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Position Paper on legal issues concerning EC proposal for Amendments of the CACM Regulation (CACM 2.0)

24th July 2025

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INTRODUCTION

The recent revision of the EU's electricity market rules by the 3 EU co-legislators, adopted on the 21 May 2024 and which entered into force 16 July 2024, led to the adoption of Regulation (EU) 2024/1747 amending Regulation (EU) 2019/943 which establishes the rules to ensure the functioning of the internal market for electricity and the rules on capacity allocation and congestion management that are needed to support the functioning of the internal market.

On 30 June 2025, the Commission submitted to the EU Member States a proposal for amendments of the CACM Regulation (Proposal or CACM 2.0). The Proposal provides for a deep restructuring of the rules on capacity allocation and congestion management that are needed to support the functioning of the internal market, disrupting the original set-up of Commission Regulation 1222/2015 (CACM 1.0).

To facilitate a general overview, we would like to introduce the topic providing an outline of the regulatory and procedural background as well as the substance and potential consequences of the Proposal.

Background

1.1 CACM 1.0

(1) Historically, cross-zonal (interconnector) capacity was auctioned separately and independently from the trading of electricity. Thus, there were separate and independent markets for cross-zonal capacity and electricity. It is widely perceived that this framework led to inefficiencies as traders had to acquire cross-zonal capacities for a given direction before the cross-zonal spread in electricity spot prices was determined[1]. To avoid such efficiency losses, with the introduction of day-ahead and intraday market coupling, implicit allocation of capacity replaced the explicit capacity allocation on European spot markets. Under this new approach, available cross-zonal capacities are allocated implicitly within the matching algorithm allowing for a more efficient trading and clearing of the coupled day-ahead and intraday markets. The matching algorithm is not operated by one single power exchange but rather jointly by multiple power exchanges.[2]

(2) The CACM Regulation which was adopted by the Commission on 24 July 2015 lays down the current regulatory framework for market coupling. The CACM Regulation is a Commission Regulation based on Regulation (EC) No 714/2009 of the European

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1 Weber, Graeber and Semmig, Market Coupling and the CWE Project, Z Energiewirtsch 34 (2010), p. 303 (306).

2 Weber, Graeber and Semmig, Market Coupling and the CWE Project, Z Energiewirtsch 34 (2010), p. 303 (305).

Parliament and of the Council.[3] It aims to establish a common electricity market with cross-zonal electricity trading. Rules for single day-ahead and intraday-market coupling are not the only aspect, but a key part of the Regulation.

(3) Market coupling under the CACM Regulation involves two types of market participants: TSOs and NEMOs. NEMOs are entities *'designated by the competent authority to perform tasks related to single day-ahead or single intraday coupling.'*[4] The CACM Regulation requires predominantly NEMOs, but also TSOs to perform single day-ahead and intraday coupling in cooperation with each other. TSOs are tasked with establishing and performing capacity allocation and assisting the NEMOs in developing relevant algorithms.[5] The tasks of the NEMOs include receiving orders from market participants, having overall responsibility for matching and allocating orders in accordance with the single day-ahead and intraday coupling results, publishing prices and settling and clearing the contracts resulting from the trades according to relevant participant agreements and regulations.[6] In line with these obligations, the legislator requires the NEMOs to jointly carry out market coupling operation (MCO) functions including:

- developing and maintaining the algorithms, systems and procedures for single day-ahead and intraday coupling;
- processing input data on cross-zonal capacity and allocation constraints provided by coordinated capacity calculators;
- operating the price coupling and continuous trading matching algorithms
- validating and sending single day-ahead and intraday coupling results to the other NEMOs.

(4) NEMOs are also entrusted with other market-coupling related tasks, such as establishing back-up procedures[7] or developing proposals for harmonised maximum and minimum prices on single day-ahead and intraday clearing prices to be applied in all bidding zones that participate in day-ahead and intraday-market coupling.[8]

(5) The CACM Regulation provides detailed guidance on the performance of these tasksContext and legal framework

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3 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 (OJ 2009 L 211, p. 15).

4 Article 2(23) of the CACM Regulation.

5 Article 8(2), Articles 14 et seq. and Article 37 of the CACM Regulation.

6 Second sentence of Article 7(1)(1) of the CACM Regulation.

7 Article 7(1)(2)(h) and Article 36(3) of the CACM Regulation.

8 Article 41(1) of the CACM Regulation

1.2 CACM 2.0

1.2.1 Procedural background

(6) On 5 June 2019, the European Parliament and the Council adopted Regulation (EU) 2019/943 on the internal market for electricity, recasting Regulation 714/2009 (Electricity Regulation).[9] The Electricity Regulation explicitly refers to the existing CACM Regulation[10] and empowers the Commission to adopt network codes or guidelines implementing provisions of the Electricity Regulation related to capacity-allocation and congestion-management, including single day-ahead and intraday market coupling. With respect to network codes, Article 60(3) of the Electricity Regulation provides that ACER may make reasoned proposals to the Commission for amendments.[11]

(7) On 20 January 2021, the Commission invited ACER to prepare reasoned recommendations for amendments to the CACM Regulation by reference to Article 60(3) of the Electricity Regulation.[12]

(8) From 15 April to 10 June 2021, ACER conducted a public consultation with stakeholders.

(9) Following the public consultation, ACER invited all TSOs and NEMOs in the further review of the amendments to provide them with the opportunity to express their concerns and views. ACER, TSOs and NEMOs focused on MCO governance and development, organization and operation. They were also involved in the meetings where the draft amendments were outlined on capacity calculation, bidding zone review, data exchange, common grid model, scheduling and redispatching and countertrading. These meetings took place from June to October 2021.

(10) On 17 December 2021, ACER issued a proposal to amend the CACM Regulation.

(11) Following the publication of ACER's Recommendation, the Commission launched a public consultation – held from 16 March to 27 April 2022 – in order to consult stakeholders to gather factual information, knowledge and perceptions about the ACER proposal, with a view to deciding whether any of the points of the ACER's proposal needed to be modified, or additional requirements needed to be included.

(12) The recent revision of the EU's electricity market rules led to the adoption of Regulation (EU) 2024/1747 amending Regulation (EU) 2019/943 establishes the rules

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9 Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (OJ 2019 L 158, p. 54).

10 First sentence of Article 7(1) of the Electricity Regulation.

11 *'ACER may make reasoned proposals to the Commission for amendments, explaining how such proposals are consistent with the objectives of the network codes set out in Article 59(3) of this Regulation. Where it considers an amendment proposal to be admissible and where it proposes amendments on its own initiative, ACER shall consult all stakeholders in accordance with Regulation (EU) 2019/942.'*

12 Proposal, paragraph 4.

to ensure the functioning of the internal market for electricity and the rules on capacity allocation and congestion management that are needed to support the functioning of the internal market.

(13) Regulation (EU) 2024/1747 confirmed the qualification of CACM Regulation as a guideline established pursuant to Article 59.1 b) and 61.2 of Regulation (EC) No 943/2019 of the European Parliament and of the Council.

(14) On 30 June 2025, the Commission submitted to the representatives of Member States within the Electricity Cross Border Committee a first complete draft of a proposal for amendments of the CACM Regulation (Proposal or CACM 2.0).

1.2.2 Substance

(15) The Commission proposes to introduce substantial and detailed amendments to CACM 1.0 notwithstanding its nature as a guideline.

(16) In essence, from a high-level perspective, the Commission proposes:

- to provide detailed regulation for all activities necessary to implement market coupling, including the details of operational activities. For example, it is expected that the operating procedures are an integral part of the methodologies and as such they are approved by ACER and published;

- that, a Member State concerned may continue to apply a national legal monopoly after the entry into force of CACM 2.0 for a maximum transition period of three years. Following this period, multiple NEMOs shall be allowed to carry out day-ahead and intraday services in each Member State, based on designation or passporting.

- to remove the performance of MCO functions and other market coupling related tasks away from the NEMOs and TSOs to a single entity named Single Market Coupling Operator (SMCO) legally and functionally unbundled from all NEMOs and the TSOs. This includes:

    - developing and maintaining the algorithms and other systems needed for the operation of the single-day-ahead and intraday coupling;[13]

    - receiving, validating and processing input data on cross-zonal capacity outputs;[14]

    - receiving, validating and processing input data on orders provided by NEMOs;[15]

    - operating the single day-ahead and single intraday coupling by using the

[13] Article 18(1)(a) of the Proposal
[14] Article 18(1)(c) of the Proposal.
[15] Article 18(1)(d) of the Proposal.

respective algorithm;[16]

- validating and sending single day-ahead and intraday coupling results to NEMOs and TSOs;[17]
- performing back-up and fallback procedures;[18] and
- acting as a central counterparty to each NEMO for the exchange of energy between NEMO trading hubs and as a balance responsible party in each relevant scheduling area for scheduling to TSOs.[19]

- to extend the tasks and competencies of ACER such as:
  - approval of Terms and Conditions and Methodologies (TCMs), with substitution role when timelines defined by ACER itself for dratfing them is exceeded;
  - appointment and replacement of the SMCO;
  - autonomous decision on changes of the number of Intra Day Auctions/IDAs sessions.

(17) In essence, Commission seeks to establish a new approach for the coupling of European electricity markets. The current regulatory framework is based on the principle of decentralisation and cooperation. All NEMOs and TSOs work closely together: on the one hand, they interpret and detail the regulatory framework arising from the CACM Regulation; on the other hand, they perform market coupling operation related tasks, such as developing and maintaining the requisite algorithms, applying these algorithms, transferring, validating and processing relevant data on orders and capacity, as well as validating the results of the algorithms, and developing and executing backup or fallback procedures in the event of malfunction. Under the proposed CACM 2.0, TSOs and NEMOs would be downgraded to participants of a governance structure, with additional administrative competences in the execution of ancillary tasks. By contrast, tasks that essentially constitute the process of market coupling would be outsourced to a third-party, thereby replacing the principle of decentralisation and cooperation by centralisation and concentration. The fact that Commission proposes to refer to the SMCO as a Market Coupling Operator (MCO) reiterates that understanding.[20]

16 Article 18(1)(e) of the Proposal.
17 Article 18(1)(f) of the Proposal.
18 Article 18(1)(j) and (k) of the Proposal.
19 Article 18(1)(l) of the Proposal.
20 Article 18 of the Proposal.

CHAPTER 1: INFRINGEMENTS OF EU LAW

Executive summary

On 30 June 2025, the European Commission (*Commission*) submitted to the representatives of Member States within the Electricity Cross Border Committee a first complete draft proposal for amendments of the CACM Regulation (***Proposal or CACM 2.0***). The justification for introducing the far-reaching changes (see section II.2 of the introduction "*Substance*") proposed by the Commission are based on a misunderstanding of the management SDAC and SIDC by NEMOs and TSOs since the entry into force of CACM 1.0 resulting from a campaign of misinformation (see par. 1.2 of Chapter 2 of this Position Paper). This misunderstanding has led the Commission to infringe basic principles of EU Treaty as well as NEMOs and TSOs rights/obligations as established by Regulation EU 2019/943.

The Proposal infringes expressly EU Law in at least the following respects:

1) The Proposal exceeds the Commission's implementing powers: breach of Article 291(2) of the Treaty on European Union (TEU) and Article 58(2)(a) in conjunction with Article 61(4) of EU Regulation 2019/943.

The Proposal introduces a disproportionately extensive, detailed and far-reaching regulation of the activities concerning capacity allocation and congestion management. Such law-making approach followed by the Commission infringes:

a) Article 291(2) of the Treaty as interpreted by the Court of Justice of the European Union (CJEU) according to which implementing regulations must be limited to non-essential elements and may neither amend nor supplement existing secondary law legislation;

b) Article 58(2)(a) in conjunction with Article 61(4) of Regulation 2019/943 as the Proposal departs significantly from the minimum degree of harmonization required by such provisions of the Electricity Regulation

It is settled case law that the Commission's power to adopt implementing acts is by its very nature limited to non-essential elements of the subject-matter envisaged by the basic act. By contrast, the essential rules governing the matter in question must be laid down in the basic legislation and may not be delegated. The Court stated regarding a delegated act that: "*provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature cannot be delegated*".[21]

2) The Proposal infringes the principle of proportionality: breach of Article 5(4) of the Treaty on European Union (TEU) and Article 58(2)(c) of the EU Regulation 2019/943

The Proposal infringes upon:

a) the principles of proportionality laid down in Article 5(4) of the Treaty on European Union (TEU);

[21] Judgment of 5 September 2012, Parliament vs. Commission, C-355/10, paragraph 65

b) the principle of proportionality laid down in Article 58(2)(c) of the EU Reg. 2019/943 (Electricity Regulation);

According to Art 5(4) of the TEU, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. NEMOs and TSOs already established both SDAC and SIDC according to the conditions established by the CACM, therefore the further, smaller developments to the SDAC and SIDC should not and cannot be considered as sufficient reasons for far-reaching changes, infringing on NEMOs and TSOs rights/obligations as established by Regulation EU 2019/943.

3) The Proposal establishes the Single Market Coupling Operator as the only governance option for EU market coupling: breach of Article 7 and Article 59(1)(b) of the EU Regulation 2019/943

The Proposal provides for the establishment of the Single Market Coupling Operator (SMCO) as the only governance option for the management of market coupling operation. This single option is fully inconsistent with the guidelines on SDAC and SIDC governance enshrined in the Electricity Regulation. Such law-making approach followed by the Commission infringes:

a) Article 7(1) of the Electricity Regulation stating that *"Transmission system operators and NEMOs shall jointly organise the management of the integrated day-ahead and intraday markets"*;

b) Article 59(1)(b) of the Electricity Regulation stating that "*The Commission is empowered to adopt implementing acts in order to ensure uniform conditions for the implementation of this Regulation by establishing network codes in the following areas:… b) capacity-allocation and congestion- management rules pursuant to Articles 7 to 10, 13 to 17, 19 and 35 to 37 of this Regulation and Article 6 of Directive (EU) 2019/944, including rules on ….different governance options …"*

The EU Council and EU Parliament, in their role as co-legislators with the Commission, established in the recent EMD reform (in particular under Art. 2(15) of Regulation (EU) 2024/1747 which amends Art 59.1 b) of Regulation 2019/943) that "*rules on day-ahead and intraday…" must comprise "…different governance options…*". This principle of "*different governance options*" has been finally introduced by the co-legislators in the trialogue of 5 December 2023 after rejecting the initial EC proposal which aimed at establishing only one option: a centralized governance based on a single legal entity. The Proposal reintroduces the initial suggestion of the EC previously rejected by the EU legislator in EMD reform as the only governance option for EU coupling. The Proposal submitted by the Commission is in breach of the primary EU legislation (Article 59(1)(b) of Regulation EU 2019/943) that should be implemented through CACM 2.0. In this respect it must be highlighted that Article 7(1) of the Regulation EU 2019/943 still requires all NEMOs and Transmission System Operators (TSOs) to jointly organise the management of integrated spot markets according to CACM Regulation. An obligation to outsource essential market coupling functions to a SMCO is contrary to such notion.

4) Restriction to the freedom to conduct a business and property: infringement of

Articles 16, 17 and 52(1) of EU Charter

The Proposal would permit a disproportionate restriction on the freedom of NEMOs to conduct their business activities as guaranteed under Article 16 of the EU Charter, and to the exercise of their right to property as protected by Article 17 of the EU Charter. Moreover, the Proposal does not satisfy any of the cumulative requirements set forth in Article 52(1) of the EU Charter for limitation of fundamental rights, Therefore, such law-making approach followed by the Commission infringes:

Article 16 of the EU Charter stating that "*The freedom to conduct a business in accordance with Union law and national laws and practices is recognised*."

Article 17 of the EU Charter stating that "*1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected.*"

Article 52(1) of the EU Charter stating that *"(a)ny 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 Proposal would restrict the NEMOs freedom to conduct business and right to property as it would effectively preclude them from managing SDAC and SIDC. The Proposal constitutes a significant restriction on NEMOs commercial freedom to conduct business, as NEMOs would otherwise be entitled to continue their role in performing MCO tasks in the absence of legal provisions withdrawing their role. The Proposal would also restrict NEMOs right to property as it would result in an expropriation of data as well as in a partial expropriation of assets for the NEMOs who would no longer be entitled to freely use Market Coupling algorithms and systems.

<u>Article 52(1) of the EU Charter lays down four cumulative requirements for any limitation of fundamental rights, none of which are satisfied by the Proposal.</u>

First, the Proposal fails to meet the condition of Article 52(1) of the EU Charter that requires that any limitation on fundamental rights must be provided for by law.

In this respect, it must be highlighted that the Proposal qualifies as an implementing secondary regulation that belongs to the category of non-legislative acts of EU pursuant to Article 289 of TFUE. In that regard, insofar as the restriction in question is set out in the Proposal, which would constitute a non-legislative act, it cannot be considered as being

"provided for by law" within the meaning of Article 52(1) of the EU Charter. In fact, implementing acts adopted by the European Commission under Article 291 of the TFEU are defined as "*a non-legislative act laying down detailed rules for the uniform implementation of legally binding Union acts*" and thus do not attain the status of law. Consequently, limitations imposed by an implementing act cannot be considered as being "*provided for by law*" within the meaning of Article 52(1) of the EU Charter. Implementing acts are, by their nature, limited to ensuring uniform conditions for implementing legally binding EU acts and it is settled case law that such implementing measures cannot amend essential elements of an EU legislation. The Proposal, as an implementing act adopted under Article 291 TFEU, cannot lawfully impose limitations on the fundamental rights of NEMOs enshrined in Articles 16 and 17 of the EU Charter.

Second, the Proposal breaches the condition of Article 52(1) of the EU Charter that requires limitations to respect the essence of the rights and freedoms in question.

The violation of the essence of the rights, as interpreted by the CJUE, implies that certain interferences with fundamental rights are so severe that they cannot be justified under any circumstances, as they affect the very core of the right. The Proposal would not merely regulate how NEMOs conduct their business, it would fundamentally alter their business model by expropriating core functions and transferring them to a separate entity (as evidently described in Articles 19(7) and 19(10) of the Proposal). This constitutes an interference with the core content of the freedom to conduct a business and violates the essence of Article 16 of the EU Charter. Similarly, the Proposal interferes with the essence of the right to property as it would deprive NEMOs from the essential aspects of their property rights over their algorithms and systems (as described in Article 18(6) of the Proposal), thus affecting the very essence of Article 17 of the EU Charter. The mandatory implementation of a SMCO directly affects NEMOs core business functions and proprietary rights, violating the essence of the rights enshrines in Articles 16 and 17 of the EU Charter and, thus, breaching Article 52(1) of the EU Charter.

Third, the Proposal fails to meet the necessity and proportionality tests.

The forced outsourcing of market coupling functions from NEMOs to an SMCO cannot be regarded as proportionate to the objectives sought. In accordance with settled case-law, the principle of proportionality requires that measures adopted by EU institutions be both suitable for achieving the legitimate objectives pursued by the contested legislation and limited to what is strictly necessary to attain those objectives. The Commission fails to demonstrate that the objectives sought cannot be achieved through less restrictive means. The Proposal does not provide for clear and precise limits on the appropriation of NEMOs' functions and property, thereby exceeding what is strictly necessary to pursue its declared aims. The Proposal does not satisfy the proportionality and necessity conditions under Article 52(1) of the EU Charter.

In light of the above, the Proposal fails to meet any of the conditions required by Article 52(1) of the EU Charter and, consequently, not only infringes that provision but also violates Articles 16 and 17 of the EU Charter.

5) Maximum duration for monopolistic NEMOs: breach of Article 5(3) and 106(2) of TFEU, of Article 40 of EU Directive 2019/944 and of Article 58(2)(b) of EU Regulation 2019/943

With respect to monopolistic NEMOs, the Proposal provides for a maximum duration (3 years from the entering into force of CACM 2.0). Such law-making approach followed by the Commission infringes:

a) the principles of subsidiarity laid down in Article 5(3) of the Treaty on European Union (TEU) stating that "*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*"

b) Article 106(2) of TFEU stating that "*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.*" In this respect, monopolistic NEMOs in central dispatching systems or systems based on unit-bidding are vested by their own Member States with particular tasks to address specific needs deriving from the physical constrains of the national grid

c) Article 58(2)(b) of the EU Regulation 2019/943 stating that "*The network code and guidelines shall: […] b) take into account regional specificities, where appropriate; (c) not go beyond what is necessary for the purposes of point (a);*". In this respect regional specificities include local/national specificities;

d) Article 40 of EU Directive 2019/944 stating that *'Each transmission system operator shall be responsible for […] operating […] the transmission system […]Member States may provide that one or several responsibilities listed in paragraph 1 of this Article be assigned to a transmission system operator other than the one which owns the system*'. In this respect, monopolistic NEMOs in central dispatching systems or systems based on unit-bidding are vested by their own Member States with particular tasks to address specific needs deriving from the physical constrains of the national grid.

The energy sector is one of the areas of mixed competence between the Union and Member States as provided in Article 4(2)(i). Moreover Article 194(2) of TFUE provides clear evidence of the relevance of Members State's prerogatives in the energy sector stating that

"*…Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).*" As well known, the principle of subsidiarity is a substantive benchmark and a procedural filter in the Commission's legislative activity, guiding the distribution of powers between the EU and Member States and embedding democratic accountability within the Union's multilevel framework. It serves not merely as a legal formality but as a core expression of respect for national diversity and decentralization, ensuring that EU action complements rather than supplants Member State autonomy. Therefore, the principle of subsidiarity must be fully applied by the Commission in any kind of implementing activity of the Electricity Regulation such as CACM review, without any possible exception.

Local/national specificities established in national primary law deriving from a clear political decision enshrined in Level 1 legislation can't be overwritten by an implementing guideline (level 2 legislation) like CACM. This is the case of the establishment of Monopolistic NEMOs fulfilling TFEU Article 106(2) requirements which provides that:

"*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union*."

The requirements set by TFEU Article 106(2) to allow the upholding of legal monopolies are fulfilled by Monopolistic NEMOs. In fact, Monopolistic NEMOs are Monopolistic NEMOs that are entrusted with particular tasks of public interest assuring:

- the security and efficiency of national electrical system which is an absolute priority of public strategical interest being in relation with the specificities of the topology of the relevant national grid;
- the monitoring and prevention of market distortions.

With respect to the particular tasks of Monopolistic NEMOs in the context of the security and efficiency of national electrical systems operation, special consideration must be given to those central dispatching systems or systems based on unit-bidding where specific tasks related to dispatching, mostly deriving from the physical constrains of the national grid and of the resources connected to it, are integrated and executed via central energy market. The choice between different models of dispatching systems is a fundamental strategical entitlement of each Member State to assure the security of the national power system. This entitlement derives from Article 40 of Directive (EU) 2019/944 which recognizes to Member States the right to assign tasks of TSOs to other system operators, such as in case of scheduling activity assigned to monopolistic NEMOs in central dispatching system or system based on unit-bidding.

With respect to the particular tasks of Monopolistic NEMOs in the context of monitoring and prevention of market distortions, it must be highlighted that the unit bidding model proves also being a fundamental market design feature in securing an effective market

monitoring by Monopolistic NEMOs. In fact, Monopolistic NEMOs in unit-bidding systems are entrusted with the relevant monitoring duty to perform a direct comparison of the quantities and prices offered by each market participant with the actual physical availabilities and generation costs of their individual generation units.

6) Overwhelming role of ACER: breach of Article 1(2) of Regulation (EU) 2019/942

The Proposal provides for a role of ACER (Agency) that goes beyond the mandate of the Agency established by Regulation 2019/942 EU and blurs the distinction between oversight powers of the Agency, as well as those related to the approval of Terms, Conditions and Methodologies (TCMs), with decisions that can be interpreted as operational decisions. Such law-making approach followed by the Commission infringes:

a) Article 1(2) of Regulation (EU) 2019/942 stating that "*The purpose of ACER shall be to assist the regulatory authorities referred to in Article 57 of Directive (EU) 2019/944 and Article 39 of Directive 2009/73/EC in exercising, at Union level, the regulatory tasks performed in the Member States and, where necessary, to coordinate their action and to mediate and settle disagreements between them in accordance with Article 6(10) of this Regulation. ACER shall also contribute to the establishment of high-quality common regulatory and supervisory practices, thus contributing to the consistent, efficient and effective application of Union law in order to achieve the Union's climate and energy goals.*"

The Proposal creates an institutional conflict by requiring ACER to assume both operational governance responsibilities and regulatory supervision functions over the same entity.

The misalignment between, on the one hand, the Agency's oversight powers and its role in the approval of TCMs, and, on the other, its involvement in decisions that can be interpreted as operational decisions raises significant concerns about a serious conflict of interest. Specifically, it would result in a situation where an EU agency may exercise oversight responsibilities over decisions in which it may also play a determinative role. Additionally, while the Proposal assigns to the Agency the authority to take certain decisions that can be construed as operational decisions, the ultimate responsibility over these points remains with NEMOs and TSOs, creating a governance framework with responsibilities that cannot be effectively carried by NEMOs and TSOs.[22]

[22] Three options are conceivable to veto or challenge a CACM 2.0 Regulation that implements Commission's proposal. First, the Comitology Committee could veto a respective draft regulation, thus obliging the Commission to submit an amended draft or to refer the current draft to an appeal committee which is made up of EU countries' representatives but at a higher level of representation and follows the same voting rules as the committee. Second, if the Proposal is adopted, the NEMOs could file an action for annulment under Article 263 TFEU within two months after its entry into force. Third – if, in the very unlikely event where the Court of Justice of the European Union (CJEU) finds a lack of legal standing for an Action for Annulment – the NEMOs could implicitly tackle a Regulation that implements the Proposal before a national court, thereby initiating a proceeding whereby the national court requests the CJEU to give a preliminary ruling on the validity of such regulation.

Detailed Assessment

All NEMOs have hereby examined whether the Proposal is consistent with EU law. For the purpose of this analysis, we will first examine whether the Proposal is compatible with EU primary and secondary law (A.). We will then look at legal remedies available to challenge a CACM 2.0 Regulation corresponding to the Proposal (B.).

2.1 Legal Analysis

The Proposal infringes EU Law at least with respect to the following matters:

1) **The Proposal exceeds the Commission's implementing powers: breach of Article 291(2) of the Treaty on European Union (TEU) and Article 58(2)(a) in conjunction with Article 61(4) of EU Regulation 2019/943;**

2) **The Proposal infringes the principle of proportionality: breach of Article 5(4) of the Treaty on European Union (TEU) and Article 58(2)(c) of the EU Regulation 2019/943**

3) **The Proposal establishes the Single Market Coupling Operator as the only governance option for EU market coupling in breach of Article 7(1) and Article 59(1)(b) of the EU Regulation 2019/943;**

4) **Restriction to the freedom to conduct a business and property: infringement of Articles 16, 17 and 52(1) of EU Charter;**

5) **Maximum duration for monopolistic NEMOs: breach of Article 5(3) and 106(2) of TFEU, of Article 40 of EU Directive 2019/944 and of Article 58(2)(b) of EU Regulation 2019/943;**

6) **Overwhelming role of ACER: breach of Article 1(2) of Regulation (EU) 2019/942.**

2.1.1 The Proposal exceeds the Commission's implementing powers: breach of Article 291(2) of the Treaty on European Union (TEU) and Article 58(2) in conjunction with Article 61(4) of Regulation 2019/943

1. The Commission's power to adopt implementing acts subject to constraints;

2. As preliminary considerations, it must be highlighted that:
- it is settled case law that the Commission's power to adopt implementing acts is by its very nature limited to non-essential elements of the subject-matter envisaged by the basic act. By contrast, the essential rules governing the matter in question must be laid down in the basic legislation and may not be delegated. Therefore, according to the CJEU: "*provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature cannot be delegated*".

- the Commission's power to implement non-essential rules is likewise subject to constraints. In Parliament v Commission, the CJEU held: "*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.*"

2.1.1.1 1.1 Article 291(2) TFEU confirms that the Commission has no competence to adopt the Proposal in the current form

3. Article 61(2) in joint reading with Article 59(1)(b) of the Electricity Regulation only empowers the Commission to adopt implementing acts. Thus, the Proposal must be compatible with the legal requirements for implementing regulations arising from Article 291 TFEU. The Proposal, however, runs contrary to these requirements.

2.1.1.1.1 Legal Requirements following from Article 291 TFEU

4. Article 291 (2) TFEU provides:

> *'Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.'*

5. According to settled case law of the CJEU, the Commission's power to adopt implementing acts is subject to constraints.

6. First, it is settled case law that the Commission's power to adopt implementing acts is by its very nature limited to non-essential elements of the subject-matter envisaged by the basic act.[23] By contrast, the essential rules governing the matter in question must be laid down in the basic legislation and may not be delegated. Therefore, according to the CJEU:

> *'[...] provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature cannot be delegated.*[24]

7. Second, the Commission's power to implement non-essential rules is likewise subject to constraints. In Parliament v Commission, the CJEU held:

> *'Furthermore, it follows from Article 290(1) TFEU in conjunction with Article 291(2) TFEU that in exercising an implementing power, the Commission may*

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23 Judgment of 17 December 1970, Köster, 25/70, ECLI:EU:C:1970:115, paragraphs 6 et seq.; Judgment of 27 October 1992, Germany v Commission, C-240/90, ECLI:EU:C:1992:408, paragraph 36.

24 Judgment of 5 September 2012, *Parliament v Council*, C-355/10, ECLI:EU:C:2012:516, paragraph 65.

neither amend nor supplement the legislative act, even as to its non-essential elements.'[25]

8. Indeed,

> *'[I]mplementing measures cannot amend essential elements of basic legislation or supplement it by new essential elements'*[26]

9. According to the CJEU, this presupposes that the provisions of the implementing measure '(i) comply with the general aims pursued by the legislative act, and (ii) are necessary and appropriate for the implementation of that act without supplementing or amending it.'[27]

2.1.1.1.2 the Proposal runs contrary to these requirements

10. Articles 17 and 18 of the Proposal, *in primis* among other provisions, disregard these constraints. The Proposal concerns essential elements of the subject- matter which fall into the scope of the Electricity Regulation.

11. Rules on the integration of electricity markets as well as on the existence and the key tasks of NEMOs are by definition essential according to the above-mentioned legislation. For this reason, the legislator stipulates in the Electricity Regulation that the electricity markets are to be integrated by means of market coupling and that the NEMOs are to assume the corresponding tasks. One of the essential elements of this subject-matter is the question of whether market coupling is implemented by means of a centralised and concentrative approach or by means of a decentralised approach based on cooperation between the TSOs and NEMOs.

12. The essential nature of this issue derives from the fact that it requires the balancing of key policy concerns. Proponents of the centralised approach argue that this approach saves costs and is thus more efficient in the long run; moreover, it is said that a centralised approach simplifies the decision-making process. Proponents of the decentralised cooperation model argue that the latter diversifies responsibility, thus lowering the risks of EU-wide disruptions and improving the quality of decision-making. The question of forming a SMCO thus requires weighing efficiency goals against security-relevant concerns. Such a balancing decision is political by nature.

13. A comparative analysis confirms this understanding. As already explained, the obligation to establish European entities such as ENTSO-E, ENTSO-G or E-DSO is always specified in legislative acts.[28] Moreover, even the details of unbundling models are laid down in legislative acts.[29] Although such decisions require the consideration of highly

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25 Judgment of 15 October 2014, Parliament v Commission, C-65/13, ECLI:EU:C:2014:2289, paragraph 45.
26 Judgment of 15 October 2014, Parliament v Commission, C-65/13, ECLI:EU:C:2014:2289, paragraph 66.
27 Judgment of 15 October 2014, Parliament v Commission, C-65/13, ECLI:EU:C:2014:2289, paragraph 46.
28 See paragraph (49).
29 See paragraph (49).

complex and specific issues, it is undisputed that such aspects must be determined in a legislative act and not in a mere implementing act. The question of whether a centralised or a decentralised market coupling model is preferable has a political dimension, which is at least comparable to the aforementioned examples. The governance of the single day ahead and intraday market has also been the subject of high political debate during the adoption of Electricity Regulation as demonstrated by the outcome of the Trialogue of 5 December 2023 on Article 59(1)(b). The adoption of Article 18 therefore requires a political decision and thus concerns essential elements of the subject matter underlying the Electricity Regulation.

2.1.1.2 Article 58(2)(a) in conjuction with Article 61(4) of Regulation 2019/943 confirms that the Commission has no competence to submit the Proposal in the current form

14. Art 58(2)(a) of Reg. 2019/943 clearly sets the characteristics of the EU regulation guidelines for its implementation: *"The network codes and guidelines shall:(a) ensure that they provide the minimum degree of harmonization required to achieve the aims of this Regulation; "*

15. These fundamental characteristics are further confirmed specifically by Article 61(4) of Reg. 2019/943 that states "*Where appropriate, the Commission may adopt implementing acts setting out guidelines providing the minimum degree of harmonization required to achieve the aim of this Regulation…*"

16. The Proposal, is very far away from the minimum degree of harmonization requested by Article 58(2)(a) in conjunction with Article 61(4) of the Electricity (Regulation 2019/943) as an extensive overkilling regulation is spread throughout the draft text

17. A clear example concernes the operating procedures. The Proposal states that operating procedures are an integral part of the methodologies and as such they are approved by ACER and published. This provision could unnecessarily hinder the processes of adopting and modifying procedures - which, being operational, must on the contrary be modified quickly and in a flexible manner - but also creates serious cybersecurity risks. In fact, the procedures have sensitive details that for security reasons must necessarily be kept confidential, especially in a period like the current one that sees the multiplication of hacker attacks and requires more attentions to policies that guarantee cybersecurity.

2.1.2 The Proposal infringes the principles of proportionality: breach of Article 5 of the Treaty on European Union (TEU) and Article 58(2)(c) of the EU Reg. 2019/943 (Electricity Regulation)

2.1.2.1 The principle of proportionality under EU law

18. Under EU law, the principle of proportionality has various dimensions. According to the

settled case law of the CJEU, it is one of the general principles of European law.[30] Under the second sentence of Article 52(2) of the European Charter of Fundamental Rights (***Charter***), it works as a barrier to intervene into the fundamental rights and freedoms of others. In the context of Article 5(4) TEU, it puts constraints on the competences of the EU.

19. The principle of proportionality requires that measures implemented through provisions of EU law be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them.[31]

20. With respect to politically and economically more complex decisions, however, a less severe standard applies, as the settled case law of the CJEU shows:

> *'With regard to judicial review of compliance with those conditions the Court has accepted that in the exercise of the powers conferred on it the Community legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus, the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.'*[32]

21. Thus, in principle, the requirement of proportionality is subject to a two-fold test, consisting of an appropriateness and necessity limb. With respect to more complex political, economic, or social choices, however, the requirement of proportionality is subject to a one-fold test which is limited to an appropriateness limb or, more precisely, to the absence of manifest inappropriateness.

2.1.2.2 The principle of proportionality as specifically stated in the Electricity Regulation

22. The subject-matter of the Proposal is rather complex and requires political and economic choices. Nonetheless, the legislator decided to constrain the Commission's discretion in adopting network codes and guidelines in the form of the two-fold test. Article 58(2)(c) of the Electricity Regulation reads:

> *'The network codes and guidelines shall:*

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30 Judgment of 4 May 2016, Pillbox 38, C-477/14, ECLI:EU:C:2016:324, paragraph 48; Judgment of 8 June 2010, Vodafone and Others, C-58/08, ECLI:EU:C:2010:321, paragraph 51.

31 Judgment of 16 June 2015, Gauweiler and Others, C-62/14, ECLI:EU:C:2015:400, paragraph 67; Judgment of 11 March 1987, Rau v Commission, joined cases 279, 280, 285 and 286/84, ECLI:EU:C:1987:119, paragraph 34.

32 Judgment of 4 May 2016, Pillbox 38, C-477/14, ECLI:EU:C:2016:324, paragraph 49; Judgment of 8 June 2010, Vodafone and Others, C-58/08, ECLI:EU:C:2010:321, paragraph 52.

(a) ensure that they provide the minimum degree of harmonisation required to achieve the aims of this Regulation […] (c) not go beyond what is necessary for the purposes of point (a);'

23. Hence, the Commission's discretion when adopting implementing acts is not only constrained by the requirement to refrain from manifestly inappropriate measures; rather the Commission may also not go beyond what is necessary to achieve the aims of the Electricity Regulation.

24. Thus, in line with the settled case law of the CJEU,

'[…]when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.'

25. The proposal, in its current form, does not fulfil the basic conditions foreseen in the Protocol on the application of the principles of subsidiarity and proportionality (Protocol), specifically Art. 5, according to which the Commission and its draft legislative acts should fulfill the following:

"*Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.*"

It can be argued that currently, none of these conditions are sufficiently fulfilled by/in the Proposal. No statement is made on compliance with the principles of subsidiarity and proportionality, nor is there any assessment of the financial impact.

According to Art 5(4) of the TEU, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. NEMOs and TSOs already established both SDAC and SIDC according to the conditions established by the CACM, therefore the further, smaller developments to the SDAC and SIDC should not and cannot be considered as sufficient reasons for far-reaching changes, infringing on NEMOs and TSOs rights/obligations as established by Regulation EU 2019/943.

2.1.3 The Proposal establishes the Single Market Coupling Operator as the only governance option for EU market coupling: breach of Article 7 and Article 59(1)(b) of the EU Reg. 2019/943 (Electricity Regulation)

26. According to Article 7(1) of the Electricity Regulation, NEMOs and TSOs, are fully responsible for the management of the organization of SDAC and SIDC, Establishing a SMCO "*legally and functionally independent from any NEMO or TSO*" (Article 19(7) of the draft CACM 2.0 proposal) "*performing MCO tasks*" (Article 18(1) of the CACM 2.0 proposal) and fully "*liable for the performance of those tasks"* (Article 19(10) of the draft CACM 2.0 proposal), runs contrary to Article 7(1) of the Electricity Regulation and, hence, would change the meaning of the obligation to jointly organise the management of integrated spot markets as provided therein.

27. The EU Council and EU Parliament, in their role as co-legislators with the Commission, established in the recent EMD reform (in particular under Art. 2(15) of Regulation (EU) 2024/1747 which amends Art 59.1 b) of Regulation 2019/943) that "*rules on day-ahead and intraday…"* must comprise *"…different governance options…*".

28. It is established that the principle of "*different governance options*" has been finally introduced by the co-legislators in the trialogue of 5 December 2023 after rejecting the initial EC proposal which aimed at establishing only one option: a centralized governance based on a single legal entity.

29. The current Proposal shows again the initial proposal of EC already rejected by EMD reform as the only governance option for EU coupling. Also in this case, the approach followed by EC is in total breach of the primary EU legislation (amended Regulation EU 2019/943) that should be implemented through CACM 2.0. In this respect it must be highlighted that Article 7(1) of the Regulation EU 2019/943 still requires all NEMOs and TSOs to jointly organise the management of integrated spot markets according to CACM Regulation. An obligation to outsource essential market coupling functions to a SMCO is contrary to such notion, and the process according to which the Commission intends to limit the role of NEMOs and TSOs, described in Art. 17 (1) of the Recast CACM, can be interpreted as being in breach of Regulation EU 2019/943, as well as the abovementioned principle of proportionality, since it is a straightforward argument that it is simply not necessary for accomplishment of the objective of the Treaty.

2.1.3.1 Legal basis for the full responsibility of TSOs and NEMOs for the management of the organization of SDAC and SIDC

30. As shown above, the Proposal is explicitly designed as a guideline.[33] Thus, regard must be had to the first sentence of Article 61(2) of the Electricity Regulation which provides the following:

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33 See Article 1(1) of the Proposal.

'The Commission is empowered to adopt guidelines in the areas where such acts could also be developed under the network code procedure pursuant to Article 59(1) and (2).'

31. Article 59(1)(b) of the Electricity Regulation provides:

> *'The Commission is empowered to adopt implementing acts in order to ensure uniform conditions for the implementation of this Regulation by establishing network codes in the following areas: […]*
>
> > *(b) 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.'*

32. Among the aforementioned provisions, only Article 7(1) of the Electricity Regulation concerns the cooperation among the TSOs and all NEMO's as regards the operation of market coupling. Article 7(1) provides:

> *'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 COMMISSION pursuant to Articles 4 and 8 of Regulation (EU) 2019/942.'*

33. Thus, Article 61(2) in joint with Article 59(1)(b) of the Electricity Regulation empowers the Commission to adopt guidelines implementing different governance options that preserve the TSO's and the NEMOs obligation under Article 7(1) of the Electricity Regulation to jointly organise the management of the integrated day-ahead and intraday markets in accordance with Regulation (EU) 2015/1222.

2.1.3.2 The meaning of the TSOs and NEMOs obligation to jointly organise the management of integrated intraday and day-ahead markets pursuant to the CACM Regulation

34. The first sentence of Article 7 (1) consists of five elements: *'Integrated day-ahead and*

intraday markets', to *'organise the management'* of these markets, to do so *'jointly'* or – as following from the second sentence of the first paragraph – *'to cooperate'*, *'Transmission system operators and NEMOs'* as the addressees of this obligation, and *'Regulation (EU) 2015/1222'* as the regulatory reference point.

35. According to the settled case law of the CJEU, a provision's *'wording,' 'the context in which it occurs'* and the *'objects of the rules of which it is part'* are the three main sources when interpreting a provision of EU law.[34] Applying these principles leads to the following understanding of the five aforementioned elements (a-e) as well as on their interplay (f).

a) Integrated day-ahead and intraday markets

36. Integrated day-ahead and intraday markets are markets that bring together the different bidding zones into uniform or closely interconnected European electricity spot markets. Integrated spot markets are thus a market state with low barriers to cross- zonal electricity trading. This requires a marketplace where both cross-zonal capacities and electricity are allocated in an efficient manner.

b) Organising the management of these markets

37. Article 7(1) of the Electricity Regulation requires the NEMOs and TSOs to jointly organise the management of these integrated spot markets.

38. For the European legislator, the integration of spot market should be achieved via implicit auctions in the form of market coupling, overcoming the model based on the so-called explicit auctions.

39. In the context of Article 7(1) of the Electricity Regulation, the legislator solely refers to market coupling when requiring the TSOs and NEMOs to organise the management of integrated spot markets. This follows from the context of the provision: the first sentence of Article 7(1) refers to the existing CACM Regulation which provides for intraday and day-ahead market coupling as the key instrument to integrate European electricity spot markets. Furthermore, Article 7(1) of the Electricity Regulation addresses the NEMOs, which are by definition market operators that are *'designated by the competent authority to carry out tasks related to single day-ahead or single intraday coupling definition carry out tasks related to market coupling.'* In other words, NEMOs can only act in their role as NEMOs as far as they perform functions related to market coupling.

40. The phrase *'organising the management of integrated intraday and day-ahead markets'* refers to the NEMOs' and TSOs' execution of measures which constitute market coupling and, hence, lead to integrated electricity markets. A closer look at the nature of these measures confirms that understanding. Market coupling is implemented through

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[34] Judgment of 21 November 2019, Procureur-Generaal bij de Hoge Raad der Nederlanden, C-678/18, EU:C:2019:998, paragraph 31.

various measures, such as developing and maintaining the algorithms, systems and procedures, processing input data on cross-zonal capacity and allocation constraints provided by coordinated capacity calculators, operating the price coupling and continuous trading algorithms, and validating and sharing single day-ahead and intraday coupling results among the NEMOs. Hence, market coupling is not a task that can be executed in isolation, rather it is a multi-person process requiring coordination, interaction, preparation as well as operation. The phrase 'organising the management of integrated intraday and day-ahead markets' is an appropriate wording for these measures.

41. The term *'organise'* furthermore points to the responsibility of NEMOs and TSOs as regards the process of market coupling. It implies that NEMOs and TSOs must undertake all measures which are necessary to achieve a proper market coupling and, hence, integrated markets. This, however, requires that NEMOs and TSOs have control over the process of market coupling. Only, then, they have the organisational power to fulfil their responsibility for a proper management as required by Article 7(1).

c) Doing so *'jointly'*

42. Following from the first sentence of Article 7(1) of the Electricity Regulation, the obligation to organise the management of integrated spot markets must be executed by TSOs and NEMOs jointly. In line with that, the second sentence of Article 7(2) requires *'to cooperate at Union level.'* This again reflects the fact that market coupling as envisaged under Article 7(1) of the Electricity Regulation is an interactive and decentralised process which is carried out by the TSOs and NEMOs. Just to give two examples: the algorithms used for market coupling apply to the entire internal market; consequently, it is logically necessary that all NEMOs, and thus those responsible for all bidding zones, are involved in the development of these algorithms. Likewise, the exchange of cross-zonal data also requires cooperation between at least several NEMOs.

d) *TSOs and NEMOs as the addressees of this obligation*

43. The fact that the first sentence of Article 7(1) explicitly refers to the TSOs and the NEMOs as the addressees of the obligation to jointly organise the management of day-ahead and intraday markets underpins that understanding. According to Article 2(8) of the Electricity Regulation, *'"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.'* Consequently, at least the essential tasks for implementing market coupling must be carried out by NEMOs as such and cannot be outsourced to a third party. Otherwise, a NEMO loses its status as a NEMO.

44. The rationale underlying Article 7(1), in joint reading with Article 2(8) of the Electricity Regulation, underpins the understanding that tasks subject to Article 7(1) of the Electricity Regulation must not be assigned to entities different from TSOs and NEMOs: When designating a NEMO, the competent authority assesses whether the NEMO is capable of carrying out essential MCO tasks, such as fulfilling their obligation to organise the management of intraday and day-ahead markets. If Article 2(33) applied

in the context of Article 7(1), NEMOs could designate a third party to perform the key MCO functions irrespective of the consent of the competent authority. This would potentially undermine the material considerations underlying the authorities' decision to designate a particular NEMO.

45. Thus, the fact Article 7(1) of the Electricity Regulation explicitly and solely addresses the TSOs and NEMOs shows that NEMOs must carry out the key MCO tasks by themselves. They cannot outsource this *'obligation to organise'* the functioning of single day-ahead or single intraday market coupling.

e) *The CACM 1.0 as a regulatory reference point*

46. Finally, the legislator's reference to the existing CACM Regulation affirms the above-mentioned understanding. Article 7 of the Electricity Regulation requires that the obligation to *'jointly organise'* is executed *'in accordance with Regulation (EU) 2015/1222'*. Thus, MCO-related tasks provided for by the existing CACM Regulation are the reference point of the Commission's competence to implement rules on the TSOs' and NEMO's obligation to jointly organise the management of integrated day- ahead and intraday markets. This does not mean that the legislator obliges the Commission to maintain every detail of the existing CACM Regulation. However, the reference to the existing CACM Regulation reiterates that the Commission's competence to specify the TSOs and NEMOs task to jointly organise the management of integrated markets must comply with the fundamental concept underlying the CACM Regulation that was in force when the Electricity Regulation was adopted. Otherwise, this reference was obsolete. The approach that TSOs and NEMOs organise market coupling in a cooperative and decentralised manner is part of the fundamental concept underlying the CACM regulation. Any amendments of the rules on the TSOs' and NEMOs' obligation to jointly organise the management of market coupling must therefore align with that approach.

47. This is not contradicted by the fact that recital 15 of the current CACM Regulation provides that Commission may transfer the implementation of MCO functions to a SMCO. Recital 15 refers to Article 7(6) of the CACM Regulation, which reads the following:

> *'If NEMOs fail to submit a plan in accordance with Article 7(3) to establish the MCO functions referred to in paragraph 2 of this Article for either the intraday or the day-ahead market time-frames, the Commission may, in accordance with Article 9(4), propose an amendment to this Regulation, considering in particular appointing the ENTSO for Electricity or another entity to carry the MCO functions for single day-ahead coupling or for intraday coupling instead of the NEMOs.'*

The Commission's competence to appoint a SMCO is therefore a measure of last resort, which may only be executed if NEMOs do not comply with their obligation to submit an

Implementation Plan in accordance with Article 7(3) of the CACM Regulation[35]. Against this background, recital 15 and Article 7(6) rather support the finding that the CACM Regulation, to which Article 7(1) of the Electricity Regulation refers, is based on the decentralised approach.

Keeping a connection with the CACM 1.0 approach, the principle of "different governance options" set by Art. 2(15) of REGULATION (EU) 2024/1747 which amends Art 59.1 b) of Regulation 2019/94 should lead to consider a centralized governance option like the SMCO only as a measure of last resort, which may only be executed if NEMOs do not comply with their responsibilities for the management of SDAC and SIDC.

f) ***Consequences***

48. Article 61(2) in joint reading with 59(1)(b) and the first sentence of Article 7(1) of the Electricity Regulation empowers the Commission to adopt guidelines which implement the TSOs and the NEMOs obligation to jointly organise the management of integrated spot markets in accordance with the CACM Regulation. As already the legislator's reference to the existing CACM Regulation shows, the integration of electricity markets by the means of a decentralised cooperative market-coupling process is the basis of this obligation. The requirement of all TSOs and NEMOs to jointly organise this process points to the TSOs and NEMOs responsibility to carry out that process in a coordinated and hence a joint manner. This means that each of the TSOs and the NEMOs must make contributions that, in sum, lead to the implementation and success of this process. The definition of NEMOs as persons which carry out MCO-related tasks underpins this understanding. Establishing a new governance structure that centralises the market-coupling process and takes the control of this process away from the respective TSOs and NEMOs was contrary to that notion.

49. This understanding does not only follow from an isolated analysis of the respective elements of the first sentence of Article 7(1) of the Electricity Regulation but is also confirmed by context-related considerations. First, under European energy law, the European Parliament and the Council decide, on the basis of an ordinary legislative procedure, whether and to what extent companies are subject to unbundling rules. Directive (EU) 944/2019 for examples sets out the unbundling rules which are relevant for electricity TSOs and DSOs;[36] Directive 2009/73/EC provides for the unbundling standard applicable to natural gas TSOs and DSOs.[37] Second, and even more striking, it was the European Parliament and the Council which established the European Association for the cooperation of transmission system operators for electricity

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35 Such Implementation Plan was submitted by NEMOs to all NRAs and Commission in 2016 and approved by all NRAs in 2017, available at https://www.nemo-committee.eu/publication-detail/mco-plan.

36 Articles 35 and 43 et seq. of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ 2019 L 158, p. 125).

37 Articles 9 and 26 of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94).

(ENTSO-E)[38], the European Association for the cooperation of transmission system operators for natural gas (ENTSO-G)[39] and the Association for the European Distribution System Operators (E.DSO).[40] Especially the latter is based on provisions set out in the Electricity Regulation. Thus, European energy law in general and the Electricity Regulation in particular are based on the notion that legislative acts are the instrument to establish requirements concerning the corporate structure of companies. Interpreting the Electricity Regulation in a way that essential MCO tasks and other market related task of all NEMOs and TSOs would be transferred to a SMCO by means of an Implementing Act is contrary to that notion.

Therefore: no entitlement to deprive NEMOa and TSOs from jointly organising the management of integrated spot markets

50. Against this background, Article 61(2) in joint reading with Article 59(1)(b) and Article 7(1) of the Electricity Regulation does not empower the Commission to deprive NEMOa and TSOs from their responsibilities in managing SDAC and SIDC.

51. the Proposal outsources market coupling functions from TSOs and NEMOs to a third-party, thus depriving TSOs and NEMOs.

52. Market Coupling is a largely IT-based process, thus presupposing the development and maintenance of price coupling and continuous trading matching algorithms. The actual market coupling then consists of validating data on cross-border capacities and processing it into the algorithms, running the algorithm and passing on the results of the algorithm to the power exchanges, thus enabling them to reflect these results in the electricity prices.[41]

53. The Proposal establishes as the only possible governance option for market coupling one SMCO performing MCO tasks, such as:

    a. developing and maintaining algorithms and other systems which are needed for the single day-ahead and intraday Market Coupling;[42]

    b. operating these algorithms;[43]

    c. receiving, validating and processing input data on cross-zonal capacity outputs;[44]

    d. validating and sending single day-ahead and intraday coupling results to

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38 Articles 4 et seq. of 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 (OJ 2009 L 211, p. 15).

39 Articles 4 et seq. of Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ 2009 L 211, p. 36).

40 Articles 52 et seq. of the Electricity Regulation.

41 Articles 7 et seq. of the Electricity Regulation.

42 Article 18(1)(a) of the Proposal.

43 Article 18(1)(e) of the Proposal.

44 Article 18(1)(c) of the Proposal.

NEMOs and TSOs;[45]

e. performing backup procedures and fallback procedures in the event of incidents in the event of incidents in the single day-ahead and intraday coupling.[46]

f. acting as a central counterparty to each NEMO for the exchange of energy between NEMO trading hubs and as a balance responsible party in each relevant scheduling area for scheduling to TSOs.[47]

54. Consequently, the SMCO will be entrusted with carrying out those measures which essentially constitute day-ahead and intraday market coupling. As shown above, this is already sufficient to assume that TSOs and NEMOs will be deprived of organising the management of integrated spot markets. Therefore, the Proposal does not implement Article 7(1) of the Electricity Regulation, but rather runs contrary to that provision.

Commission has failed to establish convincing reasons as to why the setting up of a SMCO is appropriate and necessary as the only governance option for the management of SDAC and SIDC

55. Against this background, we see much support for the view that the Proposal violates the principle of proportionality.

56. The Proposal seeks for the completion of a fully functioning and interconnected internal energy market.[48] Commission argues that obliging all NEMOs and TSOs to establish a SMCO is appropriate and necessary to achieve various sub-aims which contribute to this overall objective, as recital 14 of the Proposal shows:

> *‚Establishment of such entity is needed to ensure better and faster development of single day ahead coupling, in particular to be able to implement future requirements and improvements without delays and excessive burden. Such arrangement should also enable more effective regulatory oversight and enforcement, simpler and less costly operation, level playing field for competition among NEMOs, easier entry for new NEMOs, more coordinated development of solutions and higher level of continuity of the single day-ahead and intraday coupling.‘*

57. We do not find Commission’s arguments convincing (see a)-e)). In any event, the Proposal is likely disproportionate to the aims it pursues (see f)).

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45 Article 18(1)(f) of the Proposal.
46 Article 18(1)(j) and (k) of the Proposal.
47 Article 18(1)(l) of the Proposal.
48 Judgment of 13 November 1990, C-331/88, The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others, paragraph 16; Judgment of 21 July 2011, Azienda Agro-Zootecnica Franchini and Eolica di Altamura, C-2/10, ECLI:EU:C:2011:502, paragraph 73.

A SMCO is neither appropriate nor necessary to ensure better and faster development of single day-ahead markets

58. A better and a faster development of single day-ahead markets is a legitimate objective. However, we fail to see, why a SMCO shall be necessary to pursue that objective.

59. According to the Commission, there are deficits as regards the quality and the swiftness of the development of single day-ahead coupling. The Commission is particularly concerned that the current framework delays and hampers on the implementation of future requirements and improvements.[49] In essence, the Commission backs this analysis with four arguments. First, the Commission points to the fact that all NEMOs involved in any implementation project decide with consensus.[50] Second, the Commission argues that the current framework of market coupling requires bilateral and regional agreements thus leading to excessive coordination.[51] Third, Commission argues that the arrangements that enable the operation of multiple NEMOs in a single bidding zone are not harmonised.[52] Fourth, Commission finds that the current structure gives rise to a sequential approach thus giving rise to delays.[53]

60. These arguments, however, do not justify the new concept under the Proposal.

61. Simplifying the decision-making process does not require the establishment of a SMCO but can also be achieved by less intrusive measures such as replacing the unanimity principle in decision making with qualified majority. Such decision-making body has already been implemented by NEMOs and TSOs starting from Q3 2022.

62. Moreover, a SMCO is not necessary to overcome inefficiencies related to bilateral or regional agreements, which cover pre- and post-coupling activities which will be dealt at bilateral or regional level in any case, without direct involvement of the SMCO. Rather, it would be equally effective to regulate the process of bilateral and regional cooperation, thus making this process more efficient. Apart from that, Commission's argument ignores that such bilateral and regional agreements are necessary to reflect regional particularities as was the case for the arrangements concerning more than one NEMO in one bidding zone (so-called multi-NEMO arrangements)[54]. In doing so, Commission also contradicts the objectives of the Electricity Regulation. Article 1(c) of

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49 Recital 14 of the Proposal.

50 Annex 3 of Proposal No 2/2021 of the European Union Agency for the Cooperation of Energy Regulators 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, recital 7 (Impact Assessment).The Impact Assessment, carried out in 2021 by ACER on a different draft, has been used as the basis for drafting the Proposal as stated by the Commission in its "Staff Working Document" provided to representatives of Member States in the Cross Border Electricity Committee (relevant committee in charge of the comitology process) on 14.07.2025

51 Recital 7 of the Impact Assessment.

52 Recital 7 of the Impact Assessment.

53 Recital 7 of the Impact Assessment.

54 Proposal, Annex 3 (Initial impact assessment on the market coupling organization), paragraph 7(c), para. 47; Annex 4 (Reasoning to proposed amendments to the CACM Regulation), paragraph 105.

the Electricity Regulation requires "*taking into account the particular characteristics of national and regional markets*".

63. Commission's concerns in relation to the sequential approach are also not well-founded: First, Commission has not provided any evidence that a SMCO is less likely to apply a sequential approach. Second, even presuming that the current decentralised approach incentivises the application of a sequential approach, the establishment of a SMCO is not necessary to establish a non-sequential approach. Rather, the legislator could force NEMOs to establish predefined projects simultaneously. Third and most importantly, removing the sequential approach might cause systematic harm which is disproportionate to the pursued acceleration of the implementation of certain projects. The sequential approach is applied precisely because it ensures a higher quality and security of IT-implementation decisions. The possibility of initially testing projects within a limited area of application prevents possible IT defects from causing union-wide harm. Hence, the benefits which allegedly arise from a quicker implementation are likely to be disproportionate to the risk of an IT failure deficit resulting from a non-sequential approach.

A SMCO is neither appropriate nor necessary to enable more effective regulatory oversight and enforcement

64. According to recital 14 of the Proposal, the establishment of a SMCO is needed to overcome regulatory gaps. Improving regulatory oversight and enforcement is a legitimate objective. The establishment of a SMCO is, however, not appropriate and necessary to achieve that objective.

65. According to recital 15 of the proposal, Commission argues that the establishment of the SMCO would improve the efficiency of SDAC and SIDC management:

> *'The establishment of a single market coupling operator (hereinafter 'SMCO') is needed to ensure better and faster development of single day-ahead coupling and single intraday coupling, in particular to be able to implement future requirements and improvements without delays and excessive burden. Such arrangement should also enable more effective regulatory oversight and enforcement, simpler and less costly operation, level playing field for competition among NEMOs, easier entry for new NEMOs, more coordinated development of solutions and higher level of continuity of the single day-ahead and intraday coupling. This will ensure the development of a future-proofed framework for market coupling,.'*

66. Reading this recital 15 *a contrario*, Commission points out that there are deficits concerning cost regulation, particularly as regards the allocation, reporting and recovery of costs under the CACM Regulation.[55]

67. Commission's analysis, however, misses the point.

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55 Recital 28 of the Impact Assessment.

68. With reference to cost regulation, a specific cost methodology (as proposed in the Proposal) would be the only measure to effectively improve the regulation of MCO costs.

69. From a more general point of view, it is not comprehensible why the concept of a SMCO under the Proposal should be appropriate to overcome deficits as regards monitoring and enforcement quality. Rather, the opposite is likely: under the current regime, each NEMO is monitored by the competent national regulatory authority. By contrast, according to Article 13(6) of the Proposal, read in conjunction with the second sentence of Article 64(1) of the Proposal, all NRAs and Commission shall monitor the compliance of the SMCO. According to the third sentence of Article 64(1) of the Proposal, Commission and all regulatory authorities must cooperate when doing so. Thus, monitoring and enforcement measures will require cooperation among Commission and all competent national regulatory authorities. It is not at all clear how such a process will improve monitoring and enforcement efficiency. In fact, the enforcement framework would become even more complex: While there would be one authority endowed with enforcement power, it would still be the case that the underlying decisions would have to be coordinated jointly by all NRAs. These two layers show clearly a higher complexity rather than an improvement of regulatory oversight and enforcement.

A SMCO is neither appropriate nor necessary to achieve a more simple/efficient operation.

70. The Commission finds that the concept of a SMCO is appropriate and necessary to simplify the operating process. This conclusion is not convincing.

71. Commission argues that the current framework of market coupling was too complex and risky. According to the Commission, in recent years partial decoupling incidents occurred that led to major market disruptions and caused huge financial losses.[56] The Commission argues that these events resulted from the current organisation of market coupling; the involvement of each NEMO and each TSO in the process of collecting relevant market coupling inputs gave rise to a high risk of one individual organisation's failure leading to a decoupling event, Commission says.[57] Second, the calculation of the results of day-ahead market coupling which is currently executed by rotating NEMOs/market coupling operators (i.e. executing coordinator and back-up coordinator roles) takes too much time, Commission contends.[58] Third, Commission argues that the clearing and settlement between NEMO trading hubs and scheduling was bureaucratic and constituted barriers to entry.[59] Fourth, Commission argues that the current approach implied high risks of interoperability and data flow problems for the whole market coupling process.[60] In addition, Commission argues that the current framework gave rise to various scenarios in which NEMOs stop operating in a bidding

56 Recital 12 of the Impact Assessment.
57 Recital 13 of the Impact Assessment.
58 Recital 13 of the Impact Assessment.
59 Recital 13 of the Impact Assessment.
60 Recital 13 of the Impact Assessment.

zone, thus excluding this bidding zone from market coupling.[61]

72. None of these arguments are sufficient to show the appropriateness and necessity of the obligation to establish a SMCO.

73. As a preliminary note, the three decoupling events the Commission is referring to were caused by local order book issues which were unrelated to the execution of MCO functions. Thus, these incidents would also have occurred, if MCO functions had been executed by a SMCO.

74. As another preliminary note, Commission's arguments only refer to the single day-ahead market coupling but not to the single intraday market coupling, thus lacking any justification as to why the single intraday market coupling shall be performed by a SMCO.

75. Regarding the first point, it must be considered that the SMCO's scope of responsibility will be a multiple of the scope of responsibility of a single NEMO. Therefore, it is not comprehensible why under the concept of a SMCO there is a lower risk that the respective bidding zones will be subject to individual failure than under the current decentralised approach. Rather, the SMCO will be subject to a cluster risk, thus particularly increasing the risk of a far-reaching harm caused by a single incident. The effect of such an incident could lead to the scenario in which the SMCO stops operating, causing an EU-wide decoupling.

76. Establishing a SMCO triggers significant concentration risks. Given the centralised position of the SMCO, its failure would likely affect all coupled bidding zones, thus causing significant harm both financially and in terms of security of supply; by contrast, the failure of an individual NEMO would rather have limited impact. Moreover, a failure of the SMCO could simultaneously affect the performance of the single day-ahead and intraday market coupling algorithms, thereby exacerbating the effects; under the current system, by contrast, separate NEMOs are responsible for the performance of these algorithms, thus diversifying the risks of failure. Furthermore, the SMCO would have to simultaneously administer the – over the various bidding zones non-uniform – tasks currently executed by the NEMOs, thus increasing complexity and hence the probability of failure.

77. Regarding the second point, the alleged excessive duration of the calculation of the results of day-ahead market coupling has no relationship with the number of NEMOs executing market coupling operations. It only depends on the features of the day-ahead algorithm which are fixed as algorithm requirements by the algorithm methodology. In fact, each algorithm requirement constitutes a specific constraint from a computational point of view. On the other hand, having more NEMOs acting as coordinator (i.e. responsible for coordinating the market coupling operation for a respective day) or back-up coordinator for the market coupling is surely beneficial since a failure

61 Recital 14 of the Impact Assessment.

experienced by the NEMO acting as coordinator can be addressed by reverting to calculations done by back-up coordinator NEMOs. Such parallel and backup construction has so far proven to be robust and reliable and should be preserved.

78. With regard to the third point, it must also be emphasised that a SMCO is not necessary to make clearing and settlement less bureaucratic. The same effect could most likely be achieved via standardization of the relevant contractual clauses on the basis of a coordinated approval by all NRAs/Commission.

79. Regarding the fourth point, Commission ignores that the existing redundant and operational set-up ensures that each NEMO receives all data related to the other NEMOs and is, therefore, able to calculate coupling results; as a consequence the current system is very robust and reduces the risk of interoperability problems.

80. Furthermore, with respect to cybersecurity, it is necessary to consider the enormous and higher systemic risks related to the "*single point of failure*" in the event of a cyber - attack since a decentralized system can adopt filtering measures capable of limiting or isolating the extent of the cyber-attack. A successful cyber-attack, on the other hand, on a centralized system would be evidently devastating for the overall market coupling system.

81. Finally, the scenario in which NEMOs stop operating in a bidding zone, thus excluding this bidding zone from market coupling, is rather theoretical as there is always enough incentive for any NEMO already operating in another bidding zone to take over the role of a NEMO which stops its operations. Should this theoretical scenario, instead, become effective, it would be the responsibility of the local NRA to set the appropriate measures in line with their respective powers and the decentralized principle established by the Electricity Regulation.

A SMCO is neither appropriate nor necessary to achieve a less costly operation

82. Commission argues that a SMCO is appropriate and necessary to save costs stating the following:

> *' The establishment of a single market coupling operator (hereinafter 'SMCO') is needed to ensure better and faster development of single day-ahead coupling and single intraday coupling, in particular to be able to implement future requirements and improvements without delays and excessive burden. Such arrangement should also enable more effective regulatory oversight and enforcement, simpler and less costly operation, level playing field for competition among NEMOs, easier entry for new NEMOs, more coordinated development of solutions and higher level of continuity of the single day-ahead and intraday coupling '*[81]

83. As a preliminary note, the Amendment Proposal lacks a solid and elaborated cost-benefit analysis.

84. It is thus already doubtful whether the creation of a SMCO leads to any cost savings

related to operations. This is because each NEMO must maintain its capability to run local markets in a decoupling scenario. Consequently, depriving NEMOs from performing tasks relating to the operation of single day-ahead and intraday coupling does not give rise to significant savings as regards IT. Rather, a SMCO gives rise to additional cost: the structural changes resulting from the establishment of a SMCO will cause transitional costs including all investment costs for the usage of the relevant assets for operating EU market coupling. Furthermore, there will be additional costs arising from measures which are necessary to address the risks of a single point of failure. Moreover, there would be additional operational costs. For example, the SMCO will need to be fully equipped to operate as a power exchange, in addition to having MCO capabilities. Thus, the SMCO will have to significantly invest in IT systems through direct acquisition or licensing and staff in order to operate a platform and to handle clearing and settlement towards market participants. Having said this, it is considerable that a SMCO leads to higher overall costs born both by the SMCO and the NEMOs compared to the current framework. In any case, Commission has not demonstrated that a centralised approach would be less costly and generally more efficient than the current decentralised and rotating approach.

85. The proposed set up of a new entity implies the transfer of assets to such entity. This raises, moreover, significant uncertainties with respect to the taxation implications of such transfer.

86. Finally, the risks associated with the removal of current rotating model are disproportionate to the alleged cost savings. Limiting the rotating principle to just a few NEMOs would arguably also cause higher costs, but at the same time maintain the benefits of diversifying the risks under a rotating model. By contrast, the SMCO would be particularly prone to market failure, especially in the initial phase of its operation. Comparing these two scenarios, the obligation to establish a SMCO proves to be manifestly disproportionate.

A SMCO is neither appropriate nor necessary to achieve a level playing field for competition and to lower barriers to entry

87. The Commission argued in its 2021 Impact Assessment that:

> *'The current CACM set-up leads to a situation in which NEMOs need to cooperate to find common solutions for the market coupling, while at the same time competing with each other in that same framework. This conflict of interest prevents both the development and improvement of the market coupling and the efficient operation of MCO tasks. By that, the current set-up cannot ensure that the market coupling as a natural monopoly puts global welfare increase as its main priority instead of individual commercial interests of NEMOs.'*[62]

88. According to the Recital 15 of the Proposal, a SMCO which is functionally unbundled from all NEMOs would ensure a "*level playing field for competition among NEMOs, easier entry for new NEMOs*".

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62 Recital 25 of the Impact Assessment.

89. Commission's line of arguments is not convincing. First of all, the it has been demonstrated that the current structure prevents third parties from entering the electricity exchange market or established electricity exchanges to compete against each other.

90. In addition, the restraints of competition that have been asserted by Commission could be tackled by less onerous means, such as stricter anti-discrimination rules and individual accountability of NEMOs for non-compliance. If Commission's assertion were correct that NEMOs delay the market entry of potential competitors, the legislator could simply establish stricter deadlines or requirements preventing NEMOs from doing so. As a more general point, it is for European competition law to provide for effective and established tools to limit restraints in competition. Finally, the Commission fails to recognize the current dynamics at play in the NEMO framework, as new entrants do continue to enter the market[63] and exert competitive pressure on established electricity exchanges.

A SMCO is neither appropriate nor necessary to achieve more coordinated development of solutions and a higher level of continuity

91. The Commission finds that a SMCO would be appropriate and necessary to achieve a "*more coordinated development of solutions and a higher level of continuity of the single day-ahead and intraday coupling*"[64]. This however does not give rise to the necessity of establishing a SMCO. Rather, such considerations concern the governance of the NEMOs, such as timelines and decision rules applicable to a joint decision-making body. As mentioned above, NEMOs and TSOs continue to improve governance, as the establishment of a decision-making body that may decide with qualified majority shows.

The Obligation to establish a SMCO is manifestly disproportionate

92. Even assuming, *arguendo*, that some of Commission's arguments are accurate, there would be a lack of necessity. As outlined above, the necessity limb requires according to the settled case law that the *'disadvantages caused must not be disproportionate to the aims pursued'*.[65]

93. The obligation to establish a SMCO, however, causes severe disadvantages which are disproportionate to the alleged benefits of a SMCO. A SMCO causes concentration risks, transitional risks, the creation of sunk costs as well as risks of over regulation and of disconnection from the market participants and the market. Especially the combination of the concentration risks and the transitional risks may translate into particularly severe harm with pan-European impact. These downsides are disproportionate to the alleged benefits asserted by the Commission: the fundamental protection of security of supply, which is endangered by Commission's proposal, is to be given significantly

63 See e.g. ETPA: https://etpa.nl/news/dutch-energy-exchange-ready-to-disrupt-european-energy-trading/

64 Recital 15 of the Proposal.

65 Judgment of 13 November 1990, The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others, C-331/88, ECLI:EU:C:1990:391, paragraph 16; Judgment of 21 July 2011, Azienda Agro-Zootecnica Franchini and Eolica di Altamura, C-2/10, ECLI:EU:C:2011:502, paragraph 73.

more weight than the efficiency gains asserted by the Commission. The stranded investments resulting from a SMCO are severe, particularly concerning investments into IT infrastructure. Commission's proposal intervenes into the NEMO's property rights as well as their commercial freedom to conduct a business according to Articles 16, 17 and 52 of the Charter, as it forces operators of electricity exchanges to cease parts of their business activities, thus precluding revenue which is necessary to compensate the costs of long-term investments into IT infrastructure. In this respect, please refer also to the following Paragraph 5. By contrast, the productive or monitoring efficiency gains claimed by the Commission are of a both speculative and rather tweaking nature. In addition, Commission has various other options, i.e. modifying various elements of the current system, to improve the process of market coupling without taking the risks and downsides of a SMCO. Here again, Commisssion's proposal has not been economically substantiated. It has not been demonstrated how the severe disadvantages caused by the establishment of a SMCO to the current NEMOs but also to the market structure in general would be outweighed. It is therefore hard to see how EU regulators – besides having no competence in this respect (see section II above) – could justify the necessity and proportionality of measures as drastic as the proposed unbundling and centralization requirements.

Therefore: The Proposal is likely to be contrary to the principle of proportionality

94. In light of the above, Commission's proposal likely violates the principle of proportionality.

2.1.4 Restriction to the freedom to conduct a business and property: infringement of Articles 16, 17 and 52(1) of EU Charter

95. The mandatory implementation of the SMCO to perform the MCO functions represents a disproportionate restriction on the freedom of NEMOs to conduct their business activities as guaranteed under Article 16 of the EU Charter, and exercise their right to property as protected by Article 17 of the EU Charter.

2.1.4.1 The fundamental rights at stake: freedom to conduct a business and right to property protected respectively under Articles 16 and 17 of the EU Charter

96. Articles 16 and 17 of the EU Charter provide the following:

> "*Article 16 - Freedom to conduct a business*
> *The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.*
> *Article 17 - Right to property*
> 1. *Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.*

2. *Intellectual property shall be protected.*"

97. The aim of Articles 16 and 17 of the EU Charter is to protect both the freedom to conduct a business and the right to property without being subject to either discrimination or disproportionate restrictions[66].

98. These rights are particularly relevant in the context of the Proposal, as the establishment of a SMCO directly affects NEMOs business operations and proprietary rights.

99. As a reminder, Article 16 of the EU Charter guarantees the freedom to conduct a business, in line with EU and national law. This right has been interpreted broadly, covering, *inter alia*, the freedom to exercise an economic activity, the freedom to contract and the freedom to engage in fair competition[67]. In the context of EU-wide or cross-border activities, such freedom is protected under the TFEU provisions on the freedoms of establishment and of service[68].

100. Pursuant to Article 17(1) of the Charter, "(e)*veryone has the right to own, use, dispose of, and bequeath their lawfully acquired possessions*". Deprivation of possessions is only permissible where it serves the public interest, is provided for by law, and is subject to the payment of fair compensation within a reasonable time. In addition, the use of property may be regulated by law insofar as it is necessary to meet objectives of general interest.

101. In the present case, the Proposal would restrict NEMOs freedom to conduct business and right to property as it would effectively preclude them from managing SDAC and SIDC.

102. The Proposal would indeed entail the outsourcing of essential MCO tasks to the SMCO, an entity that is legally and functionally unbundled and, as such, acts independently in the organisation and management of market coupling.

103. **The Proposal would restrict NEMOs freedom to conduct a business** – as the activities currently carried out by NEMOs, who, in the absence of legal provisions withdrawing their role in performing MCO tasks, would otherwise continue to do so – the Proposal would, based on Article 16 of the EU Charter, constitute and interference with their commercial freedom to conduct business.

104. In practice, the Proposal would oblige NEMOs to (i) establish a legally and functionally independent SMCO (pursuant to Article 18.2 of the Proposal) and to (ii) transfer core business functions from NEMOs to the SMCO. It would thereby alter NEMOs established business model and compel the cessation of certain business activities, resulting in the loss of associated sources of revenue.

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66 CJEU, judgment of 30 June 2016, Lidl, C-134/15, EU:C:2016:498, paragraph 33.

67 CJEU, judgments of 22 January 2013, Sky Österreich, C-283/11, EU:C:2013:28, paragraph 42, and of 16 July 2020, Adusbef and Others, C-686/18, EU:C:2020:567, paragraph 82.

68 cf. Articles 49 and 56 of the TFEU.

105. **The proposal would also restrict NEMOs right to property – the Proposal would result in an expropriation of data as well as in a partial expropriation of assets.**

106. Pursuant to Article 11 of the Proposal, NEMOs would indeed be required to define the entities that shall provide, free of charge, key information to the ENTSO-E transparency platform in a non-discriminatory manner. Such key information shall include notably:

- information on single day-ahead coupling and intraday auctions, i.e., reference clearing prices for bidding zones per market time unit, traded volumes and net positions for NEMO trading hubs and bidding zones per market time unit; and scheduled exchanges between NEMO trading hubs and between bidding zones per market time unit.

- information on continuous trading, i.e., the aggregated traded volumes and prices.

107. In practical terms, this would result in a *de facto* expropriation of data ownership, as NEMOs would be required to transfer business information related to single day-ahead and intraday coupling, including prices per MTU, traded volumes, net positions, scheduled exchanges, and aggregated volumes and prices. In this respect, it must be highlighted that in order to properly gather, elaborate and produce all these data and information, NEMOs have to bear significant costs with high-level and peculiar technological solutions and instruments developed over the years. Furthermore, all such data have to be then properly verified by NEMOs – bearing once again the relevant costs, concerning personnel involved and relevant time spent on it - also in order to guarantee their reliability and correctness for the purposed for which the same are required to be calculated.

108. Furthermore, pursuant to Article 18(6) of the Proposal, NEMOs would be required to sell or license their coupling algorithms to the SMCO. The Proposal goes even further by imposing specific financial conditions that exclude the recovery of costs established by regulatory decisions. As a result, NEMOs would be effectively deprived of their intellectual property without receiving adequate compensation as the associated financial conditions would be below market value.

109. The mere justification of such deprivation by historical public cost recovery is not valid. Public contribution via cost recovery of the maintenance and developments of the assets for market coupling operations does not necessarily imply dispossession as is shown in other cases. An example in this respect can be considered the case of tenants of a multi-occupancy property do not automatically acquire ownership rights to such property by virtue of having to pay a share of maintenance and upkeep costs. It's true, there are "right-to-buy" regimes in place, but these measures require express legislation to ensure a process is followed whereby fair market value is obtained.

110. Finally, Article 47 paragraph 5 of the Proposal provides the following: "(t)*he single day-ahead coupling systems – including the algorithms, the continuous trading systems - and the single intraday auction systems – including the algorithm shall only be used by the MCO in the day-ahead and intraday coupling in the Union. Any usage of those systems*

outside this region shall be subject to an authorisation from the European Commission".

111. The use of market coupling systems would therefore be limited and constitute a partial expropriation of assets for NEMOs and TSOs who would no longer be entitled to freely use such systems.

2.1.4.2 Assessment of the Proposal under Article 52(1) of the EU Charter

112. The Proposal, read in light of Article 16, Article 17 and Article 52(1) of the EU Charter, must be interpreted as meaning that it would disproportionately preclude NEMOs from exercising their SDAC and SIDC activities and deprive them from their associated property rights.

113. Although the freedom to conduct a business and the right to property are not absolute[69], limitations may be imposed on these rights and freedoms only in specific circumstances, as acknowledged by Article 52(1) of the EU Charter: "(a)*ny 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*."

114. Article 52(1) of the EU Charter therefore sets out specific conditions for any limitation on the exercise of the rights it protects:

1. Limitations must be provided for by law;
2. Limitation must respect the essence of the rights and freedoms in question;
3. Limitations must be necessary and meet objectives of general interest; and
4. Limitations must be proportionate.

115. While Article 52(1) of the EU Charter lays down four cumulative requirements for any limitation of fundamental rights, none are satisfied in this instance, as will be demonstrated below.

2.1.4.2.1 The Proposal fails to meet the first criteria set by Article 52 of the EU Charter (i.e., limitation provided for by law)

116. The first condition under Article 52(1) of the EU Charter requires that any limitation on fundamental rights must be provided for by law.

117. The Proposal qualifies as an implementing secondary regulation that belongs to the category of non-legislative acts of EU pursuant to Article 289 of TFUE

118. In that regard, insofar as the restriction in question is set out in the Proposal, which

[69] CJEU judgment of 16 July 2020, Adusbef and Others, C-686/18, EU:C:2020:567, paragraphs 83 and 85.

would constitute a non-legislative act, it cannot be considered as being "provided for by law" within the meaning of Article 52(1) of the EU Charter.

119. Implementing acts adopted by the European Commission under Article 291 of the TFEU do not constitute a law and are defined as "*a non-legislative act laying down detailed rules for the uniform implementation of legally binding Union acts*".[70]

120. This finding is also supported by the European Court of Justice's jurisprudence, which distinguishes between legislative acts and non-legislative acts, such as implementing acts, and acknowledges that implementing measures cannot amend essential elements of an EU legislation.[71]

121. Further, it is well established that an EU legislation, that entails interference with fundamental rights, "*must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards*".[72] In practice, implementing acts cannot, by their nature, establish such rules as they are limited to ensuring uniform conditions for implementing legally binding EU acts.

122. In light of the above, the first criterion under Article 52(1) of the EU Charter is not fulfilled. Consequently, the Proposal, as an implementing act adopted under Article 291 TFEU, cannot lawfully impose limitations on the fundamental rights of NEMOs enshrined in Articles 16 and 17 of the EU Charter.

123. Finally, it must be recalled that the Electricity Regulation does not provide for such amendments resulting in limitations of fundamental rights. As outlined in Section 1, the Commission is exceeding the powers conferred upon it by the Electricity Regulation and is unlawfully amending essential elements of basic legislation in breach of Article 291(2) TFEU.

2.1.4.2.2 The Proposal violates the essence of the rights and freedoms in question

124. The Proposal breaches the second condition of Article 52(1) by failing to respect the very essence of the rights enshrined in Articles 16 and 17 of the EU Charter.

125. The notion of "essence" was addressed by the jurisprudence, notably in the Schrems I case[73] where the Court established that certain interferences with fundamental rights are so severe that they cannot be justified under any circumstances, as they affect the very core of the right.

126. In the present case, the Proposal would result in an obligation imposed on NEMOs to to outsource market coupling functions to an SMCO and interfere with the very

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70 https://www.consilium.europa.eu/en/council-eu/decision-making/implementing-and-delegated-acts/#:~:text=An%20implementing%20act%20is%20a,of%20legally%20binding%20Union%20acts.

71 CJEU, judgment of 5 September 2012, Parliamant v Council, EU:C:2012:516, paragraphs 66-67.

72 CJEU, judgment of 8 April 2014, Digital Rights Ireland, C-291/12 and C-594/12, U:C:2014:238, paragraph 54.

73 CJEU, judgment of 6 October 2015, Schrems I, C-362/14, EU:C:2015:650, paragraph 94.

substance of their corresponding intellectual property rights.

127. While in certain cases the CJUE has found that no restriction of the right or freedom at stake where the measure merely introduced incentives, the Proposal, by contrast, imposes binding obligations[74]. In doing so, it definitely restricts the ability of the NEMOs to freely conduct their market coupling activities and to make use of their available resources.

128. The Proposal would not merely regulate how NEMOs conduct their business, it would fundamentally alter their business model by expropriating core functions and transferring them to a separate entity. This is evident in Article 19(7) and 19)10) of the Proposal that states:

7. The Single Market Coupling Operator shall be legally and functionally independent from any NEMO or TSO. No NEMO nor TSO shall benefit from undue advantages through participation in the Joint Steering Committee.

10. Once considered operational pursuant to Article 20(5), the Single Market Coupling Operator shall be liable for the performance of the MCO tasks defined in Article 23.

129. This constitutes an interference with the core content of the freedom to conduct a business and violates the essence of such fundamental right.[75]

130. Similarly, the Proposal interferes with the essence of the right to property as it would deprive NEMOs from the essential aspects of their property rights over their algorithms and systems, thus affecting the very essence of Article 17 of the EU Charter.

131. In light of the above, the second criterion under Article 52(1) of the EU Charter is not satisfied as the Proposal violates the essence of the rights and freedoms guaranteed by Articles 16 and 17 of the EU Charter.[76]

2.1.4.2.3 The Proposal fails to meet the necessity and proportionality tests

132. Finally, the Proposal fails to satisfy the necessity and proportionality requirements set out in Article 52(1) of the EU Charter.

133. Pursuant to Recital 15 of the Proposal, the Commission identified several shortcomings based on the current applicable framework for market coupling operations, notably distortion to the level-playing field among NEMOs, cost inefficiency, unnecessary complexity, absence of necessary investment and delayed implementation of projects.

134. The Proposal thereby seeks to address these issues to ensure a fully functioning and interconnected internal energy market. As such the proposal does pursue an objective

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74 CJEU, judgment of 15 April 2021, Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) e.a., C-798/18 et C-799/18, EU:C:2021:280, paragraphs 58-64.

75 CJEU, judgment of 16 July 2020, OC e.a. v Banca Italia e.a., C-686/18, EU:C:2020:567, paragraph 89, and judgment of 22 January 2013, Sky Österreich, C-283/11, EU:C:2013:28, paragraph 49.

76 CJEU, judgment of 30 April 2024, Trade Express L ODD and Devnia Investment, C-395/22 and C-428/22, EU:C:2024:374, paragraph 82, judgment of 16 July 2020, Adusbef and Others, C-686/18, EU:C:2020:567, paragraph 89.

in the general interest.

135. Nevertheless, it must be determined whether the forced outsourcing of market coupling functions from NEMOs to an SMCO may be regarded as proportionate to the objectives sought.

136. In that regard, in accordance with settled case-law, the principle of proportionality requires that measures adopted by EU institutions be both suitable for achieving the legitimate objectives pursued by the contested legislation and limited to what is strictly necessary to attain those objectives.[77]

137. More particularly, in the Digital Rights Ireland case, the Court specified that "*where interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference*".[78]

138. In the present case, the Commission found that the setting up of a SMCO is necessary and proportionate to address the identified issues but fails to demonstrate that the objectives sought cannot be achieved through less restrictive means.

139. In this respect, it should be noted NEMOs along with TSOs have encountered the issues mentioned in the Proposal and have developed less intrusive alternative measures that enabled them to continue to efficiently exercise their market coupling activities.

140. Therefore, the solution taken up in the Proposal would be, as demonstrated in Section 2, disproportionate and unnecessary.

141. Further, the Commission did not conduct a proper impact assessment that weighs the alleged benefits of the SMCO against its costs, particularly the costs to fundamental rights. This failure to conduct a proper balancing exercise violates the proportionality principle, as interpreted in the Volker und Markus Schecke case.[79]

142. While the proportionality of an EU act in light of Article 52(1) of the EU Charter is assessed on a case-by-case basis, it should be noted that the present case bears similarities with previous cases.

143. In the Digital Rights Ireland case, the European Court of Justice invalidated a data retention because it failed to establish clear and precise rules limiting its interference with fundamental rights to what was strictly necessary. More particularly, the EU act

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77 CJEU, judgment of 8 April 2014, Digital Rights Ireland, C-291/12 and C-594/12, U:C:2014:238, paragraph 46; judgment of 8 July 2010, Afton Chemical, C-343/09, EU:C:2010:419, paragraph 45; judgment of 9 November 2010, Volker und Markus Schecke and Eifert, C-92/09 and C-93/09, EU:C:2010:662, paragraph 74; judgment of 23 October 2012, Nelson and Others, C-581/10 and C-629/10, EU:C:2012:657, paragraph 71

78 CJEU, judgment of 8 April 2014, Digital Rights Ireland, C-291/12 and C-594/12, U:C:2014:238, paragraph 47.

79 CJEU, judgment of 9 November 2010, Volker und Markus Schecke, C-92/09 and C-93/09, EU:C:2010:662, paragraph 86.

at stake did not "*lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary".*[80]

144. Similarly, the Proposal does not provide for clear and precise limits on the appropriation of NEMOs' functions and property, thereby exceeding what is strictly necessary to pursue its declared aims.

145. Further, the European Court of Justice also found in some instances that national legislation applicable in a generalised manner without providing for any differentiation, limitation or exception according to the objective pursued exceeds the limits of what is strictly necessary and cannot be considered to be justified based on Article 52(1) of the EU Charter.[81] For instance, in the Schrems I case,[82]the Court invalidated the Safe Harbor decision because it permitted generalized access to electronic communications, thus compromising the essence of the right to privacy.

146. In the present case, the proposal would permit generalized expropriation of NEMOs core business functions and intellectual property, compromising the essence of Articles 16 and 17 of the EU Charter.

147. In light of the above, the Proposal would exceed the limits imposed by compliance with the principle of proportionality in the light of Article 52(1) of the EU Charter, and violates Articles 16, 17 and 52(1) of the EU Charter.

2.1.5 Maximum duration for monopolistic NEMOs: breach of Article 5(3) and 106(2) of TFEU, of Article 40 of EU Directive 2019/944 and of Article 58(2)(b) of EU Regulation 2019/943

148. With respect to monopolistic NEMOs, the Proposal provides for a maximum duration (3 years from the entering into force of CACM 2.0).

2.1.5.1 Article 5(3) TFEU confirms that the Commission has no competence to propose a maximum duration for monopolistic NEMOs in the Proposal

149. TFEU Article 5(3) provides that:

> "*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*"

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[80] CJEU, judgment of 8 April 2014, Digital Rights Ireland, C-291/12 and C-594/12, U:C:2014:238, paragraph 65.
[81] CJEU, judgment of 21 December 2016, Tele2 Sverige AB, C-203/15 and C-698/15, EU:C:2016:970, paragraphs 105-107.
[82] CJEU, judgment of 6 October 2015, Schrems I, C-361/14, EU:C:2015:650.

150. The energy sector is one of the areas of mixed competence between the Union and Member States as provided in Article 4(2)(i) TFEU. Moreover, Article 194(2) TFEU provides clear evidence of the relevance of Members State's prerogatives in the energy sector stating that "*…Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).*"

151. As well known, the principle of subsidiarity is a substantive benchmark and a procedural filter in the Commission's legislative activity, guiding the distribution of powers between the EU and Member States and embedding democratic accountability within the Union's multilevel framework. It serves not merely as a legal formality but as a core expression of respect for national diversity and decentralization, ensuring that EU action complements rather than supplants Member State autonomy. Therefore, the principle of subsidiarity must be fully applied by the Commission in any kind of implementing activity of the Electricity Regulation such as CACM review, without any possible exception.

152. The principle of subsidiarity applies to all the European Union's institutions, including the Commission, and constitutes a foundational normative constraint of the exercise of European Union competences in areas not falling within the scope of the latter's exclusive competence. In this context, the Commission bears a particularly critical responsibility to ensure rigorous adherence to the subsidiarity principle at both substantive and procedural levels. Under Article 5(3) of TEU the Commission must pass a dual test of necessity and added value, demonstrating persuasively that the objectives of a proposed action cannot be adequately achieved by the Member States independently—whether at national, regional, or local levels—and that the scale or effects of the intervention justify a Union-level response. This requirement demands more than a superficial justification; it compels a concrete and evidence-based subsidiarity analysis embedded within the legislative process from its inception.

153. The provisions concerning the Monopolistic NEMOs – including the eventual proposal of a maximum duration - is a fundamental strategical entitlement of each Member State which falls within Member States competence. It can be argued that currently, the Proposal is an implementing act of the Commission which infringes the subsidiarity principle disrupting national specificities set by national primary law. Indeed, Commission's legislative activity must also evaluate alternative national measures and argue why such measures would be inadequate to achieve the stated objectives effectively. Nevertheless, no statement is made on compliance with the principles of subsidiarity, nor is there any assessment of the financial impact.

154. To institutionalize this obligation, the Protocol on the application of the principles of subsidiarity and proportionality at Article 5 provides that:
"*Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever*

possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved."

155. Therefore, each legislative proposal must be accompanied by a detailed explanatory statement. This document must explicitly set out the grounds for concluding that the subsidiarity principle has been respected.

156. Furthermore, in procedural terms the Protocol subjects the Proposal to multilayered scrutiny. National parliaments have the right to assess whether a draft legislative act complies with subsidiarity and may issue reasoned opinions indicating non-compliance. If a sufficient number of parliaments object under the early warning mechanism, the Commission is obliged to review, amend, or withdraw the proposal.

2.1.5.2 Article 106(2) TFEU confirms that the Commission has no competence to propose a maximum duration for monopolistic NEMOs

157. TFEU Article 106(2) provides that:
"*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.*"

158. The requirements set by TFEU Article 106(2) to allow the upholding of legal monopolies are fulfilled by Monopolistic NEMOs. In fact, Monopolistic NEMOs are entrusted with particular tasks of public interest assuring:
- the security and efficiency of national electrical system which is an absolute priority of public strategical interest, being in relation with the specificities of the topology of the relevant national grid;
- the monitoring and prevention of market distortions.

159. With respect to the particular tasks of Monopolistic NEMOs in the context of the security and efficiency of national electrical systems operation, special consideration must be given to those central dispatching systems or systems based on unit-bidding where specific tasks related to dispatching, mostly deriving from the physical constrains of the national grid and of the resources connected to it, are integrated and executed via a central energy market. The choice between different models of dispatching systems is a fundamental strategical entitlement of each Member State to assure the security of the national power system. This entitlement derives from Article 40 of Directive (EU) 2019/944 which recognizes to Member States the right to assign tasks of TSOs to other system operators, such as in case of scheduling activity assigned to monopolistic NEMOs in central dispatching system or system based on unit-bidding.

160. With respect to the particular tasks of Monopolistic NEMOs in the context of monitoring and prevention of market distortions, it must be highlighted that the unit bidding model proves also being a fundamental market design feature in securing an effective market monitoring by Monopolistic NEMOs. In fact, Monopolistic NEMOs in unit-bidding systems are entrusted with the relevant monitoring duty to perform a direct comparison of the quantities and prices offered by each market participant with the actual physical availabilities and generation costs of their individual generation units.

2.1.5.3 Article 40 of Directive (EU) 2019/944 confirms that the Commission has no competence to propose a maximum duration for monopolistic NEMOs

161. The responsibility for dispatching is assigned to Member States by primary EU law. Directive (EU) 2019/944, Article 40 (Task of Transmission System Operator):

- Par (1) *'Each transmission system operator shall be responsible for [...] operating [...] the transmission system [...]*';

- Par (2) '*Member States may provide that one or several responsibilities listed in paragraph 1 of this Article be assigned to a transmission system operator other than the one which owns the system'.*

162. These provisions confirm that dispatching rules and oversight remain under TSO/national responsibility. Member States may assign substantial dispatching tasks of TSO to other "system operators" such as also Power Exchanges acting as Independent System Operator/Market Operator.

163. In this respect it must be noted that two principal models of dispatching exist: central dispatch (centralized markets) model and self-dispatch model (decentralized markets). Such models are defined in Regulation EU 943/2019 as follows:

b) 'central dispatching model' means a scheduling and dispatching model where the generation schedules and consumption schedules as well as dispatching of power-generating facilities and demand facilities, in reference to dispatchable facilities, are determined by a transmission system operator within an integrated scheduling process" - Reg 943/2019, art 2, par (29)

c) 'self-dispatch model' means a scheduling and dispatching model where the generation schedules and consumption schedules as well as dispatching of power-generating facilities and demand facilities are determined by the scheduling agents of those facilities - Reg 943/2019, art 2, par (30).

164. With specific reference to the Central dispatching model, which a Member State may adopt considering specific regional need such physical constrains of the national grid, Market participants submit to a single operator (TSO or PX/NEMO acting as Independent System Operator/Market Operator) unit-based bids reflecting plant-level costs. Such single operator (TSO or PX/NEMO acting as Independent System Operator/Market Operator) defines, via an integrated scheduling process, market

results and corresponding schedules of all resources (monopolistic task). Therefore, dispatching is done centrally through market-based offers submitted to the single operator (TSO or PX/NEMO acting as Independent System Operator/Market Operator). As a consequence, in central dispatching model, market operation is a natural monopoly since it embeds the scheduling process and adequacy checks for the security of the national electricity system.

165. As explained above, legal monopoly in market operation is a structural and unavoidable component of central dispatch. No EU secondary law can require national market operators to delegate outcome-setting powers to a third-party such as the SMCO. Cross-border market integration must occur through horizontal cooperation where national market operators operating central dispatch systems retain their responsibility according to EU and national law. European integration must respect national competences as preserved by EU primary law consistently with the EU general principle of proportionality and with the characteristics of implementing guidelines that, pursuant to Article 58.2(a), must provide the "minimum degree of harmonisation "required to achieve the aim of Regulation 2019/943

166. As provided by Directive (EU) 2019/944, the choice of dispatch model and governance of market operation remains an exclusive Member State competence. Any legislative proposal suggesting Member States must abandon central dispatch or monopoly market operation is in clear breach of EU primary law and must be rejected. In this respect, an Implementing Guidelines/ delegated act like CACM belongs to the category of secondary EU legislation that must not override or interfere with responsibilities assigned by primary EU legislation.

2.1.5.4 Article 58(2)(b) of Regulation (EU) 2019/943 confirms that the Commission has no competence to propose a maximum duration for monopolistic NEMOs

167. Moreover, the Proposal runs contrary to the provisions laid down in Article 58(2)(b) of the Electricity Regulation

168. Article 58(2)(b) of the Regulation (EU) 2019/943 sets forth that "*The network code and guidelines shall: [...] b) take into account regional specificities, where appropriate; (c) not go beyond what is necessary for the purposes of point (a);*". In this respect regional specificities include any local/national specificity where appropriate.;

169. The Proposal results to be clearly contrary to the provisions laid down by Article 3(h) and Article 58(2)(b) of the Regulation (EU) 2019/943 as it does not sufficiently leave room for taking into account regional specificities;

170. Furthermore, it has to be noted that no proof on any such verification and/or analysis of regional specificities has been provided by the EU Commission anywhere in the relevant documentation, whilst it should have been extensively and thoroughly done considering the various countries and situations whereby monopoly have always been present and implemented;

171. Another significant issue in this field is the fulfillment of the principle of proportionality (as cited also under letter c) of Article 58 (2) of the Regulation (EU) 2019/943), which requires that measures implemented through provisions of EU law be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them. This has been fully clarified by the settled case law of the CJEU where it was stated that "*when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued"*[83]. Taking into account regional specificities would have been a legitimate application of such principal and would have avoided the distruptive proposal of the monopoly elimination contained in the Proposal;

172. From a strictly legal perspective, any significant disruption of national specificities established in national primary law should be the result of a clear political decision and enshrined in Level 1 legislation, such as the Regulation (EU) 2019/943 and it should not be imposed through a Commission Regulation;

173. According to Article 58(2)(b) of the Regulation (EU) 2019/943, a guideline shall "*take into account regional specificities, where appropriate."* In line with that requirement, the Commission must adhere to the principles concerning the operation of electricity markets which provide under Article 3(h) of the Electricity Regulation that "*market rules shall provide for regional cooperation where effective";*

174. Both provisions reflect the legislator's understanding that uniform European-wide implementation measures are not an aim in itself. Rather, the legislator acknowledges that regard to regional particularities is a prerequisite for effective harmonisation and integration. To illustrate: the physical and topographical conditions within the internal market are subject to regional features, for example as regards the degree of volatility, the availability of interconnector capacities or the exposure to risks related to bottlenecks. In addition, situation-specific peculiarities may arise from the fact that electricity is not traded on a single exchange, but on various exchanges based in different Member States. These power exchanges differ in terms of size, liquidity and trading behaviour of their users. If disruptions affect one power exchange or a cluster of power exchanges, both the type of disruption and the measures required to tackle the disruption might be subject to regional peculiarities. Thus, within the European Electricity markets, numerous situations are possible where cooperation on a regional level – based on EU-wide uniform rules – is the best instrument to secure an effective functioning of the markets.

175. This particularly applies to market coupling, as the example of backup procedures shows. Backup procedures are carried out in case of an incident interrupting the normal

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83 Judgment of 13 November 1990, C-331/88, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others*, paragraph 16; Judgment of 21 July 2011, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura*, C-2/10, ECLI:EU:C:2011:502, paragraph 73.

market coupling process. Such incidents can be of global nature, thus jeopardising the ability of all NEMOs to carry out MCO functions; however, they may also have a local dimension only preventing one or several NEMOs from executing MCO functions. Particularly in the latter case, it is essential that the NEMOs concerned participate – if necessary, in cooperation with the central coordinator – in the performance of the backup procedures in order to assure the simultaneous management of the necessary tasks, thereby reducing the complexity of incident management.

176. The Proposal however makes it harder to adopt a decentralised and regional-specific approach as regards the performance of backup procedures. According to Article 18(1)(j) of the Proposal, it will be the SMCO that performs backup procedures. In conjunction with the unbundling rules, it follows that precisely those employees of a NEMO who are naturally most familiar with the cause of a regional disruption are not allowed to participate in its rectification.

177. The example of backup procedures thus shows that the Proposal makes it more difficult to deal with regional specificities precisely where this would be appropriate. The Proposal thus could run contrary to Article 58(2)(b) of the Electricity Regulation, in conjunction with Article 3(h) of the Electricity Regulation.

2.1.6 Overwhelming role of ACER: breach of Article 1(2) of Regulation 2019/942

178. The Agency for the cooperation of Energy Regulators (ACER) has been established in 2011, and is governed by the Regulation 2019/942 EU. ACER has a significant role in regards to the development and implementation of network codes and guidelines. Nevertheless the Proposal for recast CACM goes beyond the mandate of ACER established in line with Regulation 2019/942 EU, and blurs the distinction between oversight powers of the Agency, as well as those related to the approval of TCMs, with decisions that can be interpreted as operational decisions.

179. Such dichotomy between distinct responsibilities of different Parties leads to significant questions about potential conflict of interest of an EU agency in relation to oversight responsibilities over decisions that they themselves might make, especially in relation to:

1. Decisions on the appointment of Joint Steering Committee, its internal rules organization, governance and overall structure.
2. Decision on both the appointment of members of the Management board of the SMCO and their possible relief from their position.
3. Deciding on the readiness of the SMCO to go-live, in case they disagree with the findings of NEMOs/TSOs in their reporting.
4. Extension of the transitional period during which NEMOs are required to provide a backup service to SMCO.

180. The Proposal is clearly based on a “command and control” regulatory model, whereby the regulating entity (i) sets forth very detailed obligations upon the regulated entity, (ii) verify the fulfilment of such obligations and (iii) can levy sanctions upon the

regulated entity. Such a model is obsolete and could lead to significant issues, such as:

a. No flexibility can be applied to the specificities of the regulated entity/ies;
b. No economic efficiency compared to market-based solutions;
c. It can cause the regulated entity to act exclusively in order to fulfil the minimum requirements (no incentives to innovation);
d. High costs of enforcement on its monitoring and control duties in relation to the activitities carried out by the regulated entity.

181. All such items may lead to significant and dangerous hypothesis of conflicts of interests for the decisions to be taken by ACER in such field.

182. First of all, it is totally inappropriate that the regulating entity has the power to choose the members of the board of the regulated entity. The members of the board so appointed would always be in check vis-à-vis the regulated entity and this is a structural conflict of interests that undermines the institutional balance from the beginning and that leads to a lack of:

a. impartiality in the control activities,
b. credibility for the overall regulation,
c. correct management responsibility for the regulated entity, which results in the latter being just an operational feature of the regulating entity rather than an autonomous and efficient entity.

183. With such a Proposal, there would be a certain vertical integration among regulating and regulated entity, whereby the latter is not an autonomous entity anymore, but a mere operational articulation of the former. There would be a clear disruption of the separation among whom sets forth the rules and who has to apply them. It would be a sort of public intervention that is mainly used in not liberalised sectors or sectors in which the State (EU in this case) feels the need to keep a direct control (but without having the legitimate power to do so).

130. What described above would, in practical terms, results in an impairment of the pursued freedom and liberalisation of the power sector in the European Union.

184. Additionally, while the Proposal provides that ACER takes certain decisions that can be seen as operational decisions, the ultimate responsibility over these points remains with NEMOs and TSOs, creating a governance framework with responsibilities that cannot be duly carried by NEMOs and TSOs.

3 Remedies to challenge a CACM 2.0 Regulation

185. There are three types of remedies to prevent or challenge a regulation that implements the Proposal. First, the Comitology Committee could veto the Proposal, thus preventing the Commission from adopting it (I.). Second, the NEMOs could file an action for annulment if the Proposal will be adopted (II.). Third, the NEMOs could implicitly tackle

a Regulation that implements the Proposal before a national court, thereby initiating a proceeding whereby the national court requests that the CJEU gives a preliminary ruling on the validity of such regulation (III.).

3.1 Negative opinion of the comitology committee under Regulation (EU) No. 182/2011

186. Following from Article 61(2), read in conjunction with Article 59(1) and 67(2) of the Electricity Regulation, the adoption of guidelines which implement rules on market coupling are subject to the procedural rules set out in Article 5 of Regulation (EU) No. 182/2011 (***Comitology Regulation***).[84] Thus, the Comitology Committee under the Comitology Regulation could issue a negative opinion on the Commissions' proposal to adopt a regulation that corresponds to the Proposal. In more detail:

3.1.1 Background

187. The Comitology Regulation is based upon Article 291(3) TFEU. It sets out rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing power. Under the Comitology Regulation, a committee, informally known as the Comitology Committee, takes a key role.

188. The Comitology Committee consists of expert delegates from the Member States and a chairing representative from the European Commission. The Committee's key task is to deliver an opinion on the implementing act which the Commission intends to adopt. In contentious cases, the Committee's opinion is delivered by vote with the Commission's chairperson having no voting rights. Generally, a negative opinion will block the adoption of the concerned implementing act, but there exist certain exceptions to overcome a negative opinion. In other words: a negative opinion of the Comitology Committee in charge of the Proposal could stop it from becoming reality.

3.1.1.1 The Committee's vote on the opinion

189. Both the majority rules on voting on the opinion and the exceptions from the blocking effect of a negative opinion depend on the procedure applicable to the Committee. In principle, there are two types of procedures: the advisory procedure under Article 4 of the Comitology Regulation and the examination procedure under Article 5 of the Comitology Regulation. While Article 4 is the standard procedure, the examination procedure is only applicable, if the conditions laid down in Article 2(2) and (3) of the Comitology Regulation are satisfied.

190. Here, the examination procedure is applicable: the Proposal concerns an implementing act of general scope and is therefore already subject to Article 2(2)(a) of the Comitology Regulation. Additionally, Article 59(1) in joint reading with Article 61(2) and Article 67(2) of the Electricity Regulation requires the Commission to apply the examination

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84 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 Commission's exercise of implementing powers (OJ 2011 L 55, p. 13).

procedure when adopting acts which implement rules on market coupling in the sense of Article 59(1)(b) of the Electricity Regulation.

191. In order to reach a vote in favour of a negative opinion, Article 5(1) of the Comitology Regulation sets out the requirements for a qualified majority vote: it must comprise 55 percent of the (present) members of the Comitology Committee, it must comprise at least 15 members of the Comitology Committee in total, and the Committee members voting in favour of the negative opinion must constitute at least 65 percent of the population of the EU. The blocking effect of the negative opinion is contained in first sentence of Article 5(3) of the Comitology Regulation for the examination procedure.

3.1.1.2 Prerequisites for overruling a negative opinion

192. Typically, a committee's negative opinion would cause the European Commission to draft an amended version of the implementing act[85], or to submit the draft implementing act to the appeal committee for further deliberation.[86] In exceptional cases, however, there can also be possibilities for overruling such negative opinion. One such scenario is contained in Article 7(1) of the Comitology Regulation which reads:

> *'By way of derogation from Article 5(3) and the second subparagraph of Article 5(4), the Commission may adopt a draft implementing act where it needs to be adopted without delay in order to avoid creating a significant disruption of the markets in the area of agriculture or a risk for the financial interests of the Union within the meaning of Article 325 TFEU.'*

193. Given the highly restrictive conditions and the – presently non-relevant – areas of agriculture and finance, the exception of Article 7(1) of the Comitology Regulation can be disregarded. The same applies to the other exemption of '*duly justified imperative grounds of urgency*' as contained in Article 8(1) of the Comitology Regulation. As a result, there are no possible exemptions from the blocking effect a negative opinion of the Comitology Committee in charge would have.

3.1.1.3 Remedies

194. The scenario of the Commission ignoring a negative opinion of the Comitology Committee is highly unlikely to occur since this would certainly cause significant political turmoil given the restriction of the rights of the Member States this would entail. In this unlikely event, however, there would not be an immediate judicial remedy to challenge the Commission's ignoring of the Committee's negative opinion while the legislative process continues. Instead, the resulting implementing act, ie the CACM 2.0 Regulation could be challenged after the adoption of the regulation by way of the remedies described below under II. and III.

195. Likewise, there are no judicial remedies to challenge an (unfavourable) opinion of the

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85 Second sentence of Article 5(3) of the Comitology Regulation.

86 Second sentence of Article 5(3), Article 6 of the Comitology Regulation.

Comitology Committee. The only way of influencing the Committee's vote would therefore be via lobbying activities. In this regard, it could also be an option to approach either the European Parliament or the Council in order to encourage them to indicate to the Commission that a draft implementing act exceeds the implementing power provided for in the basic act according to Article 11 of the Comitology Regulation.

3.2 Action for Annulment under Article 263 TFEU

196. An action for annulment under Article 263 TFEU enables the judicial review of the legality of acts of the EU as a procedural tool to ensure the rule of law and to guarantee an effective legal protection. Among others, an 'act of the EU' comprises also legislative acts, ie Directives and Regulations. Thus, the envisaged amendment of the CACM Regulation would qualify for a judicial review under Article 263 TFEU. An action for annulment seeks the restoration of the situation under EU law by way of the removal of the unlawful act of the EU. A successful action for annulment will lead to a judgment that restores the parties to the situation that existed prior to the adoption of the contested act. In other words, such judgment would cause the judicially challenged act to become void.[87] The General Court of the EU (***EGC***) is competent to deliver a first instance judgment on an action for annulment, while the European Court of Justice is competent for appeals against such a judgment.

3.2.1 Prerequisites for legal standing

197. For an annulment action to be admissible, the potential claimant is required to have legal standing. The requirements for legal standing for an action for annulment are specified in Article 263(4) TFEU. Article 263(4) TFEU contains three different constellations for legal standing:

> *'Any natural or legal person may [...] institute proceedings against an act (a) addressed to that person or (b) which is of direct and individual concern to them, and (c) against a regulatory act which is of direct concern to them and does not entail implementing measures.'*

198. The (revised) CACM Regulation constitutes a legal act in the shape of an abstract-general law and is thus not addressed to anyone in particular. Therefore, the first variant '*addressed to that person*' is not applicable here. Also, the third variant does not apply to a potential action for annulment against the revised CACM Regulation since a Regulation does not qualify as a '*regulatory act*' in the sense of Article 263(4) TFEU. The interpretation of the term '*regulatory act*' has been subject to disputes, but by now the CJEU has clarified that it is conceptualised as the counter term to legislative acts and therefore excludes any Regulation (or Directive) as the European form of legislative acts.[88]

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87 Article 264 TFEU.

88 Judgment of 3 October 2013, Inuit Tapiriit Kanatami, C-583/11 P, ECLI:EU:C:2013:625, paragraph 60 et seq

199. The constellation applicable to a potential annulment action against the (revised) CACM Regulation therefore is the second variant of Article 263(4) TFEU according to which legal standing requires the challenged act to be '*of direct and individual concern.*' In other words, in order to be entitled to bring an action for annulment against the (revised) CACM Regulation, a NEMO will have to demonstrate that it is directly and individually concerned.

3.2.2 Conditions of Direct and Individual Concern

3.2.2.1 Direct Concern

200. The first condition of direct concern is of a less complex nature for the present case. A (potential) claimant is directly concerned, if the challenged act itself interferes with his or her interests, so that no further implementing measure is required.[89] Article 14(1) of the Proposal constitutes the obligation for every single NEMO to participate in the establishment of the SMCO. Given that the SMCO will be established to perform the MCO tasks[90] that have been carried out by the NEMOs before, Article 14(1), (2) of the Proposal clearly interferes with the (legitimate) interests of any NEMO to keep its responsible position for the MCO tasks within its respective designated bidding zone. In addition, said interference does not require any further implementing measures. Having the form of an EU Regulation, the Proposal is directly applicable without any further transposition into national law. Also, a further administrative action is not required for the obligation in Article 14(1) of the Proposal to take effect on every single NEMO since the provision applies to '*[a]ll NEMOs*'. The condition of 'direct concern' is therefore fulfilled.

3.2.2.2 Individual Concern

201. The condition of an 'individual concern' constitutes a more complex hurdle to take since the existing case law is less clear and tends to vary in the tests it applies.

aa) *Plaumann* Formula

202. As a starting point, the CJEU has developed the so-called '*Plaumann* formula' in its jurisdiction to further define the meaning of an 'individual concern.' According to the CJEU's settled case law, this condition is to be interpreted in the following way:

> *'Persons other than those to whom a decision is addressed may claim to be individually concerned, within the meaning of the fourth paragraph of Article 263 TFEU, only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated*

89 Judgment of 13 May 1971, International Fruit Company, 41–44/70, ECLI:EU:C:1971:53, paragraph 23/29; Judgment of 17 January 1985, Piraiki-Patraiki/Commission, C-11/82, ECLI:EU:C:1985:18, paragraph 7.

90 Article 14(2) of the Proposal.

> *from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed by such a decision."*[91]

203. In other words, the *Plaumann* formula raises the question whether a potential claimant can be distinguished because he is affected by the Union act in question in a manner comparable to a decision's addressee because of certain peculiar attributes or circumstances. With regard to the effect Article 14(1) of the Proposal would have on any of the NEMOs, there are good reasons to argue that all NEMOs would be affected in a way comparable with a decision's addressee. Notwithstanding the legal nature of the Proposal as a Regulation – and thereby an abstract-general law – the establishment of the SMCO for performing the MCO tasks as envisaged in Article 14(1) of the Proposal would only establish a legal obligation for all NEMOS and all TSOs. Due to this very limited scope of application of Article 14(1) of the Proposal, NEMOs (and TSOs) are – de facto – the only addressees of this legal obligation although the obligation is formally framed in a more abstract way.

bb) Separate and Identifiable Group

204. In its subsequent case law, the CJEU has further contoured its overall concept of 'individual concern' under the *Plaumann* formula by stating:

> *'[W]here a measure affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of that group, those persons may be individually concerned by that measure inasmuch as they form part of a limited class of economic operators."*[92]

205. Having regard to this criterion for an 'individual concern', there are good reasons to assume that the argument for the NEMOs' legal standing can be further corroborated. From the outset, the legal obligation contained in Article 14(1) of the Amending Proposal to '*establish one single entity to perform all the MCO tasks*' is directed to '*[a]ll NEMOs and all TSOs*' only. This restriction in scope alone could build a good case to argue that any NEMOs has been part of a clearly identifiable group upon the implementation of the Proposal. In addition to the formal qualification as a NEMO (or a TSO) it is crucial to emphasise that the status as NEMO is the result of a prior designation process by the regulatory authority of the respective Member State.[93] On substantive terms, such designation requires fulfilment of a whole catalogue of demanding criteria, such as availability of adequate financial, technical, and procedural resources, cost efficiency and adequate levels of transparent and non-discriminatory operation.[94] As a result, the designation as NEMO conveys an exclusive status that constitutes membership in '*a limited class of economic operators*' identified via regulatory stamp. Therefore, there are restrictions in scope, substance, and publicly

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91 Judgment of 15 July 1963, Plaumann v Commission, 25/62, ECLI:EU:C:1963:17, p. 107; Judgment of 12 July 2022, Nord Stream 2 v Parliament and Council, C-348/20 P, ECLI:EU:C:2022:548, paragraph 156.

92 Judgment of 27 February 2014, Stichting Woonpunt and Others/Commission, C-132/12, EU:C:2014:100, paragraph. 59; Judgment of 12 July 2022, Nord Stream 2 v Parliament and Council, C-348/20 P, ECLI:EU:C:2022:548, paragraph 158.

93 Article 4 of the CACM Regulation

94 Article 6(1) of the CACM Regulation.

controlled access to the NEMO status. This result serves as a robust basis to further argue in favour of the condition of 'individual concern' with regard to the NEMOs. The number of NEMOs can be identified as a separate and distinct group upon the implementation of the Proposal.

cc) Noticeability

206. In order to further contour the '*circumstances in which [claimants] are differentiated from all other persons*' within the assessment of an 'individual concern', the CJEU has introduced the criterion of the noticeability of the effects the Union act challenged through the annulment action has on the position of the claimant.[95] For the current situation, the noticeability of the envisaged establishment of a SMCO for performing the MCO tasks is depicted best by comparing the NEMOs situation with and without the SMCO in place.

207. As of now, each NEMO is in the position of being publicly designated for conducting market coupling operator functions within a certain bidding zone. Given the factually and legally prescribed[96] high demands for performing MCO functions, every NEMO has employed sufficient personnel for the necessary contractual, operational, and developmental tasks. In addition to a time-consuming recruitment process, said personnel has been trained over time on the specific duties associated with the performance of MCO tasks. Likewise, each NEMO has made substantive investments in the necessary IT infrastructure.[97]

208. With the envisaged establishment of the SMCO – and the corresponding shift of the MCO tasks from the NEMOs to it – the NEMOs' financial investments taken for meeting the needs of the MCO functions would be lost. Thus, if the Proposal was adopted, the NEMO's would incur stranded costs. This impact is true irrespective of the form the establishment of the SMCO would take. The SMCO will '*either be selected through a competitive tender or shall be a company owned by all NEMOs and all TSOs*'.[98] Even in case of the SMCO being co-owned by all NEMOs and TSOs, it would still '*be legally and functionally unbundled from NEMOs and TSOs*'.[99] It is therefore apparent that the NEMOs' original task as market coupling operators will be materially stripped either way. As can be inferred from Articles 15(1) and 16(1) of the Proposal, the NEMOs' responsibility for market coupling would be restricted to review and amendment tasks and would become fully disassociated from day-to-day business. As a first result of the noticeability assessment, the envisaged establishment of the SMCO, on top of triggering significant changes in the corporate structure of the NEMO companies, would substantially frustrate investments of the NEMOs and would significantly drain their tasks in market coupling.

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95 Judgment of 13 December 2005, Commission v Aktionsgemeinschaft Recht und Eigentum, C-78/03 P, ECLI:EU:C:2005:761, paragraphs 69 et seq.

96 Cf. Article 6 of the CACM Regulation.

97 Cf. Article 6(1)(a) of the CACM Regulation.

98 Article 14(2) of the Proposal.

99 Article 14(2) of the Proposal.

209. As an additional observation, the establishment of the SMCO is likely to have a negative impact on the residual market position of the NEMOs. As can be inferred from Article 19 of the Proposal, NEMOs would still be economically active with immediate touch points to market coupling, eg by receiving orders from market participants and sending them to the SMCO. Due to its nature, as the result of the centralisation of the currently decentralised MCO functions by the NEMOs, the SMCO, in turn, would pose a huge operational and financial risk of a single point of failure, potentially even at pan-European level. The negative impact of such failure on the NEMOs would be two-fold. First, such failure would immediately impede the market activities of the NEMOs for the time it would persist. Second, such failure could also bring reputational damage for the NEMOs in its aftermath given that the NEMOs used to be in charge of the SMCO and are still linked to their activities with market coupling. Hence, it appears as a likely scenario that public perception will associate such failure with the NEMOs, the establishment of the SMCO notwithstanding.

210. Overall, with regard to the impact on the degree of involvement in market coupling and on a potential exacerbation of market conditions for the NEMOs, there are good reasons to argue that the establishment of the SMCO would unfold a high degree of noticeability on the NEMOs and thereby corroborates the fulfilment of the condition of 'individual concern'.

dd) Prior Participation in Procedure

211. According to the CJEU's settled case law, 'individual concern' within the meaning of *Plaumann* for example also exists if the claimant has participated in institutional proceedings that preceded the contested measure. In *Comité d'entreprise de la Société française de production/Commission*, the CJEU held that:

> *'an undertaking cannot therefore rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the undertaking in receipt of the aid, account being taken of the extent of its possible participation in the procedure and the magnitude of the prejudice to its position on the market.'*[100]

212. In other words, a sufficiently active involvement in the proceedings preceding the contested measure is a (further) prerequisite to claim individual concern. The rationale underlying this prerequisite is that a party who does not actively participate forfeits its right to establish individual concern by reference to substantial effects on its market position.

213. Applied to the present situation, regard must be had to the degree of the NEMOs' involvement in the proceedings that have taken place so far in the forefront of the creation of the Proposal. Usually, the degree of procedural participation would be a point of differentiation between the single NEMOs. Considering the information available to us, however, there appears to exist a uniform picture given, in particular,

100 Judgment of 23 May 2000, Comité d'entreprise de la Société française de production v Commission, C-106/98 P, ECLI:EU:C:2000:277, paragraph 41.

the involvement via the NEMO Committee.

214. As a first point, all NEMOs were involved in the process of further reviewing the amendments that had been proposed by COMMISSION and further developed within a public consultation. At the centre of this involvement of the NEMOs in this review was the area of MCO governance, development, organisation, and operation. Put differently, the kind of the NEMOs' involvement immediately concerned the implementation of the SMCO as prescribed in the Proposal. By doing so, the NEMOs have already taken the opportunity to raise the concerns to the Commission that would now form part of the potential annulment action.

215. As a second point, the NEMO Committee has used its reply to the European Commission's Consultation on the revision of the Capacity Allocation and Congestion Management Regulation to submit an extensive response, in particular, to the establishment of the SMCO now envisaged in the Proposal. This response did not only extend to comprehensively answering questions 6 and 7 in the European Commission's questionnaire. The NEMO Committee's response additionally included a ten-page legal assessment of the establishment of a SMCO. In major parts, this submission by the NEMO Committee also reflected the immediate impact of the establishment of a SMCO on the NEMOs themselves.

216. Overall, there are good reasons to assume that the condition of prior participation in the proceedings is fulfilled. The NEMOs' involvement until today comprised participation at all possible stages and explicitly addressed the establishment of the SMCO and the concerns ensuing from it.

3.2.3 Consequences

217. Having evaluated the *Plaumann* formula, the nature of the NEMOs as a separate and identifiable group, the noticeability of the impact of the Proposal, as well as the factor of prior participation in the proceedings, all these factors speak in favour of an 'individual concern' of the establishment of the SMCO to the NEMOs. All in all, there are thus good chances to assume a legal standing of the NEMOs for a potential action for annulment according to the second variant of Article 263(4) TFEU.

3.3 Procedure for preliminary ruling according to Article 267 TFEU

218. In addition to a potential action for annulment by the NEMOs before the CJEU, it may also be possible to reach a European judgment on the legal validity of the revised CACM Regulation by way of a preliminary reference to the CJEU according to Article 267 TFEU. A preliminary reference under Article 267, however, is not an alternative to an action for annulment under Article 263. Rather, it is a safeguard measure in case the CJEU dismisses an action for annulment under Article 263 TFEU. This follows from the CJEU's settled case law according to which a preliminary ruling under Article 267 TFEU is inadmissible, if the applicant undoubtedly has legal standing under Article 263

TFEU.[101]

219. The preliminary reference procedure enables national courts to refer a pending case to the CJEU, who will then provide an interpretive guidance for a piece of EU legislation that is determining the decision of the case in question. A preliminary reference is not only possible in cases where a national court seeks guidance how to interpret a certain provision of EU law, but also in cases where a national court considers a norm of EU law to be invalid (cf. Article 267 (1) lit. a) TFEU) – provided this norm is decisive for the pending case.

220. Looking at the pure wording of Article 267 (3) TFEU, only a national court of last resort will be obliged to refer a case to the CJEU, whilst any other national court will merely be entitled to do so. Due to established case law of the CJEU itself, however, any national court will be obliged to refer a case to the CJEU under Article 267 TFEU if the national court has doubts concerning the lawfulness of the EU legal act it is about to apply.[102]

221. Provided a national court was doubtful on the lawfulness of the revised CACM Regulation it had to apply in a case pending before it, such a national lawsuit would be a means to trigger a CJEU ruling on the validity of the revised CACM Regulation. Taking the German judicial system as example, there are two potential claims conceivable to cause a German court to consider the lawfulness of the revised CACM Regulation:

a. First a judicial proceeding before a national court could be initiated following an – administratively reprimanded – refusal of a NEMO to comply with the revised CACM Regulation. As of now, the German Federal Network Agency is vested with the competence to monitor and enforce compliance with various provisions of the CACM Regulation as one of the implementing acts of the Electricity Regulation.[103] As far as can be overseen, also the Proposal foresees corresponding tasks for the national regulatory authorities with regard to the NEMOs.[104] The Federal Network Agency would thus be in a position to monitor compliance with the obligation to participate in the establishment of the SMCO and to commence supervisory measures in case of non- compliance. Such supervisory measures could then be challenged before the Higher Regional Court Düsseldorf as the competent court for appeals against decisions on the Federal Network Agency.

b. The scenario for the second claim is of subordinate relevance since it is subject to particularly high admissibility requirements. A NEMO could file a claim for preventive injunctive relief (*vorläufige Unterlassungsbeschwerde*) by seeking judicial confirmation before the Higher Regional Court Düsseldorf of not being obliged to comply with the revised CACM Regulation and thereby not having to fear

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101 Judgment of 25 July 2018, *Georgsmarienhütte and Others*, C-146/16, ECLI:EU:C:2018:582, paragraph 17.

102 Judgment of 22 October 1987, *Foto-Frost v Hauptzollamt Lübeck-Ost*, 314/85, ECLI:EU:C:1987:452, paragraph 15 et seq.

103 Sec. 56 German Energy Industry Act (***EnWG***).

104 Article 10(6) of the Proposal.

supervisory measures by the Federal Network Agency due to non-compliance. Due to the condition of effective judicial review, such a preventive injunctive relief, however, would only be admissible if it was unacceptable for the NEMO to await the agency's supervisory measure and then to appeal it. A potential argument for unacceptability could be that compliance would necessitate long-term planning, and thus the NEMO would be factually unable to comply after an unsuccessful appeal of the supervisory measure and therefore would require early planning security on the obligation to comply with the Proposal.

222. In both of the scenarios, the addressed national court could refer the question of the validity of a revised CACM Regulation to the CJEU. Should the respective national court have no doubts concerning the validity, however, the mechanism for a preliminary reference would not be available. In case of an unreasoned refusal to refer a case to the CJEU via Article 267 TFEU, it is possible to challenge such a court refusal before the Federal Constitutional Court with reference to a violation of the entitlement to the lawful judge as enshrined in the second sentence of Article 101(1) of the German Constitution (*Grundgesetz*).