSs (not also the EP) approve the "implementing acts". The reason behind this difference lies on the fact that "implementing acts" should be limited to the detailed implementation of existing primary EU legislation, and should not propose major changes, which are not already foreseen in there. Such major changes could only be implemented, potentially, through "delegated acts" whose approval is also participated by the EP.

As a consequence, in line with CJEU juris prudence[8], the EC is only allowed to propose measures that ensure a harmonized implementation of the act on which it is based (i.e. Regulation 2019/943) but not to regulate new elements, not foreseen by that act.
In this sense, the compulsory establishment of a Single Legal Entity for the management of MCO task, as proposed by ACER, must be considered a "major change" since it introduces a new essential element which cannot be, even implicitly, inferred from Regulation 2019/943 and can thus not be introduced *ex novo* via the CACM.
Indeed, neither Article 59.1 (b) nor Article 61 of the Regulation 2019/943 assign any powers to the EC in respect of establishing rules or requirements regarding the legal form under which the TSOs and NEMOs cooperate.

8. In addition, the compulsory establishment of a Single Legal Entity for the MCO function, as proposed by ACER, would constitute not only an act of exceeding power by the EC but also an infringement of Article 7(1), in conjunction with Article 2(8), of the Regulation 2019/943.

Article 7 (1) of the Regulation 2019/943 as quoted above, does in no way foresee the obligation for the TSOs and NEMOs to set up a Single Legal Entity to perform all the MCO tasks.
According to NEMOs understanding Article 7(1) of the Regulation 2019/943 clearly leaves the manner in way the NEMOs and TSOs cooperate to achieve the indicated goal, up to the NEMOs and TSOs, in line with the fundamental freedom to conduct a business as laid down in the Article 16 of the Charter of the Fundamental Rights of the European Union.
As to the organisation and operation of the MCO function, it follows from the definition of the term "NEMO" set forth by Regulation 2019/943 that this task is assigned to NEMOs, not to any Single Legal Entity to be set up together with TSOs. Article 2(8) of the Regulation 2019/943 indeed defines the NEMO as follows: *"nominated electricity market operator' or 'NEMO' means a market operator designated by the competent authority to carry out tasks related to single day-ahead or single intraday coupling".* Since the establishment by the TSOs and the NEMOs of a Single Legal Entity to perform the MCO function is not provided in the Regulation 2019/943, the introduction of such a requirement by the EC, while exceeding the limits of the implementing powers granted to the EC by this regulation, would be inconsistent with the *single day-ahead or single intraday coupling* set-up established by Article 7(1), in conjunction with Article 2(8), of the Regulation 2019/943.

9. Furthermore, the compulsory establishment of a Single Legal Entity for the MCO function would violate article 58 of Regulation 2019/943. Such obligation would go beyond what is necessary for the purpose of ensuring that the network codes or guidelines provide the minimum degree of harmonisation required to achieve the aims of the Regulation 2019/943, since such minimum harmonisation can equally be achieved via other means than a Single Legal Entity performing the MCO function, and it is not clear why a Single Legal Entity would be needed to ensure such harmonisation.

In this respect, NEMOs would like to highlight the ruling provided by the CJEU (C-65/13, European Parliament v. Commission ("EURES Case")) which states that "*The Commission must be deemed to provide further detail in relation to the legislative act if the provisions of the implementing measure adopted by it (i) comply with the essential general aims pursued by the legislative act and (ii) are necessary or appropriate for the implementation of that act without supplementing or amending it."*

[8] See above.

The consideration that it goes beyond an implementing act to create a Single Legal Entity is further confirmed by the fact that other EU entities such as the European association for the cooperation of transmission system operators for electricity (ENTSO-E) and the Association for the European Distribution System Operators (EU DSO Entity) have been legally set up, respectively, by the Regulation (EC) 714/2009 and by the Regulation 2019/943, not by means of an "implementing act" of such Regulations or, even worse, by means of an "implementing act" unduly supplementing the act which confers implementing powers on the Commission.

2.2 Legal Issue No 2 –Inappropriateness

10. Furthermore, the establishment of a Single Legal Entity would be furthermore inappropriate to further increase the efficient functioning of single day-ahead and intraday coupling.

As is well known, the comitology process pursuant to Regulation (EU) No 182/2011 shall assess whether the establishment of a Single Legal Entity is appropriate, in accordance with Recital 14 of Regulation (EU) No 182/2011[9]

As thoroughly explained in the "Advocacy Paper" and in the replies to the current EC consultation, submitted to EC by NEMOs and TSOs, the appropriateness of the establishment of a Single Legal Entity must be evaluated, *in primis*, with respect to whether it increases the efficient functioning of market coupling.

In this respect NEMOs would like to highlight again that the centralized operational role of a Single Legal Entity would not be appropriate, as it would increase the operational risks of the single day ahead and intraday coupling and delay the delay the implementation of projects which are the key concrete goals of European market coupling, and provide immediate benefits to the EU economy, especially in the current geopolitical environment. In other words, the establishment of a Single Legal Entity would not address the main alleged root causes underlying the complexity of, and the delays in, the market coupling development. Such root causes can only be solved by other means. For example, issues related to complex decision making shall be effectively managed with the introduction of the JDMB and the QMV, while the complexity in the planning and the delays in the delivery often stem from the local activities of NEMOs and TSOs, including the management of national legally binding requirements, something that the NEMOs and TSOs have no power to change. Other causes of complexity are the need (and legal obligation) to ensure that the projects are delivered in a robust manner, that does not put at risk the operation of market coupling - something which can only be done by drafting highly specific implementation requirements, testing extensively prior to any project go live, and taking into account the interdependencies between projects.

Please refer to the answer to questions No 6 and 7 of the Consultation for a specific explanation of such inappropriate and adverse effect.

2.3 Legal Issue No 3 – Disproportionate restriction of freedom

11. Besides the considerations mentioned above regarding the (exceeding of the) powers granted to the EC, the NEMOs are of the opinion that the mandatory obligation to set up a Single Legal Entity to perform the MCO function, constitutes a disproportionate restriction of the freedom of the different NEMOs (and TSOs) to conduct their business as set forth in Article 16 of the Charter of Fundamental Rights of the European Union (the "Charter"). According to Art. 51 of the Charter the provisions of the Charter are "addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity".

12. The aim of article 16 of the Charter is to safeguard the right of each person in the EU to pursue a business without being subject to either discrimination or disproportionate restrictions[10].

The freedom to exercise an economic or commercial activity includes the freedom to decide how to organise such economic activity. In the context of EU-wide or cross-border activities, such freedom is also confirmed by the freedom of establishment and of service provision as laid down in the TFEU.
Although the freedom to conduct a business is to be exercised with respect for "Union law and national legislation", according to Article 52 of the Charter "*any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*."
The freedom to conduct a business thus acts as a limit on the actions of the Union in its legislative and executive role as well as on the actions of the Member States in their application of European Union law.[11]
In the case at hand, it is insufficiently demonstrated why the requirement of a Single Legal Entity is necessary and genuinely meets the objectives pursued by Regulation 2019/943 and how the same objectives cannot be achieved through less far-reaching measures, such as a cooperation between the involved entities based on a contract.

2.4 Legal Issue No 4 – Principle of subsidiarity

13. The subsidiarity principle requires the EU to act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level. The compliance with this fundamental principle of EU is particularly challenging when EU legislation is established via implementing acts, as highlighted in point 5 above.

[10] European Agency for Fundamental Rights, 'Freedom to conduct a business, exploring the dimensions of a fundamental right', p. 21, available via https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-freedom-conduct-business_en.pdf.

[11] See Opinion of Adv. Gen. C. Villalon, C-426/11, Alemo-Herron and Others v. Parkwood Leisure Ldt., n° 50.

14. Subject to being competent within the scope of shared competence between the EU and the Member States (principle of conferral), the EU may intervene if it is able to act more effectively than Member States (principle of subsidiarity) and if the action does not exceed what is necessary to achieve the objectives set by the Treaties. Protocol No 2 to the TFEU on the application of the principles of subsidiarity and proportionality sets further details on the principle of subsidiarity but applies only to legislative acts.

15. The proposal to establish a Single Legal Entity for the management of MCO task is still not supported by an appropriate impact assessment providing sufficient information that shows clearly and unequivocally the advantages of taking action at EU level rather than at Member State level and, consequently, demonstrate its compliance with the principle of subsidiarity.

16. In this respect, NEMOs would like to further highlight that the MCO function has been established and is currently being operated by entities designated at national level under the jurisdiction of NRAs. During the Comitology process, Member States and the Commission have a duty to assess whether removing such an essential function from NEMOs and transferring it to a new is at all consistent with the principle of subsidiarity.

3 Answers to the questions included in the targeted Stakeholder Consultation Paper

Title I - General provisions	
1. While in the original CACM the market coupling was based on exchange of electricity across bidding zones, ACER proposal is based on exchanges of electricity between Nominated Electricity Market Operator (NEMO) trading hubs. ACER concludes that this would make it easier for individual NEMOs in the market to get access to market coupling as they would no longer need to agree on separate multi-NEMO arrangements (MNA) with existing NEMOs/TSOs in a bidding zone. Do you agree with this approach and the stated benefits? If not, why?	NEMOs believe that ACER did not clearly explain the rationale behind their proposal, or how to implement it from an operational perspective. **With regards to ACER's proposed objectives:** NEMOs understand that ACER aims foster competition among NEMOs by enabling them to become operational simply by signing a bilateral contract between NEMOs and the Legal Single Entity (LSE) on the one hand, and presumably the LSE and the TSOs on the other, and by removing the existing MNAs. These new arrangements would make the LSE the single point of contact between NEMOs and TSOs. ACER's proposal does not achieve this goal for the reasons explained below. Currently, the MNAs define several key pre and post- coupling tasks, including, among others: • the exchange of technical information among NEMOs and TSOs, • performing the shipping tasks, • managing cross clearing and settlement between NEMOs and • defining the principles of the regional decoupling procedures. The exchange of technical information between NEMOs and TSOs often differs between MNAs because NEMOs and TSOs must abide to different national legal requirements, which are not in the NEMOs and TSOs' power to change. Furthermore, such local requirements are there to meet specific local needs and may not be easily prone to further harmonisation. This means that the LSE will have to meet centrally a wide range of requirements, which are now dealt with by NEMOs and TSOs through each MNA. Meeting such a wide array of national

	requirements will render the functioning of the LSE cumbersome and unwieldy and increase the risk of operational failure compared to today's arrangements, which reduce risk by managing it on a decentralised basis. Please note that the operational risks described above would be additional to the other operational and financial risks already highlighted by the NEMO Committee in the joint NEMO-TSO Advocacy paper and further detailed in the response to this consultation. **The only way to truly simplify the operation of the LSE in respect of the information exchange that must occur between NEMOs and TSOs to enable market coupling would be to harmonise the underlying national requirements – something that ACER has not proposed.** The NEMO Committee notes that the other two key pillars of the existing MNAs - fallback procedures and cross-clearing could be harmonised by means of the fallback and cross-clearing methodologies proposed in Articles 42 and 45 of ACER's Recommendation. Considering the above, NEMOs believe that the objectives set out in ACER's proposal can be more easily reached by creating a new 'MNA methodology' which would: • Harmonise, to the extent that this is legally and operationally feasible, the criteria for the exchange of technical information between NEMOs and TSOs. As mentioned above, there may be limits to the extent to which NEMOs and TSOs would be legally able to achieve further harmonisation where binding local requirements are concerned, as we understand that many of these can be removed only by the national competent authorities and/or by pan-European legislation. • Harmonise the existing fallback procedures, now included in the various MNAs, by means of the proposed single pan-European day ahead timings and procedure referred to in Article 42 of ACER's Recommendation • Harmonise the existing NEMO to NEMO clearing and settlement frameworks through the new methodology for clearing and settlement between the NEMO trading hubs, proposed in Article 45 of ACER's Recommendation

	With regards to operational considerations concerning the performance and robustness of the SDAC Algorithm: NEMOs and TSOs initial assessment indicates that, from an operational perspective, ACER's proposal to "couple Nemo Trading Hubs (NTHs) rather than Bidding Zones (BZs)" would require to change the network topology, and increase its granularity from today's BZ level, to the NTH level. This change has far-reaching consequences, which were already assessed during the first phase of the CACM implementation. These simulations showed that including NTHs directly in the network topology would increase substantially its complexity, and severely degrade algorithm performance. Incidentally, such impact will be even greater once the network constraints related to the 15 Min MTU implementation are included. As a consequence, NEMOs and TSOs selected the current network topology, which includes only BZs, and where NTHs and Scheduling Areas (SAs) are managed by the algorithms after the computation of the market coupling results is completed. In light of the above, the changes proposed by ACER is simply infeasible, as it would degrade the performance and robustness of the Algorithm and breach the proposed Article 28(1)(c)i. As a final consideration, NEMOs agree that setting up the MNAs was a very complex process, both because the MNAs were conceived as regional agreements, potentially creating misalignments among Regions – e.g. with regards to the fallback procedures - and because each MNA must meet a set of local requirements which are set in national regulations. Nevertheless, the MNA are now in force and are easily accessible, so the theoretical benefit expected from moving from coupling Bidding Zones (BZs) to coupling Nemo Trading Hubs (NTHs) appears negligible – and becomes an unmanageable risk once the operational risks of changing the network topology are taken into account.
2. Publication of information and transparency: do you consider the new article 8 sufficient to address current transparency concerns? Would you see further aspects to tackle or data to be published?	First, NEMOs would like to highlight that they already provide a wealth of data, either pursuant to legal requirements from the Regulation 543/2013 (ENTSOE Transparency Platform) or on a voluntary basis through their own website. Therefore, the "current transparency concerns" pointed out by the European Commission shall be explained further before any action is taken.

	Moreover, the requirement to publish the NEMO data through the ENTSOE Transparency Platform does not take into account that NEMOs already have their own publication website. Therefore, NEMOs consider that all relevant information shall be published by NEMOs and TSOs provided that commercial usage of such information from third parties shall be properly treated.
3. Do you have any other comments on Title I - General Provisions?	As regards stakeholders involvement, we support the initiative in Art. 5 and in fact NEMOs and TSOs have already established the Market Coupling Consultative Group as foreseen in Art 5, former Art. 11. NEMOs consider that the principle of delegation of tasks referred to in the new article 13B should be allowed also for the MCO tasks.
Title II - Organisation of market coupling and of capacity calculation	
Chapter 1 – designation of NEMOs	
4. Do you consider the review of national legal monopolies proposed in article 11 a necessary/sufficient measure? Which alternatives would you see?	
Chapter 2 - Market coupling governance and organisation	
5. The article 13 sets that NEMOs together with TSOs shall establish a joint decision making body, taking decisions related to the management of the integrated single day-ahead and intraday coupling based on the qualified majority voting rules set in article 4. Do you see any risks or inadequacies to this proposal? If so, what alternative/improvement would you suggest?	NEMOs support the proposal to establish a Joint Decision Making Body (JDMB) and to take the decisions related to the management of market coupling based on Qualified Majority Voting rule (QMV). In this regard, NEMOs point out that such principle is one of the cornerstones of the so called "Evolutionary proposal" agreed by NEMOs and TSOs to advance in the implementation of an effective and efficient market coupling and that, as part of the so called "early implementation of Evolutionary proposal", they recently established the Market Coupling Steering Committee (MCSC), which embeds the pre-existing SDAC and SIDC SCs,. In respect of the QMV rules, NEMOs and TSOs have introduced some minor differences in relation to few selected topics:

	a) the computation of the blocking minority was modified to require "TSOs representing in full at least four Member States or four individual NEMOs" in case of TSO only or NEMO only decisions and "eight individual TSOs and/or NEMOs" for joint decisions. Such solution was conceived to take into account the specificities for TSOs of the German case (the only with 4 TSOs in one MS) and of NEMOs (where some NEMO could easily represent more MSs owing to the fact that some NEMOs operate in several Member States); b) the QMV rule is applied only to non-operational decisions. As for the NEMO only decisions (except for the product methodology and the HMMP methodology, where the standard CACM QMV applies), NEMOs implemented the so called ANCA QMV, which assigns one vote to each NEMO and assumes the qualified majority is reached when 75% of the votes are aligned. The reason for such a choice is that - given the structural difference between NEMOs and TSOs in relation to market shares but also international expansion – this mechanism avoids providing unilateral blocking power to any individual NEMO, or joint decision making power to a few specific NEMOs. For further details on the above, please refer to the NEMOs' and TSOs' CACM 2.0 Advocacy Paper. Please also note that, in order to ensure consistency with the above and to improve the efficiency of the decision-making processes, NEMOs unilaterally decided to apply the ANCA QMV decision making rule also to all the NEMO-only decisions, included those described in the NEMO-only agreements, with the exception of the operational decisions.
6. The article 14 provides for the establishment of a single legal entity performing the MCO tasks. In your view, what would be the challenges and conditions for a successful set-up? Do you have any suggestions to improve the current proposal (for example in terms of accountability/liability of the entity, regulatory oversight, efficient and effective decision making, etc.) ?	We strongly oppose the proposal to establish a Legal Single Entity (LSE) to perform the MCO tasks. As already explained in Section 2 above (Legal assessment), this proposal presents several significant legal issues and does not fit with the current EU regulatory framework, since the establishment of a LSE to operate SDAC and SIDC is not foreseen in Regulation 2019/943. In summary these issues are: 1) Implementing regulations, such as the recast of CACM, can neither amend nor integrate the provisions stated in the primary legislation (in our case Regulation 2019/943) but only provide further details. The establishment of the Legal Single

	Entity via the recast of CACM is clearly an amendment or integration of Regulation 2019/943. Moreover, the establishment of the Legal Single Entity is inconsistent with the fundamental features of market coupling set forth in Regulation 2019/943, since the definition of NEMO set therein clearly assigns the market coupling tasks to NEMOs. 2) The establishment of the Legal Single Entity is a disruptive solution inconsistent with the appropriateness criteria included in Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the European Commission's exercise of implementing powers. 3) The mandatory obligation to set up a Single Legal Entity to perform the MCO function, constitutes a disproportionate restriction of the freedom of the different NEMOs (and TSOs) to conduct their business as set forth in Article 16 of the Charter of Fundamental Rights of the European Union (the "Charter"). According to Art. 51 of the Charter the provisions of the Charter are "addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity". 4) The establishment of the Legal Single Entity breaches the principle of subsidiarity which is one of the fundamental principles of the European Union established by the Treaty on the Functioning of the European Union (TFUE). For a specific explanation of the legal issues listed above, please refer to Section2 above (Legal assessment of the establishment of a Single Legal Entity),. Moreover, NEMOs consider that the proposed Legal Single Entity (LSE) would be costly and would take a long time establish, especially because trained personnel on contractual, operations and developments cannot be created from scratch. Furthermore, NEMOs consider that the process of establishing the LSE, despite a deadline set in 2028, would inevitably impact the ongoing and challenging activities related to finalization of CACM implementation (for example 15 mins, extensions, flow-based, co-optimization), both because setting up the LSE would absorb a lot of human resources and because it would introduce a wide set of uncertainties in the planning and delivery of ongoing activities. NEMOs also point out that the establishment of the LSE would not, in itself, address the main alleged root causes of the complexity and delays of the market coupling development.

	The issues related to complex decision making shall be effectively solved by the introduction of the JDMB and the QMV, -while the complexity in the planning and the delays in the delivery are widely rooted in: - the local activities of NEMOs and TSOs, including management of local requirements, often stemming from national legislations, - the need to define a detailed specification of the projects' requirements, - the need to carry out extensive testing prior to the go live of any project, to ensure the operational robustness of market coupling operations and - the need to take into account interdependencies between projects. In the NEMOs' view, it is clear that the above-mentioned issues would not be addressed or solved by the establishment of the LSE. Due to its size and systemic importance, the LSE would concentrate a huge operational and financial risk into a single point of failure – something that is not the case today. Instead of making the MCO operations stronger, ACER's proposal would make them weaker, creating risks in the most important timeframe (day ahead), which today are manageable and whose impact at pan-European level is kept to a minimum precisely due to its decentralised nature. NEMOs would also like to point out that, contrary to what was stated by ACER in its Initial Impact Assessment [12], the LSE would have not avoided the three decoupling events, which were caused by local problems incurred by individual NEMOs and not by a failure of the MCO function. Also the current IT investments on NEMO side which were financed to a large extent (via the cost recovery process) by the EU consumers, would be lost, resulting in unjustifiable stranded costs. With regards all the issues described above, NEMOs criticise the complete lack of any cost-benefit analysis from ACER's side, which does not allow to assess the operational and financial consequences of a proposal described only in its abstract features.

[12] See Annex 3 to ACER's Recommendation No 02/2021 – Initial impact assessment on the market coupling organisation, page 6, point 12..

	On this topic, NEMOs share the concerns pointed out by some NRAs according to paragraph 109 of ACER's Initial Impact Assessment: "As outlined above, some NRAs disagree with this conclusion and consider that the case for implementing a single legal entity is not yet solid. These NRAs consider that the current set-up where MCO tasks are performed by all (or some) NEMOs is fit for purpose, as long as the basic policy changes and the joint decision-making body including the qualified majority voting are implemented. These NRAs fear that major changes to the current set-up like the establishment of a single legal entity performing the MCO tasks would lead to delays and distract the cooperative spirit in the delivery of the implementation of the internal market by TSOs, NEMOs and NRAs. The main concern of these NRAs is that NEMOs and to some extent TSOs will reduce collaboration if they are faced with the prospect that five years later MCO tasks will be at the responsibility of the single legal entity. Furthermore, these NRAs doubt that the benefit of a centralised set-up would outweigh the costs and call for further investigation of the different options." For further details on what described above, please refer to the NEMOs' and TSOs' CACM 2.0 Advocacy Paper.
7. If no single legal entity were set up, would you have further proposals to improve the current governance framework (including current voluntary set up), and strengthen effectiveness of the decision making process?	In their CACM 2.0 Advocacy Paper, NEMOs and TSOs already illustrated an alternative solution to the establishment of a LSE, usually referred to as "Evolutionary proposal". NEMOs and TSOs are already in the process of implementing their proposed solution, as they consider it urgent and beneficial independently on the outcome of the CACM review process. The main features of such proposal are listed below: • *Governance.* NEMOs and TSOs already established a JDMB, which will take decisions via QMV, in line with ACER proposal. The first meeting of the new entity took place on 2-3 February 2022. NEMOs are also extending the QMV principle, according to so called ANCA rule, to all NEMO-only decisions, to support in a coherent way the overall implementation process. • *Consultative group.* NEMOs and TSOs are already establishing a Consultative Group open to Market Participants, to facilitate the exchange of views related to market coupling

	operations and development and to ensure a timely assessment of the needs and issues reported by market participants. The first meeting is planned for May 31st 2022. • *Equal footing.* Further improvements to strengthen the NEMO-TSO cooperation and ensure a full equal footing of all NEMOs and TSOs with respect to the management of MCO assets are being debated among NEMOs and TSOs, with the goal to establish them by the end of 2022. This process could involve the modification of some relevant NEMO contracts to ensure that all NEMOs and TSOs are fully involved in all the development and operational decisions related to the MCO assets (even though the NEMOs will keep managing directly the technical operation of the MCO assets), have full access to all information related to the MCO assets and have direct access to the MCO service providers. • *Cross clearing.* NEMOs consider that the approval of standard clauses related to cross clearing among NEMOs, by means of a new, dedicated methodology, would represent a powerful tool to significantly reduce negotiation complexities, costs and risks for barriers to entry of new entrant NEMOs. • *Cost sharing.* Similarly, NEMOs support the introduction of a new cost sharing methodology, which would be based on the experience gathered during the first years of the application of CACM and would ensure that cost sharing does not put at risk the timely development decisions due to the risks of cost recovery.
8. Article 16 proposes a framework for a NEMO of last resort in case no NEMO is operating in a bidding zone: Would you suggest other alternatives?	NEMOs consider the solution of a Last Resort NEMO (LRN) as a very costly "insurance" against an extremely unlikely event. Some of the proposal's shortcomings include the fact that the cost related to procuring a trading platform, building up training and maintaining a trading room with related assets and personnel, creating and signing default "clearing arrangements" between the LRN and all the Market Participants active in the EU power market, establishing a default payment system connecting the LRN with all the market participants, etc.. have not been considered by ACER. This is a further example of the risks of assessing a technical solution, without any proper cost-benefit analysis. In addition, according to ACER, the amendments proposed regarding NEMO designation and passporting entail a "reduced risk of being left without a NEMO". Therefore, this very limited risk does not justify such a costly solution.

	Furthermore, ACER's proposal, which assigns such role to the LSE, lacks any appropriate description of the organizational arrangements and of the related operations that would be required (none of the elements listed above is mentioned in the ACER proposal, nor in its Impact Assessment). NEMOs believe instead that a sufficient measure to manage the risk of lack of a NEMO in one bidding zone would be the provision of an appropriately long "early notification time" for NEMOs wanting to quit their market. A proposal was advanced by NEMOs during the hearings led by ACER and ultimately included by ACER in its draft proposal for CACM reform. Finally, we consider that each NRA should be responsible to ensure that there is a NEMO active in the corresponding Member State. This responsibility should not be transferred to other parties. For further details on what described above, please refer to the NEMOs' and TSOs' CACM 2.0 Advocacy Paper.
9. Do you have any suggestions on how regulatory oversight can be further improved, in order to ensure a smooth and efficient development of the market coupling?	NEMOs believe that the Yearly Workplan proposed by ACER in its draft proposal for CACM reform should include a full description of proposed implementation roadmap, inclusive of details like the description of the deliverables, the timing for final delivery and intermediate milestones, the description of working assumptions related to the definition of the requirements and the implementation planning, the identification of the Parties in charge of - or involved in - the delivery. A similar Master Plan, proposed by NEMOs during the hearings led by ACER, would allow a timely identification of the delays, the related reasons and the involved Parties, making them accountable to the relevant NRAs. Furthermore, NEMOs proposed to ACER to consider the establishment of a coordinated monitoring mechanism for the NRAs via ACER, in order to improve the enforceability of any decision.
Chapter 3 - MCO tasks and responsibilities	
10. Do you agree with the proposed definition of tasks and responsibilities, and their assignment	NEMOs generally agree with the proposed definitions of MCO tasks, which they contributed to draft together with ACER since the beginning of ACER's assessment of the MCO tasks and

to the different entities? If not, what would you change and why?	responsibilities. A major exception is the concept of last resort NEMO, which NEMOs contest as such and even if applied could not be described and treated as an MCO task. As for the assignment of MCO tasks, NEMOs considered that: • The operations of the MCO function should be retained as a NEMO responsibility according to the existing rotational system, as this has proven reliable, provided a redundancy of back-up solutions which in certain occasions prevented decoupling situations and do not increase the Common Costs (which include only the cost of the so called coordinator and back up coordinator, while the cost of the further operators being idle is a local cost incurred by the individual NEMOs and eventually recovered locally, if approved by the local NRA). • The cross clearing should be handled according to the existing multilateral approach, because the main reduction of costs and complexities would come from the establishment of the previously mentioned methodology on cross clearing arrangements, while centralizing the cross clearing in one entity would provide limited additional saving and introduce the risk of a single point of failure. For further details on what described above, please refer to the NEMOs' and TSOs' CACM 2.0 Advocacy Paper.
Chapter 4 – Costs	
11. Do you consider the new methodology on eligible costs of MCO and joint decision making body will increase transparency and help to improve the current cost sharing/cost recovery process? Do you have suggestions for improvement?	NEMOs consider positively ACER proposal referred to the new methodology on eligible costs and to draft a joint NEMO-TSO methodology to allocate and recover the MCO and joint decision making body common and regional costs. However, NEMOs note two main flaws in the current proposal. 1) The proposal does not include the national/individual NEMO costs – which are a substantial part of the total costs. NEMOs believe that the suggested cost methodology should also include criteria for the allocation and potential recovery of national/individual NEMO costs. Otherwise, NEMOs and TSOs will only contribute to MCO tasks as long as the corresponding costs will be categorised and recovered as common costs.

	2) The proposal falls short of harmonising the key distorting element (mainly an issue for competitive NEMOs) – i.e. the lack of harmonised cost recovery provisions. No methodology will be able to redress this, as harmonisation of cost recovery is a national NRA prerogative. NEMOs also note that in some MNA areas cost recovery has been extremely slow, and the concerned NEMOs are still awaiting cost recovery for the year 2017.
12. Do you detect any risks in the current cost sharing/recovery provisions, or have any suggestions for improvement?	As stated in the answer to the previous question, NEMOs see several limitations and risks in the current cost recovery provisions. 1) In MNA areas, these are not harmonised. This results in competitive distortions in such areas. As cost allocation and recovery is proportional, for the most part, to the volumes traded by each MNA NEMO in the concerned Member State (MS), then the MNA NEMOs which have the bulk of their traded volumes (TV) in the MS(s) with the most favourable cost recovery framework will benefit more compared to those MNA NEMOs whose TV bulk is located in MS with less favourable arrangements. 2) We do not see a clear deadline for the actual payment of cost recovery contributions. Some NRAs in MNA MSs have proven extremely slow in granting cost recovery, placing an undue burden on the NEMOs operating in these MS. 3) The distortions described above will not be redressed by the proposed cost recovery methodology, as such harmonisation can only be done by the NRAs or by a separate provision in CACM. In this respect, NEMOs urge the European Commission to add a provision to the new CACM text requiring MNA MS to grant the same level of cost recovery for the same costs (establishment, development and operational), and to ensure that cost recovery is granted in the same year following the submission of the cost report for a specified year. (I.e if the cost report for year 0 is submitted in year 1, then cost recovery should be authorised in year 1) 4) The ACER Recommendation does not provide reassurance regarding the financing of MCO activities as, ultimately, decisions on cost recovery remain in the hands of individual NRAs. In this regard, we fail to understand how a methodology on eligible

	costs could help. As Article 22.8 indicates, any decision on cost recovery remains the sole remit of NRAs. 5) The proposal does not include comprehensive definitions of all relevant costs. For instance, national/individual NEMO costs, which represent a substantial part of the total costs, are totally missing. However, they caused many of the sometimes burdensome discussions in the past years since the adoption of CACM. The respective problems will not be solved by simple denial of their existence.
13. Do you have any other comments on Title II- Organisation of market coupling and of capacity calculation?	No
Title IV - Market coupling	
Chapter 1 - Market coupling development	
20. Regarding the SDAC and SIDC algorithm, do you agree that the algorithms' source codes should be published2? Which benefits in particular would you see in the algorithm code publication? Which risks? Do you have any alternative proposals?	NEMOs consider that the source code of the SDAC and SIDC algorithms should not be published, as such publication is a disproportionate measure to reach the goals stated by ACER in relation to the monitoring of compliance and improvement of the quality of the algorithms. Publishing the source code would put operational security of the algorithms at risk, by exposing them to the threat of gaming by market participants and of cyber-attacks, especially in the current geo-political situation. Furthermore, the source code is protected by IPRs, which must be respected. Finally the opportunity to gather valid suggestions from market participants, experts and stakeholders are deeply connected to the market design requirements and the high -evel implementation details, rather than to the source code. In this respect, an improvement of the quality of the description of algorithms already published by NEMOs (if needed) could suffice, and the organization of "calls for papers" to collect new proposals - already trialled in 2021 - has proven to be a more effective and agile measure. The above proposals would in no way limit the ability of NRAs and ACER to assess the features of the algorithm, as full access to the source code is already being granted to them, together with the possibility to run audits and simulations.

21. Regarding algorithm objectives, what are your views on the possibility to introduce non-uniform pricing? Which benefits and drawbacks?	NEMOs consider that uniform pricing has proven to be an efficient solution, for the following reasons: - -it is already well established not only in the market but throughout thousands of national regulations; - -it is more transparent and understandable to market participants than non-uniform pricing; - -it reduces the risks of further potential gaming strategies related to the repetition of the so called "side payments" typical of the non-uniform pricing schemes. NEMOs appreciate ACER's intention to provide a legal basis in CACM which would allow NEMOs to develop alternatives to uniform pricing, should sound evidence demonstrate that they are needed in future – something that the version of CACM currently in force does not permit. However, NEMOs do not agree with ACER's proposed Article 38(1)d, as it limits any future design choice to uniform and non-uniform pricing. NEMOs believe that in addition to referring to non-uniform pricing, the new CACM text should provide and opening to other possible solutions. The design, objectives and evidence-based rationale for developing alternatives to non-uniform pricing should be approved in a dedicated CACM methodology. In terms of content, NEMOs consider that, while non uniform pricing has clear benefits in terms of scalability of the algorithms in relation to the market design complexities, still the uniform pricing should represent the first best solution, for the following reasons: -it is already well established not only in the market but throughout thousands of national regulations; -it is more transparent and understandable to market participants; -it reduces the risks of further potential gaming strategies related to the repetition of the so called "side payments" typical of the non-uniform pricing schemes.
22. Regarding the suspension of intraday continuous trading during intraday auctions, would you favour suspending all continuous trading (national and cross-zonal) or only cross-zonal continuous trading? Why? Do you have	NEMOs have different positions in relation to this topic.

further views on the introduction of intraday auctions?	
23. Would you find it useful to centralize clearing and settlement between NEMO trading hubs (even if there is no single legal entity) and why/why not ?(Please note that this refers to clearing and settlement between NEMOs or NEMOs and MCO and not to clearing and settlement between NEMOs and its clients).	NEMOs consider that, once established the methodology for clearing and settlement between NTHs as mentioned above, centralizing the operations of the clearing and settlement further would introduce no additional benefits in terms of costs and complexity, while introducing the risks of a single point of financial and operational failure. For further details on what described above, please refer to the NEMOs' and TSOs' CACM 2.0 Advocacy Paper.
24. Do you have any other comments on Title IV-market coupling?	No