

ClientEarth's contributions to ACER's joint public consultation on methodologies for assessing electricity resource adequacy

The sections below correspond to the questions in ACER's public consultation on the draft methodologies for the European Resource Adequacy Assessment (ERAA), and for calculating the Value of Lost Load (VoLL), the Cost of New Entry for generation or demand response (CoNE) and the Reliability Standard (RS)¹.

1 On ERAA Proposal

1.1 Do you think that policies and measures contributing to indirectly restricting wholesale price formation (as referred to in Article 10(4) of Reg. (EU) 2019/943) should be reflected in ERAA?

No

¹ Public consultation survey available in ACER's website: https://surveys.acer.europa.eu/eusurvey/runner/adequacy_2020

1.2 Please elaborate on your previous answer

Article 10(1) introduces a general prohibition on price caps in the wholesale market with limited exceptions prescribed in Article 10(2). The reasoning behind this prohibition is stated in recital 24 EMR:

*"[...] Effective scarcity pricing will encourage market participants to react to market signals and to be available when the market most needs them and ensures that they can recover their costs in the wholesale market. **It is therefore critical to ensure that administrative and implicit price caps are removed in order to allow for scarcity pricing. When fully embedded in the market structure, short-term markets and scarcity pricing contribute to the removal of other market distortive measures, such as capacity mechanisms, in order to ensure security of supply.**"*

Therefore, if the meaning of the word "*reflect*" in the question above is **not to take into account** in the ERAA methodology policies and measures that are indirectly introducing price caps, then we agree that these policies and measures should not be reflected in the ERAA.

The ERAA methodology should endeavour to assess resource adequacy by providing a model that is representative of the electricity market and system². In fact, article 23.5(b) of the Electricity Market Regulation³ (EMR) provides that the ERAA shall be based on a methodology that ensures that the assessment "*is based on [...] appropriate sensitivities on [...] wholesale prices*".

Hence, as long as policies and measures indirectly restricting wholesale price formation are applied in any bidding zone of Member States, they should not be taken into account in the ERAA. On the contrary the methodology should be based on the assumption that such indirect policy and measures are removed from the market; therefore the methodology should assume how the market should operate if the distortions caused by price caps were removed and effective scarcity pricing was in place.

1.3 How should policies and measures contributing to indirectly restricting wholesale price formation be reflected in ERAA?

We refer to our answer above and to the meaning of the word "*reflect*". To the extent that those policies and measures distort the market and impact effective scarcity pricing, they should not be taken under account. The ERAA methodology should assume a market that operates without the distortions introduced by those measures.

² "Main principles that ACER suggests to follow when approving (and amending) resource adequacy methodologies", p.1.

³ Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (OJ L 158, 14.6.2019).

1.5 Do you think that, actions taken by a regulatory authority or designated competent authority aimed to eliminate identified policies or measures which could serve to restrict wholesale price formation (as referred to in Article 10(5) of Reg. (EU) 2019/943) should be reflected in ERAA?

Yes

1.6 Please elaborate on your previous answer

Article 10(5) of the EMR provides that in case any policies and measures which could serve to restrict wholesale price formation are identified, Member State's NRAs or designated competent authorities shall take all appropriate actions to eliminate or mitigate their impact on bidding behaviour. Such actions would have an effect on wholesale price formation (by reducing or eliminating the impact of the potentially restricting policies and measures). Therefore, such actions shall be captured by the ERAA methodology, following article 23(5)(b) of the EMR, which lists "*wholesale price formation*" among the appropriate sensitivities the ERAA methodology shall be based on. So as said in question 1, those measures should provide a picture of how the wholesale market would normally operate without the distortive impact of price caps, thus eliminating security of supply concerns and making obsolete the need for a capacity mechanism.

1.7 Do you think that scenarios for ERAA should reflect the timeline for adopting measures to eliminate any identified regulatory distortions or market failures as a part of the State aid process included in the implementation plans as referred to in Article 20(3) of Reg. (EU) 2019/943?

Yes

1.8 Please elaborate on your previous answer

Before answering this question we need to provide a clarification: the procedure of adopting a market reform implementation plan and the procedure of approving a State aid under this regulation are two different procedures according to the European Commission's Statement in the adoption of EMR⁴ "Statement by the Commission on market reform implementation plans":

"The Commission notes the agreement of the co-legislators relating to Art. 20(3) which provides that Member States with identified adequacy concerns shall publish an implementation plan with

⁴ Available at <http://data.consilium.europa.eu/doc/document/ST-8737-2019-ADD-1-REV-1/EN/pdf>

a timeline for adopting measures to eliminate any identified regulatory distortions and/or market failures as a part of the State Aid process.

Pursuant to Article 108 TFEU, the Commission has exclusive competence to assess the compatibility of State aid measures with the internal market. This Regulation cannot affect and is without prejudice to the Commission's exclusive competence pursuant to the TFEU. The Commission may therefore, where relevant, give its opinion on market reform plans in parallel to the process of approving capacity mechanisms under State aid rules, but the two processes are legally separate."

The ERAA methodology must model and capture the impact of the measures included in implementation plans applied pursuant to article 20(3) of the EMR. This is a clear requirement under article 23(5)(e) of the EMR, which establishes that the ERAA methodology shall ensure the assessment "*anticipates the likely impact of the measures referred in Article 20(3)*".

In the second version of the ERAA draft methodology (dated on 22 April 2020), ENTSO-E has added a reference to implementation plans in article 5(6) that affects data collection for the PEMMDB. ClientEarth welcomes this addition, since it seems to recognise the relevance of implementation plans for the ERAA methodology. However, this change is not sufficient to fully anticipate the impact of implementation plans, as would only rely on information provided by TSOs or other market participants and does not entail the proper integration in the model of changes envisaged with the reform.

We therefore consider that the measures implemented pursuant to implementation plans, which are market-related and in some cases very specific (e.g. introducing a shortage pricing function for balancing energy, in art. 20(3)(c)), should be incorporated as part of the models, in accordance with the corresponding timeline for adopting such measures.

1.11 The Proposal for ERAA mentions that Replacement Reserve (RR) is fully available to avoid unserved energy, whereas FRR is fully unavailable for this purpose. Do you agree with this proposal?

No

1.12 Please elaborate on your previous answer

Art. 23(5)(d) EMR establishes that the ERAA methodology shall "*appropriately take account of the contribution of all resources [...] and their contribution to flexible system operation*".

The System Operation Guidelines ("SOGL")⁵ define FRR in Article 3(2)(7) as "*the active power reserves available to restore system frequency to the nominal frequency and for a synchronous area consisting of more than one LFC area, to restore power balance to the scheduled value*".

⁵ Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation (OJ L 220, 15.8.2017).

And RR means, in accordance with Article 3(2)(8), "*the active power reserves available to restore or support the required level of FRR to be prepared for additional system imbalances*". Hence, and consistently with the above definitions, we consider that it is positive to include RR as an available supply resource to avoid unserved energy. We disagree, however, with disregarding the potential contribution that at least part of the FRR could make to avoid unserved energy.

1.14 Do you agree that unused (normatively estimated based on the historical difference between available and activated for other purposes, see example below) Frequency Restoration Reserves (FRR) upwards should be used in ERAA as resource with the aim to reduce unserved energy (which ultimately materialises as imbalance)

Yes

1.17 Do you have any views for the selection of a relevant and representative set of climate years as input for the Monte Carlo approach?

Article 23(5)(b) of the EMR establishes that the ERAA methodology shall ensure that the assessment is "*based on appropriate central reference scenarios of projected demand and supply [...] and [...] appropriate sensitivities on extreme weather events, hydrological conditions [...]*." However, it is not disputed that average temperatures have increased over the last decade both globally and in Europe. Given the fast changes in climate we are already experiencing, it is worth considering whether using a dataset of the past 35 years (as we understand is the case, given that the draft methodology mentions the ENTSO-E's Pan-European Climate Dataset as the source of climate data) to estimate the weather of future years is appropriate.

To determine probable weather events, the ERAA methodology should envisage to use methods in addition to the traditional statistical models (which are derived from historical data which will be less and less relevant). Independent climate experts should be involved in this process to ensure the set of climate years is realistic taking into account expected changes in climate conditions in the future.

1.18 Do you have any other major observation on the ERAA Proposal? (if so, please indicate clearly the related Article, paragraph of the proposal, and add a sufficient explanation)

While we welcome some of the modifications to the draft methodology undertaken by ENTSO-E following the public consultation process that took place earlier this year, the draft methodology still needs improvement in order to ensure compliance with the applicable legal framework and alignment with the energy and climate goals of the Energy Union.

[Article 2(1), on a reference to definitions included in several EU rules]

The general reference to the definitions included in article 2 of some EU rules (EMR, EMD, RRPR, SOGL and CACM) must be corrected to reflect the fact that; for example in the case of the SOGL Regulation, definitions are included in Article 3.

[Article 2(2), list of definitions]

We note that some of the definitions are still not consistent with currently applicable EU law. Also, some definitions are duplicated for the purposes of the ERAA methodology, since they are included in referenced EU rules and at the same time a definition is provided in article 2.2. The definitions that prevail must be clarified for the sake of legal certainty. We recommend that the definitions already existing in EU rules prevail and that any redundant definitions in the draft methodology be deleted or rephrased consistently with EU rules.

[Articles 2(2)(p) and 4(3), on DSR]

Under Article 23(5)(d) of the EMR, the methodology shall “*appropriately [take] account of the contribution of all resources including existing and future possibilities for [...] demand response, [...] and their contribution to flexible system operation;*” and under EMR 23(5)(m), the methodology shall ensure “*that the national characteristics of [...], demand flexibility [...] are properly taken into consideration*”. In our analysis, Article 23(5)(d) EMR does not prescribe that all forms of DSR must be considered in the same way. On the contrary, “*all resources*” shall be duly considered on their own respective merits. Arguably, explicit DSR and implicit DSR are different sorts of resources, with their own impact on the demand curve and their own contribution to resource adequacy. Anticipation and evaluation of explicit and implicit DSR shall not necessarily follow the same modelling given the relative volatility of implicit DSR, which is less easily measurable than explicit DSR. Bundling together the modelling of explicit and implicit DSR as proposed in the draft methodology could therefore result in misestimating available DSR resources – which goes contrary to achieving the objective of Article 23(5)(d) EMR.

While we appreciate that the reference to implicit and explicit DSR being “*considered in the same way*” has been removed in the second version of the draft methodology, we also note that this possibility is not clearly excluded. In fact, the wording of the draft methodology is ambiguous respecting the consideration of implicit and explicit DSR. On one hand, article 4(3), when describing demand mentions that “*both policy and non-policy DSR shall consider both implicit and explicit DSR*”. On the other, article 5, on data collection, mentions that the PEMMDB shall include data on the potential on explicit and implicit DSR, “*should such split be available*”. Hence we insist on the need for the ERAA methodology to expressly state that implicit and explicit DSR shall be considered according to their corresponding characteristics.

The first paragraph of Article 4(3)(c) of the draft methodology has been amended to provide that “*[t]he data related to potential for reduction, postponement or shifting of DSR shall be based on assumptions considering that the relevant technology is available, mature and competitive within the concerned period of the assessment*”. We find this wording unclear since it is not explained which particular assumptions will be applied.

We remind the need to comply with the principle set by Article 23(5)(d) of the EMR, which refers to "*existing and future possibilities*". Indeed, the inclusion of a definition of "*mature and competitive*" in connection to DSR seems to suggest that it would be necessary to wait for a high-volume of empirical data for DSR to be included in the assessment, which would in fine result in an undervaluation of DSR available at present already and in in the short and medium terms. Explicit DSR and implicit DSR as defined in Article 2 may have different levels of availability, maturity and competitiveness within the concerned period of assessment. This, again, supports a distinct assessment for each of these resources. Lastly, we assume that the "*concerned period of the assessment*" mentioned in article 4(3)(c) is the annual (granularity) revision of the ERAA mentioned in Article 3(1) and Article 4(1)(a) and not its 10-year ahead horizon – this should be clarified.

[Article 3, on the reference to NECPs]

We acknowledge the replacement of the wording "*national trends*" in the reference to NECPs with "*national objectives, targets and contributions and other projections*", which is more consistent with the content of NECPs as regulated in article 3(2)(b) of the Governance Regulation.

More importantly, however, we recommend that the scenarios used by the ERAA methodology be fully Paris-compliant, in line with Article 1(a) of the EMR as well as with the new climate and sustainability mandate of ENTSO-E. It has been noted by the European Commission that the draft NECPs showed an "*ambition gap*" in order to be Paris-compliant⁶. For those MS that have submitted their final NECPs, this gap remains unbridged. Although some MS might have improved their ambition, they still miss alignment with all of the recommendations of the European Commission. As a consequence, the NECPs are not consistent with the Governance Regulation. In the meantime, between June 2019, when the Commission published its recommendations for the NECPs and the final drafts, the EU's ambition to meet the Paris Agreement requirements has radically increased, as clearly stated in the European Green Deal Communication.

In other words, the NECPs are outdated and behind the European Green Deal standards. Therefore, there is a substantial risk that basing scenario frameworks on existing NECPs, would mean that the ERAA methodology would use scenarios which are not compliant with the requirements of the Paris Agreement and the new ambition of the EU.

[Article 3, on the number of central reference scenarios]

It is primordial to highlight that the EMR clearly provides that the ERAA methodology shall include multiple central reference scenarios. Such understanding flows from the following stipulations of article 23(5) EMR, which provide that the ERAA methodology shall:

- be "*based on appropriate central reference scenarios of projected demand and supply*" (paragraph (b)),

⁶ More information available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0285&from=EN>

- contain “*separate scenarios reflecting the differing likelihoods of the occurrence of resource adequacy concerns which the different types of capacity mechanisms are designed to address*” (paragraph (c))
- include “*variants without existing or planned capacity mechanisms and, where applicable, variants with such mechanisms*” (paragraph (f))

Article 23(5) of the EMR specifically distinguishes between “*appropriate central reference scenarios of projected demand and supply*” on the one hand and variants with and without CM in distinct paragraphs on the other hand, because the intention of the drafters of the EMR is that the ERAA methodology shall include multiple scenarios.

However, article 3 of the draft methodology still refers only to two “*Central Reference Scenarios*”, one with CMs and one without CMs (without sub-scenarios), which would be not compliant with the EMR. Oddly enough, Appendix 2 of the draft methodology does mention the “*impact of different regulatory scenarios on adequacy*”. The concept of regulatory scenario appears particularly relevant and should be fully implemented in the operative part of the ERAA methodology.

In order to be compliant with the EMR, the ERAA methodology shall explicitly provide for different central reference scenarios, and for each of them, there shall be sub-scenarios with and without CMs in order to take account of more parameters within each central reference scenario.

Importantly, in order to be compliant with the spirit of the Clean Energy Package and the ambition of the Green Deal, ENTSO-E shall provide in Article 4 of the ERAA methodology that these “*appropriate central reference scenarios*” are aligned with the requirements of the Paris Agreement.

We note for instance that the draft Ten Year Network Development Plan (“TYNDP”) is based on three scenarios: the National Trends Scenario, the Global Ambition and the Distributed Energy Scenarios, with only the two latter scenarios being (facially) “Paris-compliant”. Indeed, these two last scenarios assume that the EU will be in a position to have major negative CO₂ emissions between 2050 and 2100 to offset the surplus of emissions between 2020 and 2050 as compared to the remaining carbon budget.

We recommend that ENTSO-E replicates this approach, being noted that the ERAA methodology shall be fully compliant with the Paris Agreement and that the scenarios used shall not all be based on the assumption that the EU will be able to generate massive negative CO₂ emissions after 2050 – because that may not be realistic and would ultimately result in missing the Paris agreement goals.

Addressing this concern will also be achieved by appropriately taking into account the full extent of DSR measures, through an appropriate methodology.

[Articles 3 & 4(4), on Strategic Reserves]

ClientEarth greets the inclusion of Strategic Reserves as an available supply resource in the second version of the draft methodology. However, consistently with our comment to article 3 above, we consider that such inclusion should be made via introducing a specific sensitivity, and not a CM scenario.

Like any CM, strategic reserves should comply with the requirements set out in Chapter IV EMR. According to Article 21(2) EMR, one of those requirements is "*conduct a comprehensive study of the possible effects of such mechanisms on the neighbouring Member States by consulting at least its neighbouring Member States to which they have a direct network connection and the stakeholders of those Member States*". It seems that the wording of Article 3(5) of the draft methodology references that strategic reserves contribute only to the adequacy of the country in which they are contracted and hence will be considered in the ERAA only after the implementation of the economic viability assessment, not affecting its outcomes is not in line with the EMR as the relevant exercise of introducing a strategic reserve should already have checked the impact of the measure beyond national level.

The ERAA should also consider any additional out of market emergency measures that TSOs have at their disposal for dealing with supply shortfalls. This would include services such as voltage reduction and instructing generators to produce at levels above their rated capacity. These services should be modelled in accordance with projected and historical information. For example, if a TSO can apply voltage reduction for one hour and reduce the level of demand by X MW through this action, this should be reflected in the model. Clearly, there are limitations in the use of these emergency measures, and these limitations should be appropriately considered in the ERAA. This point is not addressed in the methodology altogether.

[Article 5, on Data Collection]

Commenting in detail on Article 5 of the Draft Methodology on data collection at this stage is difficult without knowing the content of the data collection guidelines. We are nonetheless able to make the following general remarks:

- The spirit of Article 5 is that ENTSO-E will draft data collection guidelines instructing the TSO to collect data to substantiate the ERAA's methodology and assumptions. The guidelines will detail the data collection methodology to be followed by the TSOs and state from which sources data must be collected. We also understand from Article 5(13) that ENTSO-E intends to publish the data collection guidelines.
- The following comments can be made on Article 5 of the Draft Methodology:
 - The guidelines must provide that TSOs shall collect data from all relevant sources, including NRAs, DSOs and NEMOs, plants and other stakeholders. A detailed and non-exhaustive list of relevant data sources shall be included in the guidelines.
 - We note that the wording of Article 5(6) has been amended. Its previous version provided that ENTSO-E may "*in exceptional cases*" aim at collecting data directly from NRAs, DSOs and NEMOs or others "*should this data be missing from the TSO data collection*". However, the second version of the draft methodology does not clearly mention the possibility for ENTSO-E to supplement TSO's data when necessary. We

- consider that such possibility should be included in the final version of the ERAA methodology to ensure that ENTSO-E has all the available data necessary to produce the ERAA.
- The guidelines must provide for a clear and effective reconciliation mechanism in case of divergence between data gathered from various sources. We note the inclusion in article 5(3) of the updated draft methodology of a mention to a "*consolidation mechanism*": "*ENTSO-E shall, in case contrasting or misaligned input data from TSOs are provided, request and transparently detail the sources of TSO data and define a consolidation mechanism in order to combine such data into a consistent dataset*". We agree with ENTSO-E or any other independent entity being the entity assessing the data collected requesting more details from the sources in case necessary, and making its own analysis out of them (and not the TSOs, whose role would be to collect data but not provide an oriented analysis thereof). However, we would suggest to clarify the language cited above, particularly respecting what is being "*requested*" (more data and clarification from TSOs, by ENTSO-E) and what is "*transparently detailed*" (the contrasting or misaligned input data to stakeholders by ENTSO-E).
 - The data collection guidelines must be subject to a stakeholders' consultation under Article 8 of the draft methodology. This is not currently explicit in Article 5(13), which vaguely provides that the guidelines "*shall be published [...] for further use and validation by other stakeholders, during relevant public consultations*". The term "*validation*" seems to refer only to an action *a posteriori*, without prior consultation on draft guidelines; and a "*validation*" would not have any particular legal value. This is not satisfactory given the crucial character of data collection to build the ERAA and make relevant annual updates.
 - Potentially the relevant decision making bodies should consider the introduction of a binding legal instrument detailing the transparency requirements with regards to the implementation of ERAA provisions.

Close attention would thus have to be paid to the future data collection guidelines to ensure full effectiveness of this draft Article 5 and to verify whether it can be considered compliant with the EMR and tailored to ERAA Methodology standards.

Finally, the data collected from the TSOs for the purposes of the ERAA should be made public, at least in an aggregated form (PEMMDB). The methodology cannot be considered transparent and its functioning cannot be fully understood if the data it will be fed with is not disseminated in accordance with the transparency principle of article 23(5) of the EMR. ENTSO-E has an obligation to implement this transparency requirement in a meaningful and effective way.

[Article 5, Phase shifting transformers]

Article 5.8(c) refers to the effects of phase shifting transformers on resources availability. Considering the questionable compliance of such equipment with a unified energy market, it may be more appropriate to include such effects as a sensitivity rather than as an assumption.

[Article 6(5), price and fuel price variants]

While we note that the Draft Methodology does refer to CO₂ prices and fuel prices, the ERAA methodology should more explicitly take into account the volatility of CO₂ prices and fuel prices by providing for specific sensitivities for these items. The impact of the Covid-19 pandemic in those prices is an example of why volatility must be taken into account.

[Article 9, Process]

Generally speaking, this article is useful to streamline the process envisaged by ENTSO-E. However, since it does not provide for a timeline, its usefulness decreases. Without a timeline, article 9 is in practice duplicative of article 8.

As a reminder, Article 31(3) of the EMR provides that “*Before adopting the proposals referred to in Article 30(1) the ENTSO for Electricity shall indicate how the observations received during the consultation have been taken into consideration. It shall provide reasons where observations have not been taken into account.*” Article 30(1)(c) of the EMR refers to “*proposals related to the European resource adequacy assessment pursuant to Article 23*” which would therefore cover the tasks described by Article 9.

Yet, Article 9(9) of the Draft Methodology provides that “*ENTSO-E presents an overview of the preliminary results of the ERAA to the Electricity Coordination Group and relevant stakeholders as soon as available and preferably before the publication of the ERAA report*”.

In order to be compliant with Article 31(3) of the EMR, the word “*preferably*” shall be removed and a minimum time-period shall be added. Presenting such preliminary results just before or after the publication of the ERAA report would not be sufficient stakeholders to provide meaningful input and would be in breach of the EMR.

[Appendix 1, Glossary]

We greet the improvement of the Glossary of acronyms, which will facilitate study, understanding and application of the ERAA methodology. However, we noted that the acronym “RCC”, which is used in article 5(8)(f) is not defined and should be included in the Glossary.

2 On VoLL/CoNE/RS Proposal

2.1 In the CoNE Proposal, an initial list of technologies is set up; only technologies which fulfil criteria to become candidate Reference Technologies are then thoroughly studied.

Do you agree with the way some technologies (e.g. Demand Side Response (DSR), RES, storage, etc.) are considered in the methodology for calculating the CoNE (Title 3 of VoLL/CoNE/RS Proposal)?

No

2.2 Please elaborate on your previous answer

The methodology relating to CoNE in this respect should be made more explicit. It is unclear whether Member States would have to calculate CoNE for more than one Reference Technology. Article 10(4) only provides that “*at least one candidate reference technology shall be defined for each Member State.*”

The CoNE methodology should clarify that Member States should calculate reference technologies for a minimum number of categories, covering at least: roof PV, industrial PV, onshore wind, offshore wind, explicit DSR, RES and storage. Moreover, MS should calculate these technologies on the basis of a set of common and uniform criteria agreed in EU level and not on the basis of criteria determined unilaterally by MS. These commonly defined uniform criteria will strengthen transparency and non-discrimination in determining the reference technology and will simplify procedures. Moreover, they will facilitate cross-border/interregional cooperation requirement of MS when assessing the need for a CM (Article 21(2) EMR).

2.3 How would you suggest that these technologies should be considered?

While we cannot give details on the way the technologies should be considered, we must underline that the relevant proceedings should be governed by the principles of transparency and non-discrimination.

2.4 Do you agree with the provisions of Article 15 of the VoLL/CoNE/RS Proposal according to which Member States can rely on their own relevant,

recent and representative WACC estimates, instead of using a binding common methodology to calculate the WACC for all Member States?

No

2.5 Please elaborate on your previous answer

As already stated in 2.2 above, commonly defined and uniform criteria will result in consistency in the application of the relevant EMR rules on capacity mechanisms, which will further contribute to harmonisation and transparency. If the European legislator envisaged more flexibility on national level with regards to the application of the adequacy assessment and capacity mechanisms rules, those rules would have been adopted through a directive and not through a regulation. The fact that the rules on ERAA and CM are included in the EMR and not in the Electricity directive, shows the preference of the legislator for the highest level of alignment in the various aspects that relate to the implementation of these rules, including those technical requirements referring to WACC etc.

2.6 Do you think that the main technical parameters used to calculate CoNE should be harmonised across MSs?

Yes

2.7 Please elaborate on your previous answer

Same as above 2.2 and 2.4.

2.9 Do you think that renewal or prolongation of existing resource capacity should be considered as a candidate technology that can address the required capacity needs and thus be taken into account in the calculation of the reliability standard (Annex 2(iii) of VoLL/CoNE/RS Proposal)?

No

2.10 Please elaborate on your previous answer

If the meaning of the above question is to include technologies that already benefit from capacity mechanism, then the answer should be no. The criteria used to assess existing or prolonged schemes are outdated given that some reference technologies like coal or gas power plants may not qualify when applying new criteria as reference technologies.

2.11 Do you agree with the provisions Annex 3 of the VoLL/CoNE/RS Proposal that a range of values of VOLL and CONE should be used to defined the reliability standard?

No

2.12 Please elaborate on your previous answer

As per our answer above we don't agree that these values should be defined by MS alone but should be determined on the basis of harmonised standards applying equally to all MS.

3 On both Proposals

3.4 Do you think that the proposed involvement of stakeholders in both Proposal is sufficient to guarantee robustness and transparency on scenario assumptions, input datasets, modelling approaches (e.g. with respect to the links with national energy policy targets and plans, DSR modelling), etc.?

No

3.5 Please elaborate on your previous answer

In order to provide sufficient guarantee of robustness and transparency, the consultation mechanisms shall be fully compliant with Article 31 of the EMR and shall ensure full participation of all stakeholders through adequate means. The current drafting of Articles 8 and 9 of the ERAA draft methodology does not appear fully compliant with the requirements of Article 31 of the EMR.

Article 31(1) of the EMR provides that *"While preparing the proposals pursuant to the tasks referred to in Article 30(1), the ENTSO for Electricity shall conduct an extensive consultation process. The consultation process shall be structured in a way to enable the accommodation of stakeholder comments before the final adoption of the proposal and in an open and transparent manner, involving all relevant stakeholders, and, in particular, the organisations representing such stakeholders, in accordance with the rules of procedure referred to in Article 29. That consultation shall also involve regulatory authorities and other national authorities, supply and generation undertakings, system users including customers, distribution system operators, including relevant industry associations, technical bodies and stakeholder platforms. It shall aim at identifying the views and proposals of all relevant parties during the decision-making process."*

Articles 8(4)(4) and 9(10) of the Draft Methodology are both problematic as they state that comments shall be *"considered for improvements of the future definitions of the ERAA"* or *"incorporated into the respective edition of the ERAA as soon as practicable"*, in both cases *"without delaying the annual publication of the ERAA"*. Such approach is self-contradictory and not compliant with Article 31(1) of the EMR as it risks resulting in not fully taking into account the comments of the stakeholders.

Therefore, we would recommend to include an explicit requirement to organise participation sufficiently early to allow for it to be taken into account. Such an approach would be efficiently complemented by providing for a clear, binding timeline in Article 9.

Also, we would like to note that the NECP stakeholder consultation and other national consultation mechanisms are not appropriate for ensuring complete fulfilment of the consultation requirements of the ERAA. Article 8(4)(2) of the Draft Methodology provides that *"The exogenous capacity assumptions estimated by the TSOs shall receive feedback from stakeholders through the process of relevant consultations related to of NECPs revisions and/or within the legal framework"*

of national grid development plans, national adequacy studies, regional plans where relevant or any other relevant national consultations which have occurred prior to the ERAA consultation". Similarly, article 9(6) of the Draft Methodology provides that "The exogenous capacity assumptions estimated by the TSOs shall receive stakeholder feedback through the processes of national consultations of NECPs and/or within the legal framework of national grid development plans, national adequacy studies, regional plans where relevant or any other relevant national consultations which have occurred prior to the ERAA consultation". While the intention to invite stakeholder feedback is laudable, the mechanism proposed in the draft methodology will not be sufficient to ensure proper stakeholder participation.

Indeed, under the Governance Regulation 2018/1999, the NECPs are to be drafted every 10 years (See article 9(1) of the Governance Regulation), and are revised once 5 years after their publication (See Article 14(1) of the Governance Regulation). Therefore, the stakeholder participation mechanism which exists under article 10 of the Governance Regulation will only be implemented in 2023, 2028, 2033, 2038, 2043, etc.

We therefore recommend to provide that the consultation process available in relation to the NECP revisions and other national consultations be used when available (i.e. one year out of five, in the case of NECP revisions) and that an ad hoc consultation process, compliant with Article 31 EMR be put into place the rest of the time.

In addition, stakeholders should also be consulted on the drafting of the data collection guidelines provided for in Article 5.

Last but not least, as the impact of the methodology on the climate and the environment is indisputable, the safest way to guarantee appropriate, meaningful, timely and efficient access to information and public participation is to align the relevant procedures with the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). Therefore, access to information and public participation should be early and open at all stages of the decision making procedures that relate to the ERAA. This is in line with the Governance Regulation as well, that by analogy to NECPs and LTS clearly provides for the application of the Aarhus Convention in the five dimensions governing the Energy Union, therefore security of supply as well. For economy of space, we refer to the various guidance on the practical implementation of the Aarhus Convention uploaded in the relevant website.

3.6 How should stakeholders be involved to guarantee robustness and transparency on scenario assumptions, input, datasets, modelling approaches, (e.g. with respect to the links with national energy policy targets and plans, DSR modelling), etc.?

[See our response to question 3.4 above]

3.7 How should stakeholders be involved to support the implementation of the methodologies described in the Proposals?

[See our response to question 3.4 above]

3.8 How would you increase stakeholder interaction with the aim to improve the methodologies towards possible future updates?

[See our response to question 3.4 above]

4 Conclusion

4.1 Please provide any further comment

[Summary of main comments]

The European Resource Adequacy Assessment (“ERAA”) methodology enshrined in Article 23 of Regulation (EU) 2019/943 of 5 June 2019 on the internal market for electricity (the “EMR”, is one of the most critical tools provided within the Clean Energy Package (“CEP”) to transition Europe’s energy systems to a cleaner future and to deliver the EU’s Paris Agreement targets. These overarching principles should be properly reflected throughout the whole procedure, from initial conception to final decision-making and implementation. However, the draft methodology seems to lack the level of ambition envisioned in the CEP, as well as in the EU Green Deal and the Climate Emergency declared by the European Parliament. Moreover, the methodology seems to miss a sufficient level of transparency and in several circumstances misinterprets or is inconsistent with some EU rules.

Without prejudice to the other comments that our detailed submissions include, we repeat below the main issues that we have identified with reference to the draft methodologies as summarised in our response to the first consultation:

- The EMR provides that the ERAA methodology shall include “*central reference **scenarios***” (plural), and that it shall include “*variants without existing or planned capacity mechanisms and, where applicable, variants with such mechanisms*”. The Draft Methodology is not compliant with these requirements in the EMR, as its two central reference scenarios are with CM and without CM. The ERAA shall provide for at least 2 central reference scenarios, each having sub-scenarios with and without CMs. All of these scenarios shall be explicitly compliant with the Paris Agreement.
- The final ERAA shall include a clear, explicit and robust **ex post monitoring mechanism** of the quality of its assumptions and output, based on the historical data which will be available in the future.
- The contribution of explicit and implicit DSR shall be duly considered, the ERAA methodology shall specify that the different characteristics of implicit and explicit DSR will be duly considered.
- Articles 7, 8 and 9 of the Draft Methodology are not fully compliant with the requirements of Article 31 of the EMR (**consultation** of the stakeholders) and **transparency** requirements.

[A new climate and sustainability mandate for EU Agencies (ACER) and entities with legal mandates under EU law (ENTSO-E)]

The recast ACER Regulation⁷ has expanded the scope of ACER's objectives, which now also include to “*contribute to the establishment of high-quality common regulatory and supervisory*

⁷ 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 (EU OJ L 158, 14.6.2019).

*practices, thus contributing to the consistent, efficient and effective application of Union law in order to **achieve the Union's climate and energy goals***⁸.

We recognise the spirit of such mandate in the document "*Main principles that the European Union Agency for the Cooperation of Energy Regulators (ACER) suggests to follow when approving (and amending) resource adequacy methodologies (i.e. methodologies for ERAA, CoNE, VoLL and RS) pursuant to Articles 23(7) and 27 of Regulation (EU) 2019/943*" that has been made public by ACER in the context of this joint public consultation on the draft methodologies for the ERAA, VoLL, CoNE and RS, in particular in connection with the principles "Compliance with high-level objectives of the Regulation" and "Compliance with the legal requirements". However, we note that a specific reference to the European Union's climate goals is absent.

We remind that decarbonisation is one of the dimensions of the Energy Union strategy since its inception and that, in words of the European Commission, "*[a]n ambitious climate policy is an integral part of our Energy Union*"⁹. It is of vital importance to bear in mind such objectives even when dealing with tasks that *a priori* may not seem directly related, such as the public consultation currently at hand.

As we detail below, badly designed methodologies for the ERAA, VoLL, CoNE and RS could lead to deficient planning of the European electric systems, and to potentially increased emissions and a worsening of the climate emergency.

In the case of ENTSO-E, Article 28 EMR clearly provides for a new mandate for ENTSO-E when performing its duties stating that it "**shall contribute to the efficient and sustainable achievement of the objectives set out in the policy framework for climate and energy covering the period from 2020 to 2030**".

We understand that the task of establishing a Europe-wide resource adequacy assessment is very challenging and urgent. The decision making bodies in these procedures, ENTSO-E and ACER have been entrusted with the implementation of a crucial task for the achievement of the Paris Agreement objectives and of the Energy Union within a tight timeline. The tight deadlines should not be used as an excuse to rush the procedures compromising transparency and involvement of stakeholders as well as the quality of the deliverable. A rushed decision may result in adopting a conservative methodology, which would assess a higher risk for security of supply and for the increased ambition of the EU as communicated in the Green Deal. Allowing sufficient time should also guarantee compliance with access to information and public participation requirements as enshrined in the Aarhus Regulation.

Therefore, although we understand the principle of "pragmatic approach" that ACER advances in the document with the high-level principles for resource adequacy assessment decision making, we understand that the pragmatic approach should not compromise quality and the need for an efficient and effective methodology to address the climate emergency.

⁸ Art. 1.2, recast ACER Regulation.

⁹ Communication from the Commission To The European Parliament, The Council, The European Economic And Social Committee, The Committee Of The Regions And The European Investment Bank A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM/2015/080 final, Document 52015DC0080.

[Importance of the ERAA methodology]

The ERAA methodology is the cornerstone for transitioning to a decarbonised energy system. Its purpose is to ensure security of supply through “*an objective basis for the assessment of adequacy concerns*” (recital 43 of the EMR). A harmonised methodology based on transparent and objective criteria, as well as a solid analysis to be updated as resource adequacy issues evolve, is fundamental for several reasons:

- First, it will be a key method for Member States to assess their resource adequacy concerns, on the same basis, taking into account all relevant factors; a global assessment of each and all resources at Member States’ disposal and not only their domestic generation capacity is critical, in line with the EMR. In this respect, the types of generation capacity that have been prioritised in some Member States to date are neither compatible with the EU climate and decarbonisation objectives, nor are they compatible with the EU Commission’s clear objectives to put an end to subsidies to fossil fuels.
- In addition, the Methodology will be fundamental for all stakeholders (the Commission, ENTSO-E, ACER, Member States, TSOs, capacity providers, the general public etc.) in order to understand Member States’ assumptions of their resource adequacy concerns – only a harmonised and solid Methodology can help build consensus over alleged resource adequacy concerns.
- Finally, in accordance with the EMR, the ERAA methodology will be used to verify the need for capacity remuneration mechanisms (“CRMs” or “CM”) across Europe. CRMs that have been put in place in the past in a number of Member States (see the Commission’s sector enquiry of 2016 and the Commission’s decisions authorising capacity mechanisms under State aid law adopted since 2014) were justified by security of supply issues alleged by Member States individually, often based on TSOs’ own assessment, without any harmonisation of methodologies. The mere requirement, in paragraph (221) of the Guidelines on State aid for environmental protection and energy of a “consistency” with generation adequacy assessments conducted by ENTSO-E did not constitute a sufficient safeguard to diverging analysis – and clearly did not result in consensus over security of supply concerns alleged by Member States. Indeed, controversies in a number of Member States about security of supply assumptions and about the necessity to address them with market-wide CRMs arose from early on.

From that perspective, the ERAA methodology will be a crucial tool for the Commission, who is the decision making authority in approving State aid, to assess the compatibility of the CRMs with State aid law.

[Compliance with the principles of Transparency, Energy Solidarity and Energy Efficiency First]

We concur with ACER's outline of high level principles for resource adequacy decisions including EU law principles. We want to draw ACER's attention to three specific principles that should govern the whole resource adequacy exercise including the decision on the methodology: the transparency principle (A); the Energy solidarity principle (B) and the Energy Efficiency First Principle (C).

[A. Transparency]

Transparency is one of the key principles of EU law and it has been crystallised in various legal instruments. It is provided for under Article 15(3) of the TFEU as well as Article 42 of the Charter of Fundamental Rights of the European Union. It is an obligation for each institution, body, office or agency to ensure that its proceedings are transparent and that information relating to this decision making is available to the public. In addition to access to information, carrying out consultations through effective, timely and meaningful participation is a meaningful way to comply with the general transparency principle.

In the context of the Energy Markets, transparency is reflected in various pieces of legislation either in a more general way (for example, as part of duties of bodies like TSOs to adopt decisions in a transparent way), or with more specific legislation such as REMIT. Relevant transparency requirements also stem from consumer law.

The new Clean Energy Package provides for transparency throughout the various aspects of it including the current methodology (Article 23(5) of the EMR). The general wording of the Article does not absolve ENTSO-E or those that hold information related to the methodologies such as the TSOs of their obligation to take concrete actions that will ensure the effective application of the transparency principle. Our comments on article 8 and 9 of the Draft Methodology analyse in more detail some of these aspects related to data and monitoring.

The Methodology is not final and should include a monitoring mechanism

Article 10(2) of the draft methodology provides that "*the ERAA methodology shall be implemented through a step-by-step, gradual process, where 'proof of concept' testing and impact assessment of the different methodological elements shall be ensured, prior to considering that any such methodological deployment within the ERAA methodology target is mature as an integral part of the ERAA report*". In other words, the draft methodology itself acknowledges that it is modular, will not be implemented in full and may not be fully compliant with the EMR.

Moreover, Article 10(3) provides that "*different requirements may be gradually deployed in each subsequent annual ERAA based on latest capabilities*". Such wording is quite vague as it does not specify for example:

- In relation to what requirements are different, e.g. in relation to original requirements;
- What methodology would be followed to decide on adding, removing or modifying original criteria;
- If a consultation with stakeholders will take place;
- On whose latest capabilities it will be based, e.g. on ENTSO-E

This lack of clarity raises serious concerns, the very least on compliance with the increased transparency requirements envisioned in the CEP and the EMR specifically as analysed above. To avoid opaqueness and lack of transparency it would be sensible to add clauses regarding an explicit monitoring mechanism. Indeed, considering the fact that the ERAA methodology will be implemented on a yearly basis and will each time cover ten-year periods, starting from year 2 there will be a possibility to compare the previous output of the ERAA methodology and the actual historical data. Such monitoring must aim at identifying any bias or deviation from the data provided, or the formulas of the ERAA methodology itself.

Finally, as already described in more detail above in 3.5 the transparency principle can be guaranteed by applying on the resource adequacy procedure decision making the Aarhus Convention.

B. Energy Solidarity Principle

Solidarity has been present as a principle of the legal system of the European Union since its creation and can be traced back to the first European integration projects that preceded the current Union.¹⁰ Following the constitutional reform of the Lisbon Treaty, the solidarity principle is included in Articles 2 and 3 of Treaty on the European Union ("TEU") as one of the founding values of TEU¹¹ and on the aims and tasks of the EU respectively. The principle of solidarity applies to different areas of EU policy as further specified in various provisions of the TEU and the Treaty on the Functioning of the European Union ("TFEU"); article 194 (1) TFE establishes solidarity principle specifically in the energy sector providing that

"1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks."

The principle of Energy Solidarity has been recently interpreted in the *OPAL* decision (Judgment of the General Court of 10 September 2019¹² Case T-883/16). In words of the General Court in: ***"the principle of solidarity [...] entails a general obligation on the part of the European Union and the Member States, in the exercise of their respective competences, to take into account the interests of the other stakeholders"***¹³. The General Court also establishes that ***"As regards [...] the energy policy of the European Union, that policy requires the European Union and the Member States to endeavour, in the exercise of their powers in the field of energy policy, to avoid adopting measures liable to affect the interests of the European Union and the other Member States, as regards security of supply, its economic and political viability, the diversification of supply or of sources of supply, and to do so in order to take account of their interdependence and de facto solidarity."***¹⁴

The legal basis for the adoption of the EMR is Article 194 (1). Therefore, there is no doubt that the principle governs the interpretation of the provisions of the EMR. It should be reminded that the

¹⁰ The European Coal and Steel Community Treaty, signed in 1951, already mentioned solidarity in its preamble, acknowledging that *"Europe can be built only through real practical achievements which will first of all create real solidarity"*, Third preambular provision, original in French.

¹¹ Art. 2, consolidated version of the Treaty on European Union (OJ C 326, 26.10.2012).

¹² Judgment of the General Court of 10 September 2019, Case T-883/16, ECLI:EU:T:2019:567.

¹³ *Ibid.*, para. 72.

¹⁴ *Ibid.*, para. 73.

principle of solidarity was explicitly mentioned in Energy Union Communication (2015)¹⁵ and the Energy Security Communication (2014)¹⁶ as the guiding star in safeguarding security of supply.

In line with the above, the ERAA methodology should be drafted in line with the principle of energy solidarity. The ERAA methodology is measure that is envisaged in the EMR and that affects the interests of the EU and the MS since its objective is to achieve the transition of energy systems to a cleaner future and to deliver the Paris Agreement targets maintaining security of supply. Therefore, the relevant decision making bodies should draft the methodology in a way that reflects the solidarity principle establishing a robust and ambitious model that will guarantee security of supply for the benefit of the EU and MS.

[C. Energy Efficiency First principle]

The Energy Efficiency First principle (EE1st) is a legally binding principle established with the Governance Regulation **but it has been already conceived in the Energy Security and Energy Union Strategies, the second one naming EE1st as a "resource on its own" putting it on an equal food with generation capacity.**

The Governance Regulation recognises in recital 5 that the five dimensions of the Energy Union fall "under the overarching theme of energy efficiency first" and Article 3(3)(a) sees the principle as the interlinkage between those 5 dimensions).

According to the Governance Regulation the EE1st is defined in Article 2(18) as:

"Energy efficiency first' means taking utmost account in energy planning, and in policy and investment decisions, of alternative cost-efficient energy efficiency measures to make energy demand and energy supply more efficient, in particular by means of cost-effective end-use energy savings, demand response initiatives and more efficient conversion, transmission and distribution of energy, whilst still achieving the objectives of those decisions'."

Furthermore recital 64 provides additional clarification on the definition:

'Member States should use the energy efficiency first principle, which means to consider, before taking energy planning, policy and investment decisions, whether cost-efficient, technically, economically and environmentally sound alternative energy efficiency measures could replace in whole or in part the envisaged planning, policy and investment measures, whilst still achieving the objectives of the respective decisions. This includes, in particular, the treatment of energy efficiency as a crucial element and a key consideration in future investment decisions on energy infrastructure in the Union. Such cost-efficient alternatives include measures to make energy demand and energy supply more efficient, in particular by means of cost-effective end-use energy savings, demand response initiatives and more efficient conversion, transmission and distribution of energy. Member States should also encourage the spread of that principle in regional and local government, as well as in the private sector.'

¹⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A80%3AFIN>

¹⁶ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52014DC0330>

In line with the above, the EE1st principle should be reflected in the different provisions of the ERAA methodology given that the latter will be used when adopting investment decisions to transition to decarbonise energy system and secure supply of energy by allocating financial resources through the confirmation that a CM is needed to address security of supply concerns. Perhaps, one of the most striking point of the current methodology not been consistent with the EE1st principle is that the relevant parts that refer to demand response to not properly consider the possibilities that the latter offer to the energy system as explained in the relevant sector of the present answer.

[On facilitating future public consultation processes]

We noted that replying "Yes" or "No" to some answers in ACER's online survey leads to more or less questions appearing in the survey. While we understand ACER's intention to simplify participation and avoiding questions to some participants in the survey, we suggest that this is notified at the beginning of future surveys.

Additionally, a document comparing the two versions of the draft methodologies prepared by ENTSO-E (the draft methodologies dated on 5 December 2019, and the draft methodologies dated on 22 April 2020, which were submitted to ACER for approval) would have been useful for the purposes of facilitating the analysis by participants.

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ClientEarth is funded by the generous support of philanthropic foundations, institutional donors and engaged individuals.

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