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Ref. request by Svenska kraftnät for a derogation from the minimum level of capacity to be made available for cross-zonal trade in 2022

On 18 October 2021, the Swedish Energy Markets inspectorate (Ei) informed all National Regulatory Authorities (NRAs) that on 6 October 2021, Ei had received from Svenska Kraftnät (SvK) a request for derogation from the minimum level of capacity to be made available for cross-zonal trade for the duration of 2022. The request has been submitted in accordance with article 16(9) of Regulation 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (Regulation 2019/943).

The derogation request in question affects nine borders, including two borders between Denmark and Sweden, DK1 – SE3 and DK2 – SE4. Consequently, the Danish Utility Regulator (DUR) is an affected NRA. DUR informed Ei thereof on the 19 October 2021.

Affected NRAs may by 21 November 2021 at the latest, express a formal disagreement with granting the derogation.

DUR hereby express formal disagreement with granting SvK the derogation for the duration of 2022.

The reasons for expressing formal disagreement is based on 1) a legal interpretation of article 16(9) of Regulation 2019/943, 2) how SvK has acted on DUR's previous comments and concerns in relation to the derogations for 2020 and 2021 and 3) the current development of available capacities on the Danish – Swedish borders.

1. LEGAL BASIS FOR A DEROGATION

A TSO can request a derogation from the 70 pct. requirement pursuant to Article 16(9) of Regulation 2019/943:

“At the request of the transmission system operators in a capacity calculation region, the relevant regulatory authorities may grant a derogation from paragraph 8 on foreseeable grounds where necessary for maintaining operational security. Such derogations, which shall not relate to the curtailment of capacities already allocated pursuant to paragraph 2, shall be granted for no more than one-year at a time, or, provided that the extent of the derogation decreases significantly after the first year, up to a maximum of two years. The extent of such derogations shall

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be strictly limited to what is necessary to maintain operational security and they shall avoid discrimination between internal and cross-zonal exchanges.

Before granting a derogation, the relevant regulatory authority shall consult the regulatory authorities of other Member States forming part of the affected capacity calculation regions. Where a regulatory authority disagrees with the proposed derogation, ACER shall decide whether it should be granted pursuant to point (a) of Article 6(10) of Regulation (EU) 2019/942. The justification and reasons for the derogation shall be published.

Where a derogation is granted, the relevant transmission system operators shall develop and publish a methodology and projects that shall provide a long-term solution to the issue that the derogation seeks to address. The derogation shall expire when the time limit for the derogation is reached or when the solution is applied, whichever is earlier.”

A derogation can solely be substantially reasoned and justified in respect of “foreseeable grounds, where necessary for maintaining operational security”

SvK is justifying the derogation request for 2022 by pointing to the lack of sources for remedial actions, making SvK unable to meet the 70 pct. requirement without endangering the operational security in an N-1 situation. Notably, because of internal structural congestion in the so-called West Coast Corridor, in the neighbourhood of the Swedish city of Gothenburg, and a higher flow of energy from the East to the West, creating congestion in other sections of the Swedish internal grid.

SvK states in the derogation request that it has analysed the available tools; remedial actions and capacity allocation to manage the overloads and maintain operations inside security limits. SvK states further that when there are insufficient remedial actions available for SvK to operate the grid within security limits SvK has no other alternative than to allocate capacities that do not make 70 pct. or more of one or several of these CNECs operational secure capacity available to the market.

SvK’s previous requests for derogation for 2020 and 2021 were similarly based on the lack of sources for remedial actions. In the derogation request for 2022, SvK further points to the flow of energy from the East to the West, which affects capacities to be allocated for the purpose of operational security. However, it is clear from reading the request from SvK that the primary underlying reason for a derogation in 2022 is still and unchanged the lack of sources for remedial actions.

A derogation shall be granted for no more than one year at a time. That is, the relevant TSO has to request and explain the reasons for a derogation year by year. The reasoning behind this is that a TSO should not deviate from the requirement longer than in fact necessary.

EXTENT OF DEROGATION HAS DECREASED SIGNIFICANTLY

A derogation can be extended up to a maximum of two years provided the extent of the derogation has decreased significantly after the annual derogation applicable the first year.

DUR surely recognizes that the extent of derogation, granted for SvK for 2020, did actually decrease significantly, paving the way for granting SvK a derogation for 2021. In relation to the derogation request from SvK for 2021, DUR stated the following:

“Pursuant to the analysis carried out above, DUR’s findings show that the average export capacity on the Danish-Swedish electricity interconnectors has increased while the number of hours with available capacity under 70 pct. has fallen. DUR emphasizes that the average available capacity on DK1-SE3 in 2020 fulfils the requirement of at least 70 pct. The available capacity on the DK2-SE4 interconnector has, however, only shown an increase of 6 percentage points in 2020.
[...]

Nevertheless, it is very important for DUR to emphasize that the lack of sufficient cross-zonal capacity is one of the main barriers to electricity market integration.
[...]

DUR considers that SvK’s efforts to develop counter-trading opportunities south of the West Coast corridor have been insufficient. It is a requirement pursuant to article 16(4) that countertrade and re-dispatch are used to maximise available capacity. The efforts to develop “more comprehensive and targeted communication to the market participants” have been mentioned in both the 2019 and 2020 requests for derogation, but have not materialized in concrete results. Thus, the decision on extending the derogation period should include that SvK is required to actively develop the possibilities for re-dispatch and countertrading.

In Denmark, renewable energy producers are extensively supplying services, such as manual reserves (m-FRR). DUR raised this possibility during the consultation for granting the derogation in 2019, however, DUR does not find that SvK has further developed this possibility in Sweden. DUR is concerned by the lack of initiatives that SvK has shown during the first year with a derogation. DUR finds it reasonable to question, if SvK will take initiative during the second year with the derogation, if this is not directly required by Ei in its decision to extend the derogation”

Thus, a prerequisite for DUR not to express formal disagreement with granting SvK the derogation for 2021 was that SvK investigated the possibilities for countertrading further.

LEGAL BASIS TO GRANT DEROGATION BEYOND TWO YEARS

SvK has requested a derogation for 2022, it becoming the third derogation based on a lack of remedial actions.

DUR points to the actual circumstances that Ei has already granted SvK a derogation for 2020 and 2021 due to a lack of remedial actions as the foreseeable ground on which the derogations have been granted. DUR finds that it is questionable, if Article 16(9) provides for a sufficient legal basis for granting SvK a third derogation in a row based on a lack of remedial actions.

The basis for DUR’s legal assessment is first and foremost the wording of Article 16(9), reading notably in its essence, “[...] derogations, [...], shall be granted for no more than one-year at a time, or, provided that the extent of the derogation decreases significantly after the first year, *up to a maximum of two years.*” [DUR’s emphasizing].

DUR notes in a general context that the Court of Justice for the European Union utilizes as a primary method, “literal interpretation” (or textualism) with reference to e.g., the term, “clear and precise wording”, in the judgement of the European Court of Justice in case C-582/08, Commission vs UK.

DUR views that the wording of Article 16(9), notably the term, “up to a maximum of two years”, reflects and fulfills the EU case law quality criterion of having a “clear and precise wording”.

DUR notes that the meaning of the wording of specific terms and notions may diverge in the various language versions of EU legal acts. EU case-law then implies that the provisions in question are to be interpreted by reference to the purpose and general scheme of the rules of which it forms part.

DUR has examined and compared the term, “shall be granted for no more than one-year at a time [...] up to a maximum of two years”, within the English, German, French, Swedish and Danish language versions:

English	shall be granted for no more than one-year at a time [...] up to a maximum of two years
German	wird für nicht länger als ein Jahr auf einmal, [...] für höchstens zwei Jahre erteilt
French	est accordée pour une durée maximale d'un an à la fois ou, [...] pour une durée maximale de deux ans
Swedish	högst ett år i taget, eller upp till högst två år
Danish	Skal gives for højst et år ad gangen, [...], op til højst to år

Upon the examination of the wording of the different language versions, DUR is inclined to conclude that the different language versions clearly and precisely states that derogations may only be granted up to a maximum of two years.

In this respect, DUR further emphasizes that the Article states that the derogation may be extended on the condition that “the extent of the derogation decreases significantly *after the first year*” [DUR emphasizing]. On the contrary, the Article does not include any conditions on extending the derogation beyond the second year, ref. “after the first year”. If the regulation in fact allowed for granting derogations for years no 3, no 4, no 5 etc. it is unclear on which grounds the derogations should then be granted.

The restriction of two years for annual derogations from the 70 pct. requirement is also supported by the wording of Recital no 27 of Regulation 2019/943, reading, “[...] derogations should be possible for a *limited transitional phase*. Such derogations should be *accompanied by a methodology and projects providing for a long-term solution*.” [DUR’s emphasizing]. Thus, derogations, on a contrary, are not long-term solutions and therefore, should not be used as such.

A derogation is a short-term route for a TSO to meet the 70 pct. requirement, as the TSO's request for a derogation may solely be regulatory granted, first for one year of itself, and then for a second year of itself.

It is then relevant to question, what would otherwise be the intention of the EU legislator to include the clear and precise term, "up to a maximum of two years", in Article 16(9), if additional annual derogations for years no 3, no 4, no 5, etc. could be requested and granted.

An interpretation allowing for annual derogations for an indefinite number of years would fail to give the TSOs adequate incentives to alleviate the reasoning and justifications for not meeting the 70 pct. requirement.

Also, such an interpretation of Article 16(9), would also *de facto* make a bidding zone reconfiguration or an action plan pursuant to Articles 14 or 15 of Regulation 2019/943 less relevant as derogations could then be on-going for years with no real incentives for the TSOs to find a solution to solve the problem.

Thus, bearing in mind that Regulation 2019/943 aims at setting fair rules for the allocation of available capacities of interconnections between national transmission systems pursuant to Article 1, DUR cannot interpret Article 16(9) in any other way than derogations on same foreseeable grounds are only possible for a maximum of two years.

COUNTERTRADE

Furthermore, DUR would like to point to the fact that the Commission Decision of 14 April 2010, Swedish Interconnectors, has by now surpassed 10 years anniversary. The decision addressed competition concerns that SvK may have abused its dominant position on the Swedish electricity transmission market by ways of curtailing export capacity on the Swedish interconnectors. The decision led to, among other things, that SvK committed itself to use countertrade in order to decrease capacity reductions on the interconnectors. In regards to this, DUR notes that still in 2022, SvK foresee reductions in available cross-zonal capacity due to the West Coast Corridor. In addition, DUR also notes that capacity reductions on the Swedish interconnectors have now been an on-going problem for more than 10 years and that the extent does not seem to decrease. Finally, DUR notes that SvK presumably should have been using countertrade for the past 10 years to solve capacity reductions on the interconnectors, however, based on the information available it occurs to DUR that SvK has made no or very little use of countertrade to reduce capacity reductions.

DUR has, on several occasions, pointed to the fact that the lack of sufficient cross-zonal capacity is still one of the main barriers to electricity market integration and urged SvK to make use of and investigate further the opportunities for countertrading, i.e. the above-mentioned comments and concerns from DUR stated in relation to the derogation requests by SvK for the duration of 2020 and 2021. See also included to this response annex 1 and annex 2 (DUR's comments to SvK derogation requests for 2020 and 2021).

From DUR's comments and concerns stated in 2019 and 2020, it is reasonable to once again emphasize the following:

In 2019, DUR found that SvK, during the first year with a derogation, should investigate in other possible means aside the market for manual reserves (m-FRR) for tackling issues arising on the West Coast Corridor and, in particular, how to apply remedial actions.

In 2020, DUR raised as a main concern to Ei that “DUR considers that SvK’s efforts to develop counter-trading opportunities [...] have been insufficient” In conclusion, DUR was concerned by the lack of initiatives shown by SvK during the first year with a derogation.

DUR notes that SvK ought to be well aware that provisions within the previous EU electricity market regulations, 1228/2003 and 714/2009, as well as the most recent Regulation 2019/943, do provide for, and actually oblige, SvK to utilize other and more regular measures, alternative to annual derogations from the 70 pct. requirement.

Article 16(4) of Regulation 2019/943, in conjunction with the 70 pct. requirement in Article 16(8) points clearly to redispatch and/or countertrade as appropriate measures to reach the 70 pct. requirement, stating, “*Counter-trading and redispatch, including cross-border redispatch, shall be used to maximise available capacities to reach the minimum capacity provided for in paragraph 8*”. [DUR’s emphasizing].

In SvK’s request for derogation for 2022 it is stated that SvK’s assessment shows a lack of countertrading resources to enable an increased degree of planned continuous countertrading. According to SvK, the available resources are already considered for relieving each CNEC to or below its permanent admissible overload limit after an N-1 fault. Annex A and annex B of the derogation request comes to the following conclusions:

Annex A – Analysis of the day ahead, capacity allocation and special regulation market in the Nordics with regards to East-West flows
“the historical data in the figures show that it often is the case that less than the required amount of regulation resources are available”

Annex B - Analysis of the day ahead, capacity allocation and special regulation market in the Nordics with regards to the west Coast Corridor
“since available resources are not known until 45 minutes before the operation hour SvK has to base the capacity allocation on experience of available downregulation resources. Looking at the historical data in the figures, it is clear that it is often the case that less than the required amount of downregulation resources are available.”

For many years, SvK has argued that there is a lack of countertrade resources, however, “the chicken or the egg causality dilemma” questions “which came first” describing situations where it is not clear which of two events (demand for countertrade or supply of countertrade) should be considered *the cause* and which should be considered *the effect*.

DUR acknowledges that SvK’s primary responsibility is to comply with safety standards of secure network operations. However, DUR finds that the lack of initiatives from SvK’s side to find more countertrading resources is unsatisfactory, and DUR is not convinced that SvK has made any effort in investigating, e. g. the possibility of using renewable

energy similarly to the Danish market, where renewable energy often supply down regulation and participates in the special regulation market.

DUR finds that SvK has not provided a satisfactory explanation of why Swedish wind power is apparently not systematically utilised to provide down regulation to allow for more countertrading.

In this relation, DUR notes that on 4 November 2021, Ei adopted decision no. 2021-102559 on SvK's compliance with the 70 pct. requirement in 2021. In the decision, Ei has found that SvK does not comply with the 70 pct. requirement and SvK has been required to provide data on how countertrade and redispatch is used in Sweden as well as the other Nordic countries to alleviate the situation. In the decision, it is also stated that SvK has informed that the capacity constraints are foreseen until 2030.

DEVELOPMENT OF OVERALL AVERAGE CAPACITY ON THE DANISH – SWEDISH ELECTRICITY INTERCONNECTORS FROM 2020 TO 2021

In the assessment above, DUR has argued that it goes against the aim of Regulation 2019/943 and, more specifically, Article 16(8) of this, if derogations can be extended beyond two years on same foreseeable grounds. However, if one should find that TSOs can be granted derogations beyond two years on same foreseeable grounds, one should be able to assume the condition in Article 16(9) that the extent of the derogations has decreased significantly compared to the previous year is still standing.

Therefore, DUR has also carried out an assessment of the development of overall average capacity on the Danish – Swedish borders. The assessment shows that SvK does not fulfil the condition that the extent of the derogation decreases significantly. To this, DUR has found that, in particular, the DK1 – SE3 border fails to meet the requirement.

When assessing the average available capacity on DK1-SE3, DUR has observed a decrease from 90 pct. in 2020 to 88 pct. in 2021 in the direction DK1 to SE3. In the direction SE3 to DK1, DUR has observed a decrease from 71 pct. in 2020 to 49 pct. in 2021.

DUR observes that the available capacity on SE3 to DK1 is less than 50 pct. in 2021.

The abovementioned observations are summarized in table 1:

TABLE 1 | AVERAGE AVAILABLE CAPACITIES FOR CROSS-ZONAL TRADE ON THE DANISH – SWEDISH INTERCONNECTOR, DK1 – SE3

Year	DK1 --> SE3	SE3 --> DK1
	Available capacity (pct.)	
2020	90	71
2021 (partial)	88	49

Data sources: Nordpool Group Market Data.

Note: Unlike 2020, which contains all hours of the year, "2021 (partial)" correspond to the first 7297 hours of 2021.

When further analyzing this border, DUR finds that the frequency of hours below the 70 pct. requirement has increased from 1079 hours in 2020 to 1375 hours in the first 7297 hours of 2021 in the export direction. In the import direction, the number of hours below the 70 pct. requirement has increased from 2804 hours in 2020 to 4087 hours in the first 7297 hours of 2021.

In the direction SE3-DK1, the most frequent reason was that SvK reduced the capacity due to internal problems (2942 out of the 4087 hours below 70 pct.). In these hours, the average available capacity was 26 pct. This is an increase compared to 2020.

In both directions on the DK1-SE3 interconnector, the number of hours below the 70 pct. requirement has increased and the average available capacity during these hours have decreased in 2021 compared to 2020.

The abovementioned observations are summarized in table 2:

TABLE 2 | NUMBER OF HOURS BELOW THE 70 PCT. REQUIREMENT, UNDERLYING REASONS AND AVERAGE CAPACITY ON THE DK1-SE3 INTERCONNECTOR

Reasons	SE3 -->DK1			
	2020		2021 (partial)	
	No. Hours	Capacity (pct.)	No. Hours	Capacity (pct.)
Border itself	677	44	877	33
Svk	2003	49	2942	26
Energinet	124	34	268	20
Total hours / W. Avg.	2804	47	4087	27
Reasons	DK1 --> SE3			
	2020		2021 (partial)	
	No. Hours	Capacity (pct.)	No. Hours	Capacity (pct.)
Border itself	726	44	1083	36
Svk	232	51	187	34
Energinet	121	33	105	52
Total hours / W. Avg.	1079	44	1375	37

Kilde: Nordpool Group Market Data.

Note: 1) "Border itself" refers to hours when there have been technical issues or planned maintenance of the interconnector, 2) "SvK" refers to hours when SvK has reduced to capacity, 3) "Energinet" refers to hours when Energinet has reduced the capacity.

DUR finds that the observations above clearly shows that the derogations granted to SvK have not incentivised SvK to get any closer to fulfilling the 70 pct. requirement.. Actually, the development of available cross-zonal capacity seems to go "the wrong way", where available capacity on the bidding zone borders have decreased further

while SvK has had derogations in place. In DUR's view, the assessment of the DK1 – SE3 border confirms its previous concerns regarding SvK's lack of initiatives to investigate countertrade opportunities in order to – in the short-term – facilitate an increased flow of energy in the Swedish transmission grid.

CONCLUSION

As stated in the ACER/CEER annual report on the results of monitoring the internal electricity markets in 2020, part II.4 "A well-integrated and efficient IEM relies on sufficient capabilities for cross-zonal trade. The optimal provision of cross-zonal capacity is an essential prerequisite for the IEM to function well."

In the light of this, and based on the legal assessment above, DUR finds that Article 16(9) of Regulation 2019/943 does not provide for a sufficient legal basis for granting SvK a third derogation in a row based on lack of remedial actions. On the contrary, granting a third derogation based on essentially the same justification - lack of remedial actions - would not give the TSOs adequate incentives to alleviate the reasoning and justifications for not meeting the 70 pct. requirement.

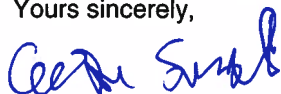
Based on the information available to DUR, DUR finds that SvK's use of appropriate measures to reach the 70 pct. requirement (countertrade and redispatch) has been insufficient and that SvK has failed to develop countertrading possibilities to a satisfactory degree.

Finally, it is a main concern for DUR that the available capacity on SE3 – DK1 has decreased and that the number of hours below the 70 pct. requirement has increased compared to 2020. On this basis, DUR finds that the derogations for 2020 and 2021 have not led SvK any further to the objective of Article 16 in Regulation 2019/943, i.e. meeting the 70 pct. requirement and SvK fails to fulfil the condition that the extent of the derogation decreases significantly compared to the previous year.

Therefore, DUR expresses formal disagreement with granting SvK a derogation from the 70 pct. requirement for the duration of 2022 pursuant to Article 16(9) of Regulation 2019/943.

DUR will be at your disposal for further explanation of the formal disagreement and the reasoning behind.

Yours sincerely,



Carsten Smidt
Director General

