Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber, Extended Composition)

25 September 2024*

(Energy – Internal market for electricity – Capacity calculation region – Core region – Adoption by ACER of the methodology for cost sharing of redispatching and countertrading – Determination of the threshold for legitimate loop flows – Article 16(13) of Regulation (EU) 2019/943)

In Case T-485/21,

Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (BNetzA), established in Bonn (Germany), represented by U. Karpenstein and K. Reiter, lawyers,

applicant,

supported by

Federal Republic of Germany, represented by J. Möller and N. Scheffel, acting as Agents,

intervener,

v

European Union Agency for the Cooperation of Energy Regulators (ACER), represented by P. Martinet, Z. Vujasinovic and E. Tremmel, acting as Agents, and by P. Goffinet, L. Bersou and M. Shehu, lawyers,

defendant,

THE GENERAL COURT (Third Chamber, Extended Composition),

composed of F. Schalin, President, P. Škvařilová-Pelzl, I. Nõmm, G. Steinfatt and D. Kukovec (Rapporteur), Judges,

Registrar: I. Kurme, Administrator,

having regard to the written part of the procedure,

further to the hearings on 12 and 13 June 2023,

gives the following

* Language of the case: German.

Judgment

1 By its action under Article 263 TFEU, the applicant, the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (BNetzA), seeks the annulment of the decision of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators (ACER) of 28 May 2021 confirming ACER Decision No 30/2020 of 30 November 2020 on the proposal of the electricity transmission system operators ('TSOs') of the 'Core' capacity calculation region, comprising Belgium, the Czech Republic, Germany, France, Croatia, Luxembourg, Hungary, the Netherlands, Austria, Poland, Romania, Slovenia and Slovakia ('the Core region'), for the methodology for cost sharing of redispatching and countertrading, and dismissing its appeal in Case A-001-2021 (consolidated) ('the contested decision').

Background to the dispute

2 The applicant is the German national regulatory authority ('NRA'), for the purposes of Article 57(1) 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). In accordance with point 1 of the first sentence of Paragraph 56(1) of the Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz – EnWG) (Law on the supply of electricity and gas) of 7 July 2005 (BGBl. 2005 I, p. 1970), the applicant has assumed in Germany the powers conferred on NRAs by Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (OJ 2015 L 197, p. 24).

3 In accordance with Article 74(1) of Regulation 2015/1222, all TSOs in each capacity calculation region are to develop a proposal, no later than 16 months after the decision on the capacity calculation regions is taken, for a common methodology for redispatching and countertrading cost sharing ('the cost sharing methodology').

4 On 17 November 2016, ACER adopted, in accordance with Article 15 of Regulation 2015/1222, Decision No 06/2016 regarding the determination of capacity calculation regions. Article 1 of and Annex I to that decision list the territories of the Member States included in the Core region.

5 The proposal for a cost sharing methodology of the TSOs of the Core region should have been submitted within 16 months of that decision, that is to say, by 17 May 2018 at the latest.

6 However, the TSOs of the Core region did not submit a proposal for a cost sharing methodology within the time limit referred to in paragraph 5 above. In accordance with Article 9(4) of Regulation 2015/1222, those TSOs informed the NRAs and ACER that they needed more time to develop such a proposal. ACER informed the European Commission, which consulted with the TSOs, the NRAs and ACER to assist the TSOs in developing that proposal and submitting it for approval as early as possible.

7 On 27 March 2019, in accordance with Article 9(7)(h) of Regulation 2015/1222, the TSOs of the Core region submitted to all the NRAs of that region a proposal for a cost sharing methodology, accompanied by an explanatory document. Those NRAs had a period of six months within which to take a decision on that proposal, in accordance with Article 9(10) of that regulation.

8 On 26 September 2019, at the request of those NRAs, ACER decided to extend the period for them to approve that proposal by six months, that is to say, until 27 March 2020.

9 On 27 March 2020, the Chair of the Core Energy Regulators' Regional Forum, on behalf of all NRAs of that region, informed ACER that they were not able to reach a decision on the proposal submitted by the same day, the proposal being considered largely incomplete, to such an extent that the NRAs were not in a position to approve it or to request an amendment to it.

10 On the same day, since the NRAs of the Core region had not been able to reach an agreement on the proposal for a cost sharing methodology submitted by the TSOs, ACER declared itself competent to adopt a decision on that proposal, in accordance with Article 5(3) and Article 6(10) of Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (OJ 2019 L 158, p. 22), and Article 9(11) of Regulation 2015/1222. Under the latter provision, ACER was required to adopt such a decision within six months, in accordance with Article 6(12)(a) of Regulation 2019/942.

11 Following a long period of cooperation, consultations and discussions between ACER, all the NRAs of the Core region and all TSOs of that region on the proposal for a cost sharing methodology submitted by those TSOs and on the amendments made to that proposal during several meetings and rounds of voting, the Board of Regulators of ACER, which is composed of representatives of the NRAs, issued a favourable opinion on that proposal on 18 November 2020, pursuant to Article 22(5)(a) of Regulation 2019/942.

12 On 30 November 2020, ACER adopted, by Decision No 30/2020, the cost sharing methodology ('Common methodology for redispatching and countertrading cost sharing for the Core CCR in accordance with Article 74 of Commission Regulation (EU) 2015/1222 of 24 July 2015'), as set out in Annex I to that decision ('the contested cost sharing methodology').

13 On 29 January 2021, the applicant submitted an appeal to the ACER Board of Appeal against Decision No 30/2020, in accordance with Article 28 of Regulation 2019/942. Other TSOs and NRAs of the Core region also submitted appeals against that decision. On 18 February 2021, the Board of Appeal consolidated all of those appeals.

14 On 28 May 2021, the Board of Appeal adopted the contested decision, by which it upheld Decision No 30/2020 and dismissed in their entirety the appeals brought against it.

Forms of order sought

15 The applicant claims that the Court should:

– annul the contested decision;

– in the alternative, in the event that the Court does not annul the contested decision in its entirety, annul the contested decision in so far as it upholds the second sentence of Article 1(1), Article 2(2)(j), Article 3, Article 7 and Article 12(2) of Annex I to Decision No 30/2020;

– order ACER to pay the costs.

16 ACER contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

17 The Federal Republic of Germany, intervening in support of the form of order sought by the applicant, submits that the Court should annul the contested decision.

Law

18 The applicant puts forward six pleas in law in support of its action.

19 The first plea alleges that the contested decision provides for an unlawful extension of the scope of the contested cost sharing methodology to network elements other than cross-zonal elements ('interconnectors'); the second alleges that the contested decision unlawfully excludes taking account of relieving flows when sharing costs; the third alleges that the threshold for legitimate loop flows ('the threshold') was determined incorrectly; the fourth alleges that priority was incorrectly given to loop flows over internal flows when determining the causes of network congestion; the fifth alleges that the methodology applied, taken as a whole, is unlawful, and the sixth alleges that the obligation, imposed on the TSOs, to submit proposals for amendments to the contested cost sharing methodology is unlawful.

20 ACER contends that all of the pleas raised by the applicant should be rejected as unfounded.

21 The Court considers it appropriate to examine, in turn, the first, fourth and third pleas.

The first plea, concerning the scope of the contested cost sharing methodology

22 The applicant puts forward three complaints in support of its first plea, alleging that the contested decision provides for an unlawful extension of the scope of the contested cost sharing methodology to network elements other than interconnectors. Nevertheless, the applicant appears to accept that congestion on critical network elements also entails a restriction of cross-zonal trade for the purposes of 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). Accordingly, the applicant appears to accept, at least in the alternative, the inclusion of internal critical network elements within the scope of the contested cost sharing methodology.

23 In the first place, the applicant submits that the scope thus defined is incompatible with Article 16(13) of Regulation 2019/943 and Article 74 of Regulation 2015/1222.

24 In the second place, the applicant, relying on the absence of a legal basis for the adoption of the contested cost sharing methodology, submits that, in the light of the principle of conferral, ACER cannot justify the extension of the scope of the contested cost sharing methodology, in relation to what is provided for in Article 16(13) of Regulation 2019/943, by the consideration that the provisions of that regulation and of Regulation 2015/1222 do not exclude such an extension of scope.

25 In the third place, the applicant submits that the broad scope of the contested cost sharing methodology also cannot be justified by considerations relating to operational security and to the 'polluter pays' principle.

26 The Federal Republic of Germany supports the applicant's arguments.

27 ACER disputes the arguments made by the applicant and the Federal Republic of Germany.

Preliminary observations

28 As a preliminary point, in the first place, it should be recalled that, in the contested decision, the Board of Appeal rejected the arguments alleging that the scope of the contested cost sharing methodology was unlawful, in essence, in paragraphs 89 to 379 ('First Consolidated Plea – Excessive scope of the RDCTCS and unlawful determination of XNEs'), in paragraphs 1078 to 1105 ('Eighth Consolidated Plea – Polluter Pays Principle') and in paragraphs 1126 to 1191 (pages 203 to 212) ('Fourteenth Consolidated Plea – ACER exceeded its competence and infringed the principle of conferral') of that decision.

29 As is apparent, in essence, from paragraphs 196 to 210 of the contested decision, that decision is based, in part, on an interpretation of Article 16(13) of Regulation 2019/943 to the effect that that provision reflects the 'polluter pays' principle. Similarly, that provision requires the origin of physical flows that contribute to congestion between zones to be identified without, however, limiting cost sharing to remedial actions carried out with regard to congestions on interconnectors.

30 Similarly, as is apparent, in essence, from paragraphs 173 to 180 of the contested decision, the Board of Appeal considered that the contested cost sharing methodology was in line with Article 74(2) of Regulation 2015/1222, in so far as the actions on the network elements included in the scope of the contested cost sharing methodology were of cross-border relevance.

31 In the second place, examination of the first plea involves determining the legal basis, purpose and scope of the contested cost sharing methodology, as confirmed by the contested decision.

32 First, as regards the legal basis and purpose of the contested cost sharing methodology, it must be noted that that methodology was adopted in accordance with Article 74 of Regulation 2015/1222 and that paragraph 2 of that provision provides for the adoption of cost-sharing solutions for remedial actions of cross-border relevance. The purpose of that methodology is thus to share the costs incurred in activating costly remedial actions, namely redispatching and countertrading, between the TSOs.

33 In that regard, point 13 of Article 2 of Regulation 2015/1222 defines 'remedial action' as 'any measure applied by a TSO or several TSOs, manually or automatically, in order to maintain operational security'.

34 Point 26 of Article 2 of Regulation 2019/943 defines redispatching as a measure, including curtailment, that is activated by one or more TSOs or distribution system operators by altering the generation, load pattern, or both, in order to change physical flows in the electricity system and relieve a physical congestion or otherwise ensure system security.

35 Point 27 of Article 2 of Regulation 2019/943, for its part, defines countertrading as a cross-zonal exchange initiated by system operators between two bidding zones to relieve physical congestion.

36 Congestion, which is a risk to operational security that requires remedial action, is defined in point 4 of Article 2 of Regulation 2019/943 as 'a situation in which all requests from market participants to trade between network areas cannot be accommodated because they would significantly affect the physical flows on network elements which cannot accommodate those flows'.

37 Congestion is caused by physical flows. There are several types of physical flows defined by the contested cost sharing methodology. Among these, Article 2(2)(a) of the contested cost sharing methodology defines allocated flows as 'a physical flow on a network element where the source and sink are located in different bidding zones'. Internal flows are defined, in Article 2(2)(o) of the contested cost sharing methodology, as 'a physical flow on a network element where the source and sink and the complete network element are located in the same bidding zone'. According to Article 2(2)(p) of the contested cost sharing methodology, a loop flow is 'a physical flow on a network element where the source and sink are located in the same bidding zone and the network element or even part of the network element is located in a different bidding zone'.

38 Furthermore, it should be noted that Article 16(13) of Regulation 2019/943 provides for the sharing of the costs of remedial actions intended to relieve congestion between two bidding zones on the basis of the contribution to that congestion of flows resulting from transactions internal to a zone. That provision provides, inter alia, that 'when allocating costs of remedial actions between transmission system operators, regulatory authorities shall analyse to what extent flows resulting from transactions internal to bidding zones contribute to the congestion between two bidding zones observed, and allocate the costs based on the contribution to the congestion to the transmission system operators of the bidding zones creating such flows except for costs induced by flows resulting from transactions internal to bidding zones that are below the level that could be expected without structural congestion in a bidding zone'.

39 In that regard, a bidding zone is defined, in point 65 of Article 2 of Regulation 2019/943, as 'the largest geographical area within which market participants are able to exchange energy without capacity allocation'. At present, the areas forming part of the Core region correspond, in most cases, to the territories of the Member States.

40 Second, as is apparent from Article 5(1) of the contested cost sharing methodology, in order to share the costs of remedial actions, the network element on which each remedial action is actually carried out must be identified.

41 As emphasised in paragraphs 106 to 110 of the contested decision, the scope of the contested cost sharing methodology extends not only to cross-zonal network elements (interconnectors), but also to all internal network elements with a voltage level higher than or equal to 220 kilovolts (kV).

42 The contested cost sharing methodology provides, in Article 3(4) thereof, that all 'cross-border relevant network elements' are 'eligible for cost sharing'.

43 On the one hand, as regards cross-border relevant network elements, the contested cost sharing methodology defines those elements, in Article 2(2)(j) thereof, as 'a network element identified as cross-border relevant and on which operational security violations need to be managed in a coordinated way'.

44 In that regard, it is apparent from paragraphs 106 to 110 of the contested decision and it is, moreover, common ground between the parties that the concept of 'cross-border relevant network elements' must be understood in the same way as the concept included in the definition set out in Article 5 of the methodology for coordinated redispatching and countertrading for the Core region in accordance with Article 35(1) of Regulation 2015/1222, adopted by ACER Decision No 35/2020 of 4 December 2020 on the methodology for coordinated redispatching and countertrading for the Core region ('the RDCT methodology'), and in Article 5 of the methodology for regional operational security coordination for the Core region in accordance with Article 76(1) of Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation (OJ 2017 L 220, p. 1), adopted by ACER Decision No 33/2020 of 4 December 2020 on the methodology for regional operational security coordination for the Core region ('the ROSC methodology').

45 The concept of 'cross-border relevant network elements' thus refers, first, to all critical network elements, in accordance with Article 5(1) and Article 7 of the day-ahead and intraday common capacity calculation methodologies, adopted by ACER Decision No 02/2019 of 21 February 2019 on the proposals of the TSOs of the Core region for the day-ahead and intraday common capacity calculation methodologies ('the CCM'), namely, currently, interconnectors and internal network elements determined by TSOs with a power transfer distribution factor, as defined by point 22 of Article 2 of Commission Regulation (EU) No 543/2013 of 14 June 2013 on submission and publication of data in electricity markets and amending Annex I to Regulation (EC) No 714/2009 of the European Parliament and of the Council (OJ 2013 L 163, p. 1), of 5% or higher, and, second and in principle, all internal network elements with a voltage level higher than or equal to 220 kV.

46 According to the definition in point 69 of Article 2 of Regulation 2019/943, a critical network element is 'a network element either within a bidding zone or between bidding zones taken into account in the [cross-zonal] capacity calculation process, limiting the amount of power that can be exchanged [between zones]'.

47 Critical network elements are therefore either interconnectors or internal elements with a power transfer distribution factor of 5% or higher. According to the contested cost sharing methodology, cross-border relevant network elements are all critical network elements as well as internal network elements with a voltage level higher than or equal to 220 kV.

48 On the other hand, as regards the concept of 'cross-border relevant redispatching and countertrading actions', it must be noted that Article 3(1) of the contested cost sharing methodology states that that concept refers to cross-border relevant redispatching and countertrading actions that are determined in accordance with the RDCT methodology and the ROSC methodology.

49 It follows, as confirmed by the parties, that, according to the contested cost sharing methodology, cross-border relevant redispatching and countertrading actions are, in principle, all redispatching and countertrading actions intended to relieve congestion on cross-border relevant network elements.

Analysis of scope

– *The extent of the scope of the contested cost sharing methodology*

50 According to the applicant, the costs of the remedial actions attributed to internal network elements that are not interconnectors or, at most, critical network elements should be excluded from cost sharing. In particular, the applicant maintains that, in any event, congestion on network elements with a voltage level higher than or equal to 220 kV is internal congestion, which does not fall within the definition of congestion between zones for the purposes of Article 16(13) of Regulation 2019/943.

51 It must therefore be examined whether the applicant is correct in claiming that the sharing of the costs of remedial actions should be limited to critical network elements, as they are set out in the CCM, since those are elements 'limiting the amount of power that can be exchanged', according to point 69 of Article 2 of Regulation 2019/943. Accordingly, only congestion on those elements would be congestion between zones for the purposes of Article 16(13) of Regulation 2019/943.

52 First, it must be examined whether critical network elements are the only elements of cross-border relevance within the meaning of Article 74(2) of Regulation 2015/1222.

53 It should be recalled that, according to Article 74(2) of Regulation 2015/1222, the contested cost sharing methodology is to 'include cost-sharing solutions for actions of cross-border relevance'. Furthermore, Article 74(4)(b) of that regulation establishes that the contested cost sharing methodology must define 'which costs incurred from using redispatching or countertrading to guarantee the firmness of cross-zonal capacity are eligible for sharing between all the TSOs of a capacity calculation region', in the present case the Core region.

54 Thus, in order to establish whether the contested cost sharing methodology, as confirmed by the contested decision, is compatible with Article 74(2) of Regulation 2015/1222, it is necessary to examine to what extent the remedial actions, the costs of which that methodology aims to share, are intended to guarantee the firmness of cross-zonal capacity.

55 However, it should be recalled that Regulation 2015/1222 is an act implementing Regulation 2019/943, as is apparent from Article 18(5) 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), which was subsequently replaced by Regulation 2019/943. Regulation 2019/943 is therefore a law that is higher ranking than and subsequent to Regulation 2015/1222. Except where their meaning is clear and unambiguous and therefore requires no interpretation, the provisions of an implementing regulation must be given, if possible, an interpretation consistent with the provisions of the basic regulation (judgment of 28 February 2017, *Canadian Solar Emea and Others* v *Council*, T-162/14, not published, EU:T:2017:124, paragraph 150). Article 74 of Regulation 2015/1222 must therefore be interpreted consistently with Article 16(13) of Regulation 2019/943.

56 In that regard, it must be observed that Article 16(13) of Regulation 2019/943 does not define the network elements on which remedial actions are intended to relieve congestion between zones, or the network elements on which the costs of remedial actions intended to relieve congestion between zones must be shared.

57 Similarly, point 4 of Article 2 of Regulation 2019/943 does not specify the network elements on which physical congestions, including those linked to cross-zonal trade, occur.

58 Article 16(13) of Regulation 2019/943 refers to the costs of the remedial actions activated by the TSOs in order to ensure cross-zonal trade and, subsequently, requires those costs to be shared between the TSOs according to the extent to which flows resulting from transactions internal to zones contribute to the congestion between two zones observed.

59 Consequently, according to the purpose of Article 16(13) of Regulation 2019/943, it is necessary to determine which congestion is to be relieved in a coordinated way in order to ensure cross-zonal trade, which, in accordance with paragraphs 54 and 55 above, will then make it possible to establish whether the remedial actions covered by the contested cost sharing methodology are intended to guarantee the firmness of cross-zonal capacity, within the meaning of Article 74(4)(b) of Regulation 2015/1222.

60 Second, it must be noted that, in order to carry out such an analysis seeking to determine which remedial actions ensure cross-zonal trade and are thus affected by cost sharing, it is necessary to clarify the role of remedial actions in the cross-zonal capacity calculation process, as provided for by the CCM, and in the regional operational security assessment process, as established by the ROSC methodology, in accordance with Article 76(1)(b) of Regulation 2017/1485 ('the CROSA process').

61 In the first place, it should be noted that the cross-zonal capacity calculation process begins two days before the delivery of electricity and is used to determine the amount of energy that can be exchanged between zones, within the operational security limits.

62 The capacity calculation process is carried out only on critical network elements. On the one hand, TSOs may limit, before the market is opened, the amount of energy that can be exchanged by the participants in order to comply with the operational security limits. On the other hand, that process also uses remedial actions, such as redispatching and countertrading. Those remedial actions, which could be activated in order to maximise cross-zonal capacity, in accordance with Article 16(4) of Regulation 2019/943, are taken into account by the TSOs, but not yet activated.

63 In fact, no remedial action is activated when calculating cross-zonal capacity and no cost is incurred.

64 In the second place, it should be noted that the costly remedial actions of redispatching and countertrading, which are the subject of the present dispute, arise only in the CROSA process, which is closely linked to the calculation of cross-zonal capacity.

65 In accordance with Article 76(1)(b)(iii) of Regulation 2017/1485, governing the coordinated preparation of cross-border relevant remedial actions, and as is apparent from Article 3(2)(b) of the ROSC methodology, the objective of the CROSA process is to coordinate, validate and implement cross-border relevant remedial actions. As is apparent from Articles 5 and 9 of that ROSC methodology, cross-border relevant remedial actions are all those that are at least sometimes able to address violations of current limits on cross-border relevant network elements, that is to say, in principle, all critical network elements taken into account for the calculation of cross-zonal capacity, and all other network elements with a voltage level higher than or equal to 220 kV.

66 Similarly, according to recital 12 and Article 5(1) of the ROSC methodology, the CROSA process ensures, in principle, the operational security of all network elements with a voltage level higher than or equal to 220 kV following the market outcomes and cross-zonal capacity allocation. At that time, TSOs have detailed information on the energy that will be injected into or withdrawn from the network.

67 The CROSA process starts with the local operational security assessment carried out by each TSO in its network, in accordance with Article 13 and Article 14(1) of the ROSC methodology, leading to the creation of an individual grid model by each TSO.

68 Subsequently, in accordance with Article 18 of the ROSC methodology, individual grid models are to be provided to the regional coordinators and merged by them with a view to the creation of a common grid model for all hours of the day, which includes 'a Union-wide data set … describing the … [characteristics] of the power system', in accordance with point 2 of Article 2 of Regulation 2015/1222.

69 When a flow on a network element exceeds the maximum flow, a remedial action must be prepared and implemented in order to comply with operational security limits.

70 As is apparent from recital 10 of the ROSC methodology, remedial action optimisation is provided for as part of the CROSA process.

71 More specifically, that optimisation within the CROSA process, described in Article 2(1)(p) of the ROSC methodology, involves determining specifically, during each iteration, which congestion on which network element, critical or non-critical, must be managed in a coordinated way.

72 Thus, for each hour in the common grid model, out of all the remedial actions available to the TSOs, it is identified which one is the most effective and economically efficient, in accordance with Article 76(1)(b)(iii) of Regulation 2017/1485, and can resolve all congestion on all interconnectors and on all internal network elements with a voltage level higher than or equal to 220 kV in the common grid model, without creating new congestion, in accordance with Articles 20, 23 and 24 and Article 27(1) of the ROSC methodology.

73 Third, in the light of the foregoing, it must be examined whether, as stated by the applicant, only the costs incurred as a result of the remedial actions on critical network elements (and therefore only interconnectors or, at most, internal network elements with a power transfer distribution factor of 5% or higher) should be included in the scope of the contested cost sharing methodology. To that end, as stated in paragraph 59 above, it is necessary to determine which congestion is to be relieved in a coordinated way in order to ensure cross-zonal trade.

74 In that regard, in the first place, the mere fact of including within the scope of the contested cost sharing methodology the costs incurred as a result of congestion on network elements with a voltage level higher than or equal to 220 kV cannot be contrary to Article 16(13) of Regulation 2019/943, since that provision merely entails determining which congestion is to be relieved in a coordinated way in order to ensure cross-zonal trade.

75 In the second place, the TSOs may use a maximum level of 30% of the capacity of each critical network element to relieve congestion on that element, provided that, as provided for in point (b) of the first subparagraph of Article 16(8) of Regulation 2019/943, 70% of that capacity remains available for cross-zonal trade, in accordance with Article 16(1) and (8) of Regulation 2019/943.

76 Nevertheless, the fact that congestion may be relieved by using up to 30% of the capacity of a subgroup of network elements does not mean that only the costs of remedial actions carried out on that subgroup of elements must be shared.

77 In the third place, it should be noted that the firmness of the minimum capacity of 70% of each critical network element is guaranteed in the most efficient way by optimising the remedial actions activated on all network elements with a voltage level higher than or equal to 220 kV. Thus, that optimisation of remedial actions on all those elements achieves the objectives of Regulation 2019/943, inter alia the delivery of market signals for increased efficiency and security of supply, in accordance with Article 1(a) of Regulation 2019/943.

78 That optimisation contributes to reducing the costs of remedial actions, thus making it possible to limit the reduction in cross-zonal capacity, as is apparent from Article 16(4) of Regulation 2019/943.

79 In the fourth place, when remedial actions activated by a TSO on internal elements that are not critical network elements form part of the optimal solution necessary to relieve congestion on critical network elements as well, the costs relating to the former elements must be shared between the TSOs in the same way as those relating to the latter. Consequently, not including network elements with a voltage level higher than or equal to 220 kV within the scope of the cost sharing methodology would lead to an unjustified limitation, in particular in the light of Article 16(13) of Regulation 2019/943, which requires all costs of the remedial actions activated to resolve congestion between zones to be shared, with the exception of the costs relating to flows that contribute to the congestion between two bidding zones observed and that do not exceed the threshold.

80 If cost sharing were limited to critical network elements, it would become uncertain, since the costs associated with congestion management would be shared differently on the basis of the element on which a remedial action would be activated. As ACER correctly observes, that would lead to discrimination between the different network elements and, thus, between the TSOs that own those elements, which is not provided for by the legislation at issue.

81 Therefore, flows resulting from internal transactions that contribute to the congestion between two bidding zones observed, described in Article 16(13) of Regulation 2019/943, which reduce cross-zonal capacity on critical network elements, cannot be treated differently, in cost sharing, where those flows pass through non-critical network elements. The remedial actions activated on those two groups of elements are optimised in order to resolve congestion problems.

82 In the fifth place, remedial actions activated on non-critical network elements can sometimes resolve congestion on critical network elements, as ACER observed in response to the Court's questions.

83 Consequently, when such remedial actions can help resolve such congestion on critical network elements, their costs must be shared, in accordance with the 'polluter pays' principle. By contrast, although they may not contribute, at a particular moment, to resolving congestion on critical network elements, that does not mean that the elements on which the remedial actions are activated lose their link with cross-zonal trade. Those remedial actions were nevertheless chosen as part of the CROSA process, having regard to the other congestions and remedial actions, in order to find the optimum solution at regional level. In addition, that congestion, in so far as it is caused by a cross-border flow, namely a loop flow, is of cross-border relevance.

84 Moreover, as provided for in recital 35 of Regulation 2019/943, in an open, competitive market, TSOs should be compensated for costs incurred as a result of hosting cross-border flows of electricity on their networks by the operators of transmission systems from which cross-border flows originate and the systems where those flows end.

85 Thus, the remedial actions on all network elements included in the CROSA process are potentially relevant for cross-zonal trade, according to Article 16(13) of Regulation 2019/943, irrespective of their power transfer distribution factor, that factor being a concept used in the CCM, which cannot determine the sharing of costs in accordance with Article 16(13) of Regulation 2019/943.

86 In any event, it should be noted that, if the TSOs establish that a non-critical network element with a voltage level higher than or equal to 220 kV can never be useful for ensuring regional security and guaranteeing the firmness of allocated cross-zonal capacity, they may exclude it from the CROSA process, in accordance with Article 5(1)(b) and Article 7(3)(b) of the ROSC methodology, and, consequently, from the sharing of costs.

87 In the sixth place, as regards recital 12 of Regulation 2015/1222, which requires coordination between cross-border and internal remedial actions, it should be noted that all remedial actions in the CROSA process are of cross-border relevance, while all other remedial actions are internal. Thus, the CROSA process ensures coordination with internal remedial actions and also ensures the security of 'internal' network elements.

88 In the absence of coordinated management through the CROSA process, there is a risk of an operational security violation, endangering cross-zonal trade. It must be emphasised that the functioning of the network is an essential condition for the security of energy supply, since electricity can reach the citizens of the Union only through the network, in accordance with recital 2 of Regulation 2015/1222.

89 Accordingly, congestion 'between zones' is all congestion that is currently, in the Core region, managed in a coordinated way as part of the CROSA process. Consequently, the 'polluter pays' principle must apply to the costs relating to such coordinated management.

90 It should be noted that coordination and cost sharing do not depend on whether there is a particular exchange or allocated flow on a network element at a given moment, because all remedial actions activated on all network elements, critical and non-critical, with a voltage level higher than or equal to 220 kV potentially contribute to facilitating cross-zonal trade, whereas their actual contribution to facilitating trade may vary depending, inter alia, on network topology, market conditions and particular generation and consumption schedules. Accordingly, it is not possible from the outset to exclude network elements with a voltage level higher than or equal to 220 kV from the scope of the contested cost sharing methodology.

91 In the seventh place, as is clear from paragraph 167 of the contested decision, without it being disputed by the parties, network elements with a voltage level higher than or equal to 220 kV were considered to be cross-border relevant elements in so far as those elements would not be structurally congested in the absence of energy exchanges. Furthermore, as is apparent from that paragraph, all the TSOs of the Core region considered, in the Explanatory Note to the ROSC methodology, that those elements were the most relevant for the CROSA process.

92 In that regard, it is apparent from page 8 of the Explanatory Note to the ROSC methodology, on which, moreover, the parties had the opportunity to comment at the hearing, that the TSOs considered that the most relevant network elements for the CROSA process were the network elements with a voltage level of 220 kV and 380 kV, 'as these elements [were] used to facilitate the energy exchanges between bidding zones within the European energy system'.

93 In the Explanatory Note to the ROSC methodology, the TSOs explained that network elements with a voltage level higher than or equal to 220 kV facilitate the energy exchanges between bidding zones in the European energy system. However, the TSOs did not establish which elements should be considered when sharing the costs of remedial actions.

94 Moreover, the voltage level of 220 kV was chosen in the Core region because it is a highly meshed network, whereas Article 16(13) of Regulation 2019/943 does not prevent other solutions from being chosen, as clarified at the hearing.

95 Furthermore, cost sharing in that context is necessary to achieve an integrated electricity market at European level.

96 A fortiori, the scope of the contested cost sharing methodology is not defined geographically and cannot be limited solely to network elements located on the border between two bidding zones, or interconnectors that connect Member States' networks. By contrast, as stated in paragraph 59 above, Article 16(13) of Regulation 2019/943 requires the identification of which congestion is to be relieved in a coordinated way in order to ensure cross-zonal trade.

97 In the light of the foregoing, the applicant is incorrect in claiming that the contested decision is contrary to Article 16(13) of Regulation 2019/943 because only interconnectors or, at most, critical network elements should be included in cost sharing.

98 In the Core region, all congestion relieved by remedial actions activated in accordance with the ROSC methodology, as established by Decision No 33/2020 and confirmed by the contested decision, corresponds to 'congestion between … zones' referred to in Article 16(13) of Regulation 2019/943.

99 It should also be noted that, in the Core region, all remedial actions activated in accordance with the ROSC methodology, as established by Decision No 33/2020, contribute to guaranteeing the firmness of cross-zonal capacity, in accordance with Article 74(4)(b) of Regulation 2015/1222.

100 Accordingly, the contested decision also cannot be deemed to be contrary to Article 74 of Regulation 2015/1222, interpreted in accordance with Article 16(13) of Regulation 2019/943. The Board of Appeal was therefore correct in dismissing the appeal brought against the contested cost sharing methodology.

101 The arguments raised by the applicant against the contested decision cannot invalidate that conclusion.

102 First, as regards the applicant's argument that only congestion on an interconnector or, at most, on an internal critical network element is congestion the costs of which can be shared on the basis of Article 16(13) of Regulation 2019/943, it must be pointed out that, in applying the contested cost sharing methodology, the only situation in which costs relating to non-critical network elements are shared in accordance with that provision is that in which congestion on those elements is caused by loop flows, as described in paragraph 37 above, that exceed the threshold referred to in Article 16(13) of Regulation 2019/943.

103 According to recital 6 of the contested cost sharing methodology, loop flows that exceed the threshold are the primary contributor to congestion subject to cost sharing. That follows from the finding that congestion caused by internal flows is borne by the owner of the congested network element, whereas, as is apparent from Article 16(13) of Regulation 2019/943, the costs caused by flows resulting from internal transactions that contribute to the congestion between two bidding zones observed must be shared proportionately between TSOs.

104 A loop flow is a 'cross-border flow', within the meaning of point 3 of Article 2 of Regulation 2019/943, namely a 'physical flow of electricity on a transmission network of a Member State that results from the impact of the activity of producers, customers, or both, outside that Member State on its transmission network', which is not limited to critical network elements.

105 Accordingly, congestion caused by a cross-border flow, such as a loop flow, cannot be classified as congestion that is excluded from the scope of Article 16(13) of Regulation 2019/943.

106 Moreover, if congestion on a non-critical network element is caused solely by internal flows, the costs of remedial actions to address that congestion will be borne, in any event, by the owner of that network element, in accordance with Article 76(1)(b)(v) of Regulation 2017/1485. Thus, contrary to what the applicant claims, the 'polluter pays' principle remains the exception to the rule, since that principle applies, de facto, only to loop flows that exceed the threshold, whereas the 'owner pays' principle applies to other flows, such as loop flows that do not exceed the threshold and internal flows.

107 In addition, congestion that is not congestion 'between zones' for the purposes of Article 16(13) of Regulation 2019/943 is congestion that appears on the network elements excluded from regional operational security coordination, either because that has been decided by the TSOs or because they are elements that are excluded at the outset from the coordination of remedial actions, namely network elements with a voltage level below 220 kV.

108 Second, it should be noted that the only exception to the rule in Article 16(13) of Regulation 2019/943 according to which the costs associated with remedial actions relating to flows resulting from internal transactions that contribute to the congestion between two bidding zones observed must be shared is the exception relating to those flows that do not exceed the threshold, for which the costs must be borne by the owner of the congested network element.

109 In that regard, it should be noted that, contrary to what the applicant claims, the legislature did not intend to exclude a group of network elements from cost sharing, since it provided, in Article 16(13) of Regulation 2019/943, for the sharing of costs incurred through the coordinated relief of congestion between zones.

110 Similarly, the fact that Article 76(1)(b)(v) of Regulation 2017/1485 provides for the possibility of adopting other cost sharing methodologies related to the various remedial actions referred to in Article 22 of that regulation, which complement where necessary the common methodology developed in accordance with Article 74 of Regulation 2015/1222, is irrelevant to the interpretation of Article 16(13) of Regulation 2019/943, which is, moreover, a higher-ranking law.

111 Third, the applicant's argument that the scope of the contested cost sharing methodology, as confirmed by the contested decision, is contrary to Article 290(1) and Article 291 TFEU or has no legal basis, in so far as ACER extended the scope provided for by the legislation, must be rejected.

112 In particular, coordinated remedial actions on network elements with a voltage level higher than or equal to 220 kV allow cross-zonal trade, help to prevent the limitation of cross-zonal capacity and guarantee the firmness of that capacity, in accordance with Article 16(13) of Regulation 2019/943.

113 In the same way, and given that the scope of the contested cost sharing methodology is consistent with Article 16(13) of Regulation 2019/943, ACER cannot be criticised for extending the scope of that methodology beyond Article 16(13) of Regulation 2019/943 by relying on the 'polluter pays' principle.

114 Similarly, the applicant's arguments alleging infringement of the principles concerning delegation of powers set out in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7, p. 9), must be rejected.

115 In that regard, it must be recalled that ACER is an agency of the European Union, created by the legislature upon the adoption of Regulation 2019/942. As is correctly stated in paragraphs 1151 to 1158 of the contested decision, ACER's powers to adopt a decision such as the contested cost sharing methodology are governed by that regulation, in particular Article 6 thereof, as well as Article 74 of Regulation 2015/1222 and Article 16(13) of Regulation 2019/943.

116 As is apparent from paragraph 10 above, ACER declared itself competent to adopt a decision on the basis that the NRAs of the Core region had not reached agreement on the proposal for a cost sharing methodology submitted by the TSOs, in accordance with Article 5(3) and Article 6 of Regulation 2019/942 and Article 9(11) of Regulation 2015/1222.

117 The powers available to ACER to adopt the contested cost sharing methodology are thus precisely delineated and amenable, in accordance with Articles 28 and 29 of Regulation 2019/942, to judicial review in the light of the objectives established by the Commission in Regulation 2015/1222 and by the legislature in Regulation 2019/943 (see, by analogy, judgment of 22 January 2014, *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2014:18, paragraph 53).

118 The Board of Appeal was therefore fully entitled to reject the applicant's arguments in that regard.

119 Fourth, the argument made by the applicant and the Federal Republic of Germany, based on the legislative history of Article 16(13) of Regulation 2019/943, according to which the legislature intended to exclude from sharing between TSOs the costs arising from remedial actions carried

out on elements within zones when it refused to modify, when drafting that provision, its wording by replacing 'the congestion between two bidding zones observed' with 'the congestion between and within bidding zones observed', cannot succeed either.

120 In that regard, irrespective of whether the Federal Republic of Germany and the applicant may rely on documents relating to the legislative trilogue in order to demonstrate the legislature's intention when adopting Article 16(13) of Regulation 2019/943, it is sufficient to note that any refusal expressly to include congestion within a zone is not decisive for the question of which elements should be taken into account in assessing contributions to congestion 'between two … zones'.

121 As is apparent from paragraphs 56 to 59 and 109 above, Article 16(13) of Regulation 2019/943 does not define the network elements on which the costs of remedial actions intended to relieve congestion between zones must be shared, which does not mean that the legislature intended to exclude a group of network elements from cost sharing.

122 Accordingly, the applicant's arguments that internal network elements should be excluded from the contested cost sharing methodology on the basis of Article 16(13) of Regulation 2019/943 and Article 74 of Regulation 2015/1222 must be rejected.

– *The incentives derived from including internal network elements within the scope of the contested cost sharing methodology*

123 It must be stated that the inclusion of all internal network elements, including those with a voltage level higher than or equal to 220 kV, within the scope of the contested cost sharing methodology does not entail any incentives that run counter to the objectives of Article 16(13) of Regulation 2019/943.

124 In that regard, it should be recalled that Article 16(13) of Regulation 2019/943 provides for the obligation for TSOs to bear the costs of remedial actions relating to flows resulting from internal transactions that contribute to the congestion between two bidding zones observed and that do not exceed the threshold. That incentivises TSOs to develop their network in order to be able to accommodate such flows, when they do not exceed the threshold, which corresponds to the level of loop flows that could be expected without structural congestion in a bidding zone.

125 By contrast, the relevant legal framework does not impose an obligation on TSOs to develop their networks in order to accommodate loop flows above the threshold referred to in paragraph 124 above. Those flows are, by their nature, unforeseen and unforeseeable and the TSO that accommodates those flows has no influence on them.

126 It should be noted, in that regard, that, as stated in recital 27 of Regulation 2019/943, reducing the effect of loop flows and internal congestions on cross-zonal trade was one of the main objectives of the EU legislature when establishing that legislative framework.

127 Similarly, it is apparent from page 59 of the Commission's impact assessment of 30 November 2016, carried out as part of the preparation of the legislative 'Energy' package (SWD(2016) 410), that loop flows can reduce cross-zonal capacity and lead to expensive out-of-market redispatching and significant distortions to prices and investment signals in neighbouring bidding zones. That results in a significant loss of prosperity.

128 In addition, the effect of excluding non-critical network elements would be that the TSO that causes loop flows would not have an incentive to invest sufficiently in its network, since it would not bear the full cost of the remedial actions necessary to resolve the congestion it caused. It is only that TSO, which has knowledge of and responsibility for its network, which may adopt other necessary measures, such as reconfiguring the zone or investing in its network. In that context, it should be recalled that, according to Article 35(5) of Regulation 2019/943, each TSO is responsible for its network and, accordingly, its internal problems should not be borne by neighbouring TSOs.

129 Furthermore, if each of the two responsible neighbouring TSOs had an incentive to invest in its own network, either to accommodate or to reduce loop flows, that would lead, in the absence of coordination between those two TSOs, to overinvestment and poor allocation of resources, as ACER rightly mentioned in paragraph 261 of its defence.

130 In the light of the foregoing assessments, it must be observed that a TSO cannot be exempted from the costs that it causes to the other TSOs on the non-critical elements of their networks with its loop flows that exceed the threshold, even if the remedial actions on those elements contribute to ensuring cross-zonal trade.

131 Such an approach would, moreover, be contrary to the principle of energy solidarity, as interpreted by the Court of Justice.

132 The principle of energy solidarity entails rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States and the Member States being bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it (judgment of 15 July 2021, *Germany* v *Poland*, C-848/19 P, EU:C:2021:598, paragraph 49).

133 In those circumstances, it would be contrary to the principle of energy solidarity to allow TSOs that cause loop flows that pass through other bidding zones to avoid the costs of remedial actions that have been activated in the common interest in order to optimise cross-zonal capacity, while at the same time ensuring network security as efficiently as possible, to the benefit of all TSOs and, accordingly, electricity consumers.

134 In the light of the foregoing considerations, the first plea must be rejected.

The fourth plea, concerning the prioritisation of loop flows

135 By its fourth plea, the applicant, supported by the Federal Republic of Germany, claims that Article 7(6)(a) of the contested cost sharing methodology incorrectly prioritises loop flows over internal flows as a source of congestion, which results in loop flows being penalised.

136 According to the applicant, the prioritisation of loop flows in comparison with internal flows when determining the causes of congestion infringes the ‘polluter pays’ principle, creates incorrect incentives and is incompatible with the principles of fairness and non-discrimination.

137 In the first place, according to the applicant, giving priority to loop flows in comparison with internal flows in the sharing of costs is contrary to the ‘polluter pays’ principle laid down in Article 16(13) of Regulation 2019/943. Loop flows and internal flows contribute physically in the

same way and at the same time to the congestion of network elements. As a result, TSOs in bidding zones that generate loop flows and TSOs in zones that create internal flows should contribute to the costs of remedial actions in proportion to their respective contribution to the congestion. The priority given to loop flows over internal flows runs counter to that principle.

138 In the second place, according to the applicant, the prioritisation of loop flows in comparison with internal flows creates incorrect incentives, both for the TSOs of the congested networks and for those in the bidding zone that generates the loop flows.

139 In the third place, according to the applicant, the contested decision also infringes the principle of fairness and the principle of non-discrimination. Internal flows and illegitimate loop flows are 'objectionable' to the same degree, according to the criteria of EU law and, in particular, in the light of the objective pursued by Regulations 2019/943 and 2015/1222, according to which costs must be shared on the basis of the contribution to congestion.

140 The Federal Republic of Germany supports the applicant's arguments.

141 ACER disputes the applicant's arguments, as supported by the Federal Republic of Germany.

142 Under the first subparagraph of Article 16(13) of Regulation 2019/943, costs are to be allocated 'based on the contribution to the congestion'.

143 Under Article 7(6) of the contested cost sharing methodology, the contribution to congestion of the various types of flow is determined in the following way.

144 The 'overload' on the network element in question is identified. The overload corresponds, in principle, to the volume of flows that exceeds the maximum capacity of the network element in question.

145 Furthermore, an order of priority is established for the various types of flow. Under that order of priority, burdening loop flows above the threshold are identified, in Article 7(6)(a) of the contested cost sharing methodology, as the first contributor to any overload, while burdening internal flows are identified, in Article 7(6)(b) of that methodology, as the second contributor to such an overload. There then follow, under that order of priority, burdening loop flows from other capacity calculation regions, burdening loop flows below the threshold, burdening allocated flows and burdening phase-shifting transformer flows.

146 All the flows 'contribute' to the overload only to the extent that they exceed the maximum capacity of the network element in question.

147 Thus, if the internal flows, taken together with the other flows that rank lower on the priority list, exceed the maximum capacity of the network element in question and if, in addition, there are loop flows that exceed the threshold, the share of the costs relating to internal flows and loop flows is determined according to the volume of those flows which exceed the maximum capacity of the network element in question, in accordance with the order of priority established by Article 7(6) of the contested cost sharing methodology.

148 Those explanatory remarks must be borne in mind in examining the objections raised by applicant, by which it argues that the prioritisation of loop flows over internal flows that results from the order of priority established by Article 7(6) of the contested cost sharing methodology

does not comply with Article 16(13) of Regulation 2019/943, under which costs must be allocated 'based on the contribution to the congestion' and, accordingly, based on the 'polluter pays' principle.

149 In that regard, first, it must be stated that a literal interpretation of the words 'based on the contribution to the congestion' can be reconciled both with the approach taken in the contested cost sharing methodology and with the approach advocated by the applicant. Those words can be understood to mean that a 'contribution' to the congestion exists only from the moment when the maximum capacity of the network element in question is exceeded. Furthermore, it must be held that a literal interpretation of the words 'based on the contribution to the congestion' permits an order of priority to be established between the different types of flow, in order to share the costs between them on the basis of their contribution to the congestion.

150 Second, it is also possible, in a strictly causal sense, to understand the words 'based on the contribution to the congestion' as meaning that all of the flows on the network element in question 'contribute' in the same way to any congestion.

151 In those circumstances, it is necessary to examine whether the prioritisation of loop flows is justified by their different nature, in comparison with internal flows, or whether, as the applicant submits, differentiation – and thus prioritisation – is not permissible.

152 According to the applicant, it is apparent from several provisions that the EU legislature has put internal flows and loop flows on an equal footing, which means that they may not be treated differently in allocating the costs of remedial actions, since otherwise the principles of equity and non-discrimination would be infringed.

153 In that regard it must admittedly be observed that, as is apparent from recital 27 of Regulation 2019/943, the EU legislature is concerned to avoid cross-zonal capacity being limited as a result of internal flows and loop flows and that it has therefore laid down, in Article 16(8) of that regulation, a maximum level of 30% of the capacity of each critical network element that may be used, inter alia, to manage congestion caused by internal flows and loop flows.

154 However, Article 16(13) of Regulation 2019/943 itself introduces, in that regard, a differentiation between internal flows and loop flows. That provision provides, in the first subparagraph thereof, for the determination of a threshold for 'flows resulting from transactions internal to bidding zones that are below the level that could be expected without structural congestion in a bidding zone'. While it may not be expressly apparent from the wording of Article 16(13) of that regulation, it appears that that threshold is required to be determined only for loop flows, given that, under the second subparagraph of that provision, that threshold must be defined for each individual bidding zone border.

155 In addition, even without structural congestion, loop flows are, to a certain extent, inevitable in a highly meshed interconnected electricity network (see paragraph 180 below). Hence, the purpose of determining a loop flow threshold is to exclude such flows from the sharing of costs incurred as a result of remedial actions.

156 It follows that, contrary to the applicant's submissions, Article 16(13) of Regulation 2019/943, in providing for the establishment of a loop flow threshold, treats those flows differently from internal flows.

157 In those circumstances, Article 16(13) of Regulation 2019/943 must be interpreted as allowing internal flows and loop flows that exceed the threshold to be treated differently for the purpose of sharing the costs of remedial actions, and such differentiation appears to be justified by their different nature, in the context of the legislation at issue.

158 In that regard, it should also be observed that, in accordance with Article 40(1)(a) of Directive 2019/944, each TSO is to be responsible for 'ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity, [and] operating, maintaining and developing under economic conditions [a] secure, reliable and efficient transmission system'.

159 The TSOs must thus bear the costs of development and maintenance of the network that they manage as well as the costs of remedial actions, with the exception only of remedial actions in respect of which cost sharing applies.

160 As was observed in paragraph 133 of Decision No 30/2020, the electricity networks were, historically speaking, established in order to accommodate internal flows, and that function remains, even today, one of the reasons for their existence. Thus, internal flows constitute the basic function of an electricity network.

161 With the creation of the common market for electricity, the networks have been opened up to enable cross-border trading in electricity, and EU legislation requires the TSOs, through the use of their networks, to ensure that such trading can take place.

162 Thus, the appearance of loop flows is, to a certain extent, an inevitable – albeit undesirable – consequence of the interconnection of electricity networks operating on a zonal model, such as that of the Core region.

163 Furthermore, in contrast to internal flows and cross-border flows allocated in the context of allocating cross-zonal capacity, there is no benefit in loop flows passing through neighbouring interconnected networks and causing congestion.

164 In those circumstances, the TSOs cannot be required, in principle and to avoid the risk of non-compliance with the obligation to ensure a fair distribution of costs laid down by Article 74(6)(c) of Regulation 2015/1222, to bear the costs of remedial actions relating to loop flows exceeding the threshold that pass through their networks.

165 Given that loop flows are, to a certain extent, inevitable in a highly meshed interconnected electricity network, the threshold, which is required to be determined under Article 16(13) of Regulation 2019/943, must be understood as the limit beyond which the TSO responsible for the network elements in question will not bear the costs arising from the contribution of loop flows to congestion.

166 Thus, beyond the threshold, there is no justification for requiring the TSOs to bear the costs of remedial actions relating to loop flows that pass through their networks.

167 It follows that the prioritisation of loop flows over internal flows is justified by their different nature and, consequently, that, in the contested decision, the Board of Appeal did not infringe the 'polluter pays' principle enshrined in Article 16(13) of Regulation 2019/943 or the principles of fairness and non-discrimination, by holding that the prioritisation of loop flows, in the contested cost sharing methodology, was not unlawful.

168 That conclusion cannot be called into question by arguing that the legislature has put loop flows and internal flows on an equal footing in the process for calculation and allocation of cross-zonal capacity established by Article 16(8) of Regulation 2019/943.

169 The fact that, viewed in terms of the interest in ensuring capacity for cross-border trading in electricity, both loop flows and internal flows may limit that capacity does not mean that those types of flow must also be treated in the same way for the purpose of allocating the costs of remedial actions. The calculation of that capacity and the sharing of the costs of remedial actions are two separate matters and do not serve the same purpose. Last, contrary to the applicant's submissions, the different treatment of loop flows in comparison with internal flows, when allocating the costs of remedial actions, cannot be called into question on the basis that it gives rise to incorrect incentives either.

170 In that regard, the applicant disregards the fact that internal flows are, as observed in paragraphs 158 to 160 above, the basic function of an electricity transmission network.

171 Thus, it is only where those flows, in conjunction with the other flows which rank lower on the list of priority, including loop flows below the threshold, exceed the maximum capacity of the network element in question, that it is justified to incentivise the TSO responsible for the internal flows, through sharing the costs of remedial actions, to invest in its network.

172 By contrast, there is no justification for incentivising a TSO to invest in its network in order to be able to accommodate a greater volume of loop flows that exceed the threshold.

173 In the light of the foregoing, the fourth plea must be rejected.

The third plea, concerning the threshold

174 By its third plea, the applicant, supported by the Federal Republic of Germany, submits that the Board of Appeal's decision is unlawful in that the Board of Appeal confirmed Decision No 30/2020 by which ACER had incorrectly determined the threshold and thus infringed the second subparagraph of Article 16(13) of Regulation 2019/943.

175 In the first place, the applicant claims that ACER, by setting a temporary threshold for loop flows itself, infringed the relevant procedural provisions. According to the applicant, the second subparagraph of Article 16(13) of Regulation 2019/943 is, in relation to Articles 9 and 74 of Regulation 2015/1222, the *lex posterior*, the *lex superior* and the *lex specialis*, so that ACER was not competent under Article 9 of Regulation 2015/1222. Moreover, ACER could not have relied on Article 6(10) of Regulation 2019/942 either, given that the TSOs neither carried out the analysis required by the second subparagraph of Article 16(13) of Regulation 2019/943 nor submitted a proposal for a threshold to the NRAs for approval, so that there was no 'referral of the case' concerning the threshold to the NRAs, within the meaning of point (a) of the second subparagraph of Article 6(10) of Regulation 2019/942.

176 In the second place, the applicant submits that ACER also infringed the substantive provisions flowing from the second subparagraph of Article 16(13) of Regulation 2019/943. According to the applicant, ACER set the threshold without having carried out the required analysis. In addition, it did not determine the threshold 'for each individual bidding zone border' and at the 'level that could be expected without structural congestion', as required by the second subparagraph of Article 16(13) of Regulation 2019/943.

177 In the third place, the applicant claims that ACER was not competent, on the basis of an alleged 'need', to determine a temporary threshold.

178 The Federal Republic of Germany supports the applicant's arguments.

179 ACER disputes the applicant's arguments, as supported by the Federal Republic of Germany.

180 It is common ground that, even without structural congestion, loop flows are inevitable in a highly meshed interconnected electricity network operating according to a zonal model.

181 For that reason, the purpose of determining a loop flow threshold is to exclude such flows from the sharing of costs incurred as a result of redispatching and countertrading.

182 As regards the determination of the threshold, Article 16(13) of Regulation 2019/943 provides as follows:

> 'when allocating costs of remedial actions between [TSOs], [NRAs] shall … allocate the costs … except for costs induced by flows resulting from transactions internal to bidding zones that are below the level that could be expected without structural congestion in a bidding zone.
>
> That level shall be jointly analysed and defined by all [TSOs] in a [trading] capacity calculation region for each individual bidding zone border, and shall be subject to the approval of all [NRAs] in the capacity calculation region.'

183 First, it is apparent from Article 16(13) of Regulation 2019/943 that the threshold presupposes that the level of loop flows that could be expected without structural congestion is simulated.

184 'Structural congestion' is defined in point 6 of Article 2 of Regulation 2019/943 as 'congestion in the transmission system that is capable of being unambiguously defined, is predictable, is geographically stable over time, and frequently reoccurs under normal electricity system conditions'.

185 Second, it is apparent from the second subparagraph of Article 16(13) of Regulation 2019/943 that the determination of the threshold must be preceded by an analysis and that that analysis must be carried out by the TSOs.

186 Third, it is apparent from that provision that the threshold must be analysed and determined 'for each individual bidding zone border'.

187 In the present case, it is common ground that the TSOs did not carry out the required analysis.

188 It is also common ground that ACER did not carry out that analysis either.

189 In that regard, it is apparent from paragraph 112 of Decision No 30/2020 that, in the absence of a threshold analysed and defined by the TSOs and approved by the NRAs in accordance with Article 16(13) of Regulation 2019/943, ACER examined whether it was in a position to perform that analysis itself and concluded that that was not the case, due to constraints on resources, the time available and the necessary expertise.

190 In addition, it is apparent from recital 8 of the contested cost sharing methodology and from paragraphs 110 to 114 of Decision No 30/2020 that ACER, in such a situation, considered itself authorised to set a temporary threshold itself.

191 Moreover, it is apparent from paragraphs 115 to 122 of Decision No 30/2020 that ACER set the temporary threshold for the whole of the Core region uniformly at 10% of the maximum capacity of each network element concerned and then divided that threshold equally between all of the bidding zones that create loop flows on the network element concerned.

192 In the contested decision, the Board of Appeal rejected as unfounded the criticism relating to ACER's determination of a temporary threshold for the reasons set out in paragraphs 909 to 1077 (pages 137 to 164), 1210 to 1221 (pages 187 to 189) and 1192 to 1226 (pages 212 to 218) of the contested decision.

193 In that regard, it is apparent in particular from paragraphs 924 to 946 (pages 140 to 144), 1217 to 1221 (pages 187 to 189) and 1199 to 1226 (pages 213 to 218) of the contested decision that ACER considered that it had to set the threshold itself, given that the setting of such a threshold was, in its view, essential in order to be able to adopt the cost sharing methodology.

194 Furthermore, it is apparent from those same paragraphs of the contested decision that ACER's determination of the threshold was based on a 'rigorous analysis'.

195 It is also apparent from those parts of the contested decision that the Board of Appeal considered that ACER was authorised, or even obliged, to set a temporary threshold itself without having at its disposal the analysis prescribed in Article 16(13) of Regulation 2019/943, in order to avoid a deadlock situation.

196 In that regard, the temporary nature of the threshold thus set by ACER is emphasised in the contested decision. It is apparent from paragraph 943 (page 143) of that decision that the TSOs may still carry out the analysis required at any time and that NRAs may at any time replace the temporary threshold laid down in the contested cost sharing methodology with a definitive threshold.

197 In the light of the foregoing, it must be examined whether the Board of Appeal was entitled, without erring in law, to find, in the contested decision, that ACER's determination of the threshold in the contested cost sharing methodology complied with the requirements stemming from Article 16(13) of Regulation 2019/943. If that is not the case, it will be necessary to examine whether, as the Board of Appeal noted, ACER, in the particular circumstances of the present case, could nevertheless rely on an implicit competence authorising it to determine a threshold in a different way than that established by that provision.

Compliance with the requirements of Article 16(13) of Regulation 2019/943

198 In accordance with Article 16(13) of Regulation 2019/943, the threshold is to be analysed and defined 'for each individual bidding zone border' and must correspond to the 'level that could be expected without structural congestion'.

199 In the first place, it must be examined whether the method for determining the threshold followed by ACER in the contested cost sharing methodology, confirmed by the contested decision, complies with the requirement for that threshold to be analysed and defined 'for each individual bidding zone border'.

200 In that regard, it is apparent from Article 7(3) and (4) of the contested cost sharing methodology that the threshold is determined in two stages.

201 In the first stage, a common threshold for the whole of the Core region is applied to each cross-border relevant network element. That common threshold is set at 10% of the maximum capacity of the network element concerned.

202 In the second stage, the common threshold is divided equally, for each network element concerned, by the number of bidding zones within the Core region from which the loop flows that pass through that network element originate. If a bidding zone does not fully use the share of the threshold allocated to it, the unused part is then divided equally between the remaining bidding zones.

203 It follows that the threshold of each cross-border relevant network element corresponds to 10% of its maximum capacity, divided equally by the number of bidding zones within the Core region from which the loop flows that pass through that network element originate.

204 It is true, as ACER submits, that such an allocation results in an individual threshold for each bidding zone and, therefore, that that determination of the threshold entails a certain 'individualisation' of the threshold, in that it is determined on the basis of the individual maximum capacity of each network element concerned and according to the number of bidding zones from which loop flows that pass through those network elements originate.

205 However, it must be stated that the 'individualisation' referred to in paragraph 204 above is not the individualisation required, in the second subparagraph of Article 16(13) of Regulation 2019/943, by the words 'for each individual bidding zone border'.

206 As the applicant submits, in essence, without being contradicted on that point by ACER, the level of loop flows changes according to the characteristics of the bidding zones, such as the size, the degree of meshing, the proportion of electricity injected that comes from renewable energies and the number of borders of the bidding zone concerned. Thus, the level of loop flows may vary from one bidding zone to another, on a 'border' within the meaning of Article 16(13) of Regulation 2019/943, or even on the elements of relevance to congestion between two zones. That is why the second subparagraph of Article 16(13) of Regulation 2019/943 requires the threshold to be determined on the basis of the characteristics of the bidding zones in question and the different borders between them.

207 However, ACER's determination of the threshold is based, in the first stage, on a single threshold for all bidding zones in the Core region, so that no account is taken of the specific characteristics of those zones or of the borders between them.

208 Furthermore, the 'individualisation' carried out in the second stage also does not take account of the characteristics of the different bidding zones, but depends solely on the number of bidding zones from which the loop flows that pass through the relevant network elements originate. The same reasoning applies in the event of a subsequent allocation, among the other bidding zones, of the share of the threshold not used by a bidding zone.

209 It follows that the threshold set by ACER does not comply with the requirement laid down in the second subparagraph of Article 16(13) of Regulation 2019/943, according to which the threshold must be defined 'for each individual bidding zone border'.

210 In the second place, as regards the requirement for the threshold to correspond to the 'level that could be expected without structural congestion', it is common ground that the analysis normally required to determine the level of loop flows that could be expected without structural congestion, required by the first subparagraph of Article 16(13) of Regulation 2019/943, was not carried out in the present case.

211 In the absence of such an analysis, the threshold set by ACER cannot comply with the requirement for that threshold to correspond to the level of loop flows that could be expected without structural congestion.

212 In that regard, it is apparent from paragraphs 958 (page 145) and 1221 (page 189) of the contested decision that ACER considered that the threshold which it had set corresponded to a situation without structural congestion.

213 It is apparent from paragraph 115 of Decision No 30/2020 and from paragraph 215 of the defence that ACER consulted with TSOs regarding the level of loop flows that could be expected without structural congestion. While some TSOs indicated values varying between 3, 5 and 10%, others did not respond or indicated thresholds higher than 10%. In those circumstances, and assuming that the TSOs' responses had been influenced by their own interests, ACER set the threshold at 10% of the maximum capacity of the network element concerned as an 'average' of the opinions provided, as is also apparent from paragraph 115 of Decision No 30/2020.

214 It follows that the setting of 10% of the maximum capacity of the network element concerned as a common threshold for all bidding zones of the Core region and as the first stage in the determination of the threshold per network element concerned is not based on any analysis of the threshold without structural congestion, as required by the first subparagraph of Article 16(13) of Regulation 2019/943, but is the result of a compromise with regard to the divergent opinions provided by the TSOs concerned.

215 As ACER acknowledges in paragraph 930 (page 141) of the contested decision, the analysis required by the first subparagraph of Article 16(13) of Regulation 2019/943 presupposes, inter alia, an analysis of network investments and any alternative configurations of bidding zones that would remove structural congestions. ACER admits that it did not carry out such an analysis.

216 In those circumstances, ACER's argument that its determination of the threshold is based on a 'rigorous analysis' is ineffective, since, in any event, that analysis was not the analysis required by Article 16(13) of Regulation 2019/943.

217 It follows that the threshold set by ACER does not comply with the requirements laid down in Article 16(13) of Regulation 2019/943, according to which the threshold must correspond to the 'level that could be expected without structural congestion' and must be defined 'for each individual bidding zone border'.

The conditions for recognising implicit competence

218 It follows from the foregoing assessments that ACER's determination of the threshold in the contested cost sharing methodology does not comply with Article 16(13) of Regulation 2019/943.

219 In those circumstances, the question whether, in principle, ACER was competent to determine a threshold itself on the basis of point (a) of the second subparagraph of Article 6(10) of Regulation 2019/942, as follows from paragraph 924 (page 140) of the contested decision, is irrelevant. That provision cannot, in any event, allow ACER to set a threshold that does not comply with the requirements of Article 16(13) of Regulation 2019/943.

220 It must therefore be examined whether, despite the fact that ACER's determination of the threshold did not comply with the requirements of Article 16(13) of Regulation 2019/943, ACER had, in the specific situation in which it found itself, an implicit competence authorising it to determine a threshold in a different way than that prescribed by that provision.

221 ACER contends that its competence to determine a threshold is justified by the need for it to act. In the absence of the analysis of the level that could be expected without structural congestion that was to be carried out by the TSOs, ACER was authorised, in order to avoid a deadlock situation, to set a temporary threshold itself in the contested cost sharing methodology.

222 In the first place, it cannot in principle be accepted, in the light of the principle of legality, that an agency of the European Union, such as ACER, may derogate from the applicable legal framework. It follows that ACER could not, in principle, derogate from Article 16(13) of Regulation 2019/943.

223 In the second place, it should be noted that, in accordance with Article 6(12)(b) of Regulation 2019/942, ACER may 'provide an interim decision to ensure that … operational security is protected'. It must be stated that, in the present case, ACER did not rely on that provision to establish the threshold. Furthermore, and in any event, the adoption of the cost sharing methodology cannot be regarded as necessary in order to 'ensure that security of supply or operational security is protected', within the meaning of Article 6(12)(b) of Regulation 2019/942. The purpose of that methodology is to share the costs of remedial actions and it is not intended to determine the remedial actions to be taken in order to ensure security of supply or operating security.

224 Moreover, the existence of that provision and, accordingly, of the power to adopt, in clearly defined circumstances, interim decisions, militates against recognising that ACER has an implicit competence to set, even temporarily, the threshold in the cost sharing methodology in a different way than that prescribed by Article 16(13) of Regulation 2019/943.

225 In the third place, in accordance with the case-law, mere reliance on an interest linked to effectiveness is insufficient to create a competence on the part of an agency of the European Union (see, to that effect, judgment of 24 October 2019, *E-Control* v *ACER*, T-332/17, not published,

EU:T:2019:761, paragraph 69). Mere reliance on an interest linked to effectiveness is therefore insufficient to allow an agency of the European Union to derogate from the applicable legal framework.

226 However, it cannot be ruled out that an interest linked to effectiveness, provided that it corresponds to a real need to ensure the practical effect of the provisions of the Treaties or the regulation concerned, may justify the existence of an implicit decision-making power (see, to that effect, judgment of 24 October 2019, *E-Control* v *ACER*, T-332/17, not published, EU:T:2019:761, paragraph 69).

227 It must therefore be examined whether, in the present case, the conditions for recognising that ACER has implicit competence, in accordance with that case-law, were satisfied.

Recognition that ACER has implicit competence

228 In accordance with the case-law cited in paragraph 226 above, in order to determine whether ACER could avail itself of implicit competence, it must be examined whether recognising that ACER has such competence corresponded to a real need to ensure the practical effect of the provisions at issue.

229 In that regard, it is apparent from paragraphs 924 to 946 (pages 140 to 144) and 1206 to 1220 (pages 214 to 216) of the contested decision that ACER claimed that the need to adopt a cost sharing methodology within the prescribed time limit had forced it to set the threshold itself, despite the absence of the analysis normally required.

230 First, as regards the need relied on with regard to the timetable, it is true that ACER was, in principle, required to adopt a cost sharing methodology within the time limit laid down in Article 6(12)(a) of Regulation 2019/942 and Article 9(11) of Regulation 2015/1222, namely a time limit of six months from 27 March 2020.

231 However, EU law does not attach any penalty to exceeding the six-month time limit laid down in Article 6(12)(a) of Regulation 2019/942 and Article 9(11) of Regulation 2015/1222. That time limit is therefore indicative rather than mandatory.

232 In accordance with the case-law, where there is such an indicative time limit, even if the EU body to which that time limit applies must endeavour to comply with it, it may be necessary for it, in particular because of the complexity of the task and provided that the interests of a Member State are not impaired, to have more time (see, to that effect, judgment of 15 January 2013, *Spain* v *Commission*, T-54/11, EU:T:2013:10, paragraph 27).

233 Consequently, the starting point of ACER's reasoning is incorrect, since it was not mandatory for it to adopt a cost sharing methodology within the prescribed time limit, that is to say, before 28 September 2020.

234 Furthermore, it is common ground that the analysis of the 'level that could be expected without structural congestion' is complex and requires a considerable amount of time.

235 It was therefore, in principle, open to ACER to allow the TSOs sufficient time to carry out the analysis required without being criticised for disregarding the time limit laid down in Article 6(12)(a) of Regulation 2019/942 and Article 9(11) of Regulation 2015/1222.

236 That is all the more so since the obligation to determine a threshold by carrying out the analysis provided for in Article 16(13) of Regulation 2019/943 did not enter into force until 1 January 2020.

237 At the time when the TSOs of the Core region submitted their proposal for a cost sharing methodology to all the NRAs of that region for approval, namely on 27 March 2019, Regulation 2019/943 had not yet been adopted.

238 In that regard, it must be stated that neither Decision No 30/2020 nor the contested decision explores the possible consequences, for the timetable for adopting the cost sharing methodology, of the fact that the obligation to determine a threshold and, therefore, to carry out the corresponding analysis did not enter into force until 1 January 2020.

239 Therefore, the Board of Appeal's assumption in the contested decision that it was necessary for ACER to adopt the contested cost sharing methodology, without being able to wait for the analysis prescribed by Article 16(13) of Regulation 2019/943, owing to the time limit set for it to do so, is based on a reading of the regulatory framework that does not take into account either the indicative nature of the time limit to be observed by ACER or the change in the legal framework in force.

240 Accordingly, mere reliance on an indicative time limit for ACER to adopt the cost sharing methodology is insufficient to demonstrate a real need to ensure the practical effect of the provisions at issue.

241 Second, ACER stated that the need for it to act is justified by the TSOs' failure to act. It is apparent from paragraph 955 (page 145) of the contested decision that ACER contended that the TSOs had not been able, 'in a period of nearly 3 years', to carry out the analysis required by Article 16(13) of Regulation 2019/943.

242 In that regard, it should be recalled that the obligation to determine the threshold by carrying out the analysis prescribed by Article 16(13) of Regulation 2019/943 did not enter into force until 1 January 2020.

243 Moreover, it must be stated that, contrary to what ACER maintains in paragraph 926 (page 140) of the contested decision, the TSOs did not consider it mandatory, in the explanatory document of 22 February 2019 accompanying the proposal for the cost sharing methodology of 27 March 2019, to determine a threshold, but rather perceived that as an option left to them.

244 Even if it were accepted that the need to set a threshold was recognised by the TSOs before the adoption of Regulation 2019/943, the fact remains that Article 16(13) of Regulation 2019/943 specifies how the threshold should be determined, namely on the basis of an analysis of the 'level [of loop flows] that could be expected without structural congestion' and 'for each individual bidding zone border'.

245 ACER does not contend that it was established, before the entry into force of Regulation 2019/943, that the threshold had to be determined in that way.

246 In those circumstances, ACER could not legitimately criticise the TSOs for not being able, 'in a period of nearly 3 years', to carry out the analysis required by Article 16(13) of Regulation 2019/943.

247 That conclusion is also not called into question by the documents produced by ACER at the hearing to demonstrate that the TSOs and NRAs of the Core region were still discussing how the analysis required by Article 16(13) of Regulation 2019/943 should be carried out.

248 Irrespective of whether those documents are admissible, it must be stated that the ongoing negotiations relied on by ACER are irrelevant to the present case.

249 According to the case-law, the legality of a decision must be assessed purely on the basis of the elements of fact and of law existing at the time when it was adopted (see judgment of 27 April 2022, *Roos and Others* v *Parliament*, T-710/21, T-722/21 and T-723/21, EU:T:2022:262, paragraph 211 and the case-law cited). Thus, the evidence relied on by ACER, which post-dates the contested decision, cannot be taken into account for the purpose of assessing the legality of that decision.

250 Third, ACER contended that the need for it to act is justified by the TSOs' failure to comply with the time limit that it had set for them. In that regard, it states that it set for the TSOs a time limit of four months, from 18 April to 20 August 2020, to carry out the analysis required by Article 16(13) of Regulation 2019/943 and adds that they did not comply with that time limit.

251 As is apparent from paragraphs 930 (page 141), 954 (page 145) and 1131 (page 202) of the contested decision, ACER itself considered that the analysis prescribed by Article 16(13) of Regulation 2019/943 was complex and would require a considerable amount of time.

252 Moreover, ACER has not demonstrated that, during the four-month time limit that it had set for the TSOs, it facilitated, in one way or another, the work of the TSOs in carrying out the analysis prescribed by Article 16(13) of Regulation 2019/943.

253 In accordance with Article 6(11) of Regulation 2019/942, which reflects the principle of sincere cooperation enshrined in Article 4(3) TEU, ACER is required to consult NRAs and TSOs when preparing a decision on the basis of Article 6(10) of that regulation.

254 In accordance with the principle of sincere cooperation and taking into account the clear intention of the EU legislature to make decision-making on difficult but necessary cross-border issues more efficient and faster (judgment of 7 September 2022, *BNetzA* v *ACER*, T-631/19, EU:T:2022:509, paragraph 46), ACER was to facilitate the development, by the TSOs and NRAs, of the analysis required by Article 16(13) of Regulation 2019/943.

255 In those circumstances, ACER cannot legitimately criticise the TSOs for not being able to carry out the analysis required by Article 16(13) of Regulation 2019/943 within the prescribed time limit, namely four months.

256 Fourth, ACER further contended that the need to adopt the contested cost sharing methodology without being able to wait for the analysis required by Article 16(13) of Regulation 2019/943 is justified by two other considerations.

257 First, at the hearing, ACER contended that it would have been necessary to give the TSOs sufficient time, after the contested cost sharing methodology was adopted, to put in place the necessary arrangements properly to implement it.

258 It should be noted that, according to Article 13(2) of the contested cost sharing methodology, read in conjunction with Article 37(2) of the RDCT methodology, a first step in the implementation of the contested cost sharing methodology was scheduled for 4 June 2023, whereas the full implementation of that methodology was scheduled for 4 June 2025.

259 Thus, given that the contested cost sharing methodology was first to be partially implemented only two and a half years after it was adopted, and fully implemented four and a half years after it was adopted, mere reliance on the need for the TSOs to put in place the necessary arrangements properly to implement that methodology is not sufficient to demonstrate, in the light of the very long period laid down for implementing it, a real need to adopt that methodology without being able to wait for the analysis required by Article 16(13) of Regulation 2019/943.

260 Second, it is apparent from paragraph 946 (page 144) of the contested decision that ACER considers that the contested cost sharing methodology had to be implemented simultaneously with the RDCT methodology and the ROSC methodology.

261 In that regard, it is sufficient to note that the present case in no way involves deciding whether ACER was authorised to set the same dates for the implementation of the contested cost sharing methodology, the RDCT methodology and the ROSC methodology, but rather determining whether ACER could adopt the contested cost sharing methodology without being able to wait for the analysis required by Article 16(13) of Regulation 2019/943.

262 In those circumstances, the argument based on the alleged need to implement the contested cost sharing methodology, the RDCT methodology and the ROSC methodology simultaneously is irrelevant to the question of when the cost sharing methodology had to be adopted.

263 Accordingly, ACER also could not contend that the need for it to act was justified by considerations relating to the need to allow the TSOs sufficient time to put in place the necessary arrangements properly to implement the contested cost sharing methodology simultaneously with two other methodologies.

264 It follows that ACER has not established that it was necessary to adopt the contested cost sharing methodology without being able to wait for the analysis required by Article 16(13) of Regulation 2019/943.

265 Consequently, ACER has not demonstrated that there was a real need to ensure the practical effect of the provisions at issue that would justify recognising that it has implicit competence.

266 In any event, it must be stated that ACER's determination of the threshold is not capable of ensuring the practical effect of the provisions at issue.

267 It is true that that determination of the threshold enabled ACER to adopt the contested cost sharing methodology on 30 November 2020, that is to say, slightly after the time limit that had been set for it to do so, which expired on 27 September 2020. However, that did not ensure the practical effect of the substantive provisions at issue.

268 The contested cost sharing methodology must, in accordance with Article 74(6)(a) of Regulation 2015/1222, provide incentives to invest effectively to manage congestion. In addition, according to recital 34 of Regulation 2019/943, the management of congestion should provide correct economic signals to TSOs and market participants.

269 As stated in paragraph 217 above, the threshold determined by ACER, confirmed by the contested decision, does not comply with the requirements of Article 16(13) of Regulation 2019/943, according to which the threshold must correspond to the 'level that could be expected without structural congestion' and be defined 'for each individual bidding zone border'.

270 In those circumstances, on account of that determination of the threshold, the contested cost sharing methodology cannot provide, by means of sharing the costs of remedial actions, 'correct economic signals' for network investments.

271 Furthermore, it must also be stated that the weighing-up of the interest in complying with the prescribed time limit and the interest in complying with Article 16(13) of Regulation 2019/943, apparently carried out by ACER, does not justify determining a threshold that does not comply with the relevant legislation.

272 As pointed out in paragraph 231 above, the time limit set for ACER to adopt a cost sharing methodology was merely indicative, so that, in a weighing-up of interests, the intention to comply with that time limit cannot take precedence over compliance with the requirements of Article 16(13) of Regulation 2019/943.

273 That outcome cannot be called into question by ACER's argument that it determined the threshold only on a temporary basis. The temporary nature of that determination in no way mitigates the breach of the relevant regulatory framework by ACER and the Board of Appeal.

274 The fact that the temporary nature of the determination of the threshold exists only *de jure* does not make it possible to lessen ACER's failure to comply with the relevant regulatory framework.

275 Accordingly, ACER cannot justify its approach of giving precedence, in the weighing-up of interests, to the interest in complying with the prescribed time limit over the interest in complying with the requirements of Article 16(13) of Regulation 2019/943 by relying on the temporary nature of the resulting interference with the regulatory framework, through determining a threshold in a way that does not comply with that framework. Consequently, ACER could not base its determination of the threshold on an implicit competence.

276 In the light of the foregoing assessments, it must be concluded that ACER's determination of the threshold in the contested cost sharing methodology, as confirmed by the contested decision, infringes Article 16(13) of Regulation 2019/943, in that that threshold does not meet the criterion that the threshold must correspond to the 'level that could be expected without structural congestion' or the criterion that the threshold must be defined 'for each individual bidding zone border'. Furthermore, it is apparent from the foregoing that ACER was also not entitled to determine a threshold differently in order to comply with the time limit set for it to adopt the contested cost sharing methodology.

277 In those circumstances, the third plea must be upheld, without there being any need to examine the other objections raised by the applicant in support of it.

278 In so far as the third plea concerns a central element of the contested cost sharing methodology, which is the subject of the contested decision, the Court cannot annul the contested decision only in part.

279 Consequently, the applicant's action must be upheld on the basis of the third plea and the contested decision must be annulled in so far as it confirms Decision No 30/2020 and dismisses the applicant's appeal in Case A-001-2021 (consolidated).

280 In those circumstances, there is no need to examine the fifth and sixth pleas raised by the applicant.

Whether the contested decision should be maintained

281 Under the second paragraph of Article 264 TFEU, the Court may, if it considers it necessary, state which of the effects of the act which it has declared void are to be considered as definitive.

282 In response to measures of organisation of procedure ordered by the Court, the parties submitted their observations in that regard.

283 In the present case, ACER contends that the annulment of the contested decision and, consequently, of the contested cost sharing methodology would have serious consequences. TSOs would have to bear all the costs of all remedial actions activated on their network elements, even if those actions were necessary due to loop flows from other bidding zones. The effect of that situation would likely be that TSOs would have an incentive to limit cross-zonal capacity, resulting in higher electricity prices.

284 In accordance with the case-law, on grounds of legal certainty, the effects of an act may be maintained, in particular, where the immediate effects of its annulment would give rise to serious negative consequences for the persons concerned and where the lawfulness of the act in question is contested not because of its aim or content, but on grounds of lack of competence or infringement of an essential procedural requirement (see judgment of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB*, C-584/20 P and C-621/20 P, EU:C:2021:601, paragraph 175 and the case-law cited).

285 In that regard, first, it should be noted that the annulment of the contested decision is based, inter alia, on an infringement of substantive law, namely an infringement of the second subparagraph of Article 16(13) of Regulation 2019/943, and not solely on an infringement of essential procedural requirements.

286 Second, ACER's line of argument is based on the assumption that the contested cost sharing methodology is already applicable.

287 It is apparent from the parties' answers to the questions put by the Court that the contested cost sharing methodology, which is the subject of the contested decision, will not be fully implemented before 4 June 2025 and that, on account of delays, its implementation may even be further postponed.

288 In those circumstances, there is no need to limit the effect of the annulment of the contested decision.

Costs

289 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

290 Since ACER has been unsuccessful and the applicant has applied for costs, ACER must be ordered to pay the costs.

291 According to Article 138(1) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs. The Federal Republic of Germany must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition)

hereby:

1. **Annuls the decision of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators (ACER) of 28 May 2021 in Case A-001-2021 (consolidated), in so far as it confirms ACER Decision No 30/2020 of 30 November 2020 on the proposal of the electricity transmission system operators of the 'Core' capacity calculation region, comprising Belgium, the Czech Republic, Germany, France, Croatia, Luxembourg, Hungary, the Netherlands, Austria, Poland, Romania, Slovenia and Slovakia, for the methodology for cost sharing of redispatching and countertrading, and dismisses the applicant's appeal in that case;**

2. **Orders ACER to bear its own costs and to pay those incurred by the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (BNetzA);**

3. **Orders the Federal Republic of Germany to bear its own costs.**

Schalin Škvařilová-Pelzl Nõmm

Steinfatt Kukovec

Delivered in open court in Luxembourg on 25 September 2024.

[Signatures]