Introduction

The way we produce and consume energy shifted fundamentally in the past decade: Decarbonisation, decentralisation and digitalisation became the guiding principles for the energy transition. However, each EU country has found a slightly different approach. Therefore, power exchanges like EPEX SPOT SE, EXAA AG and TGE S.A. implemented local solutions that match specifically local needs. The EU Electricity Market Reform endangers these local markets – and in so doing, also the EU energy transition as well as the race to net zero.

The scope of the latest changes on the article pertaining to SDAC and SIDC markets goes clearly beyond the original scope of the Commission's public consultation and proposal. It is no longer about the sharing of liquidity but provides that local/national products fall into the scope of CACM. Moreover, the proposal introduces a complete ban of local products and markets. This ban goes even further than the scope of CACM as it is not limited to day-ahead and intraday products and applies not only to NEMOs but to all its shareholders and other entities that exercise control or any right over a NEMO.

The current proposal entails negative side-effects, which will eventually endanger the integrity of markets and render the energy transition impossible. The current proposal also illustrates that further assessments and discussions are needed in that matter. Against this background, we highly recommend a profound impact assessment in the format as it is already considered for peak shaving products and other proposals of the EMD package.

In this paper, EPEX SPOT SE, EXAA AG and TGE S.A. are proposing a new wording for Article 7.2 (ca) and Recital 14 of Regulation (EU) 2019/943 calling for an impact assessment (section 1). In the subsequent section 2, the reasoning why the current text puts market integration and energy transition at risk is outlined. Moreover, the need for the requested impact assessment is clarified.

Paris/Vienna/Warsaw, 2 October 2023

1. New Wording Proposal

New wording (in bold) suggested for recital 14

It is therefore important for the intraday markets to adapt to the participation of variable renewable energy technologies such as solar and wind as well as to the participation of demand side response and energy storage. ~~*The liquidity of the intraday markets should be improved with the sharing of the order books between market operators within a bidding zone, also when the cross-zonal capacities are set to zero or after the gate closure time of the intraday market. In order to ensure that order books are shared between NEMOs in the day-ahead and intraday timeframes, NEMOS should submit all orders to the single day-ahead and intraday coupling, and should not organize the trading of day-ahead and intraday products, or products with similar characteristics, outside the single day-ahead and intraday coupling. To address the inherent risk of discrimination in the trading of day-ahead and intraday products inside and outside the single day-ahead and intraday coupling, this obligation should apply to NEMOs and to undertakings which directly or indirectly exercise control or any right over a NEMO.*~~ ***In view of further optimising liquidity in day-ahead and intraday markets, the Commission, after public consultation, should perform an assessment about the possibility to organise day-ahead and intraday markets in such a way to ensure the sharing of liquidity between all NEMOs, both for cross-zonal and for intra-zonal trade. The impact assessment shall take into account the current state of implementation of the regulatory framework, the various policy options and the economic and environmental impacts of possible options in the short, medium and long terms, using appropriate qualitative and quantitative methods. That assessment shall more precisely take into consideration the impact of submitting all orders to single day-ahead and intraday coupling on organisation, functioning and performance of market coupling; at the same time the impact on the organisation, functioning and performance of local markets shall be assessed with emphasis on specific national developments and the possibility to address them in a timely and efficient manner in organising wholesale trading. The Commission shall also assess the impact on competition among NEMOs and with other market operators (e.g., brokers and regulated markets without NEMO designation), on innovation, and on time to market of new day-ahead and intraday products.***
In light of this assessment, the Commission should, where and to the extent appropriate, submit a legislative proposal to amend Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management in order to introduce the sharing of liquidity between all NEMOs, both for cross-zonal and for intra-zonal trade. Furthermore, the gate closure time of the intraday market should be set closer to the time of delivery to maximise the opportunities for market participants to trade shortages and surplus of electricity and contribute to better integrating variable renewables in the electricity system provided that this measure does not have negative impacts on the security of the national electricity system, cost-efficiency, greenhouse gas emissions and facilitates the integration of renewable energy.

In article 7 paragraph 2 the following point (ca) is inserted and replaces any precedent proposal:

~~*(ca) be organised in such a way as to ensure the sharing of liquidity between all NEMOs, both for cross-zonal and for intra-zonal trade; in particular, NEMOs shall submit all orders for day-ahead and intraday products to the single day-ahead and intraday coupling until the latest point in time when day-ahead or intraday trading is allowed in a given bidding zone. NEMOs shall not organise the trading with day-ahead and intraday products, or products with similar characteristics, outside the single day-ahead and intraday coupling. This obligation shall apply to NEMOs and to undertakings which directly or indirectly exercise control or any right over a NEMO;*~~ ***By 31 December 2025, the Commission, after public consultation, shall carry out an assessment about the possibility to organise day-ahead and intraday markets in such a way to ensure the sharing of liquidity between all NEMOs, both for cross-zonal and for intra-zonal trade. The impact assessment shall take into account the current state of implementation of the regulatory framework, the various policy options and the economic and environmental impacts of possible options in the short, medium and long terms, using appropriate qualitative and quantitative methods. That assessment shall take into consideration the impact of submitting all orders to single day-ahead and intraday coupling on organisation, functioning and performance of market coupling. That assessment shall also take into account the impact on organisation, functioning and performance of local markets with emphasis on specific national developments and the possibility to address them in a timely and efficient manner in organising wholesale trading. The Commission shall also assess the impact on competition among NEMOs and with other market operators, on innovation, and on time to market of new day-ahead and intraday products.***

The Commission shall, where and to the extent appropriate, submit a legislative proposal to amend Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management in order to introduce the sharing of liquidity between all NEMOs, both for cross-zonal and for intra-zonal trade.

2. Reasoning for the suggested change in wording

Why we consider the current wording of recital 14 and art 7.2 (ca) insufficient.

The wording of the present proposal goes far beyond the original scope of the envisaged amendment. Neither the consultation on CACM conducted by ACER in spring 2021, nor the Commission's endeavour in January/February 2023 covered such plans.

First, the proposed wording suffers from **linguistic and systematic shortcomings**, which is mainly due to the application of unclear terms and an imprecise wording, which results that the scope of the entailed obligations for NEMOs remains vague and lack the legal certainty required in such a context.

As the linguistic/formal flaws are concerned, for instance, neither *"products with similar characteristics"*, nor *"undertakings which directly or indirectly exercise control or any right over a NEMO"* are further specified. A product usually consists of several specifications, but what specifications are considered characteristic for a given day-ahead or intraday product? To which degree or extent do they have to be similar? Can fundamental differences regarding some specifications outweigh certain similar characteristics? As the second example is concerned, is really any possible right over a NEMO sufficient to trigger the deemed effects? Does any control function, shareholding, or other contractual relationship suffice in this respect? And should the notion of "control" be understood from a corporate or competition law standpoint?

We also identify some systematic/logical questions. For instance, the new wording no longer limits the obligation to a mere sharing of liquidity and/or orders. It requires all NEMOs to submit all orders to the single day-ahead and intraday coupling. As SDAC/SIDC are governed by CACM only, we interpret that this results in the obligation to extend the scope of CACM to all products within the day-ahead and intraday timeframe, regardless of the availability of cross-zonal capacity, which is the CACM rationale for socializing liquidity for SDAC/SIDC in the first place. We also note that the ban of products outside CACM is wider than the obligation to share liquidity as it also applies to *"products with similar characteristics"* and any other *"undertakings which directly or indirectly exercise control or any right over a NEMO".* However, we doubt that such a difference in personal and factual scope is reasonable as it will consequently result in some products and markets being completely prohibited, and the activities of some parties entirely interdicted.

As a consequence, the current obligations appear both defective and arbitrary.

Secondly, the proposed wording is also linked to **potential negative side-effects on national markets**. We have shown that the potential of the proposed wording will result in a quite extensive application of the incorporated obligations and bans. It is this high level of unclarity and arbitrariness, which gives potential to **negative side-effects on national markets**. We are convinced that the effect on national markets will be detrimental as the possibilities will be limited by the fact that all products need to be submitted to SDAC/SIDC. While the bureaucratic layer and associated coordination needs are well-designed for cross-zonal, European projects, it will delay the introduction of tailor-made solutions addressing national

needs and/or characteristics for the energy transition and the net-zero goals. Innovations tested and launched at national or sub-national level also serve as a springboard for wider geographic roll-out and further development. The EU internal electricity market will not be enriched with innovative solutions if the latter cannot occur on a smaller scale in the first place.

Thirdly, negative impacts on innovating new products would appear quite certain. Please be advised that innovation shall not be misperceived as an empty label. Europe will need all innovative endeavours to offer the right products and instruments for the energy transition, in all geographies and markets. Indeed, products for flexibility, capacity remuneration, GOs etc. will become relevant tools while having clearly "similar characteristics" with day-ahead and intraday products (e.g., market time units, delivery structure, matching, etc.). The sharing of liquidity is a mere instrument of socialisation and coordination; in contrast, we need to incentivize marketplaces to move quickly, take risk and innovate. Against this background, it is particularly worrying that, despite the probable drawbacks for the market, not impact assessment was carried out on this matter.

Fourthly, the current proposal installs a non-level playing-field and unequal incentives between NEMOs and other marketplaces. While NEMOs, as the most transparent and best supervised markets will be hindered from developing new markets and products, less transparent and regulated platforms will still be allowed to do so.

Fifthly, the current version does trigger severe concerns as regards **legality and regularity**. Putting strictly national markets under European regulation is in line with neither the subsidiary nor the proportionality/necessity principles safeguarded by the treaties.

We qualify the scope of application as excessive; particularly the ban of offering products outside SDAC/SIDC appears critical. The proposal does not strike a balance between the means used and the intended aim. It even remains silent in that respect. Proportionality requires that advantages due to limiting a given right are not outweighed by the disadvantages to exercise it. As the potential negative side-effects are obvious, the current approach clearly lacks further assessment.

The principle of subsidiarity serves to control for the Union's use of non-exclusive powers. It limits intervention when Member States can deal with a certain issue themselves at central, regional or national level. The Union is justified in exercising its powers only when Member States are proved not to be able to arrive at the objectives of a proposed action. Again, this principle requires a more profound assessment, which has not been offered so far. As the energy is an area of shared competences, submitting strictly national markets under EU rule needs further justification to be legitimate.

Underestimating these negative side-effects will eventually endanger the integrity of markets and render the energy transition impossible.

Finally, the Electricity Regulation should remain a place where principles are discussed, while the details and the implementation measures should be kept in the CACM Regulation. Given the technicality and the need for accuracy of such a disposition, we believe that it should

remain within the scope of the CACM Regulation while the Electricity Regulation opens the doors to such a modification.

Why our new wording proposal is reasonable.

As we have outlined above, the current proposal suffers from severe flaws. We managed to illustrate that it is both (i) the complete absence of a profound analysis of the impacts of the proposed changes as well as (ii) the lack of a comparison between expected aims and negative consequences, which leads to this conclusion. Moreover, we explained why a refined assessment of impacts, costs and benefits is required.
We do not expect that these defects can be resolved by minor adaptations of the proposed wording. On the contrary, the missing analyses need to be delivered in order to enable the legislators to arrive at a reasonable assessment and to take well-educated decisions. The aim of such analyses shall be:

(i) clarify the scope of the obligations for NEMOs;
(ii) draw a clear line between socialisation and innovation;
(iii) identify clear terms to provide clarity to the market; and
(iv) assess potential negative impacts and optimal ways to avoid them.

We not only consider the European Union Commission to be in the position to deal with the complexity of the question and to make allowances for the necessary contributions e.g., of EU and national bodies to accomplish such an assessment; we also see a need for a wider public consultation as the scope of the currently presented changes have not been discussed in that respect so far. Neither ACER in the course of its review of CACM conducted by ACER in spring 2021, nor the Commission in its endeavour in January/February 2023 consulted on such plans.

Finally, we believe that the results of the impact assessment should rather be fed into the review process of CACM, which is expected to take place after the conclusion of the EMD review and, hence, offers a more convenient timeline to accommodate such impact assessment. Moreover, CACM is the most relevant text that deals with this specific topic.