

DECISION No 05/2019
OF THE AGENCY FOR THE COOPERATION OF
ENERGY REGULATORS

of 9 April 2019

ON THE INCREMENTAL CAPACITY PROJECT PROPOSAL FOR THE
MOSONMAGYARÓVÁR INTERCONNECTION POINT

THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (“Regulation (EC) No 713/2009”)¹, and, in particular, Article 7(7) and 8 thereof,

Having regard to Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems (“CAM NC”)², and, in particular, Chapter V thereof,

Having regard to Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structure for gas³ (“TAR NC”), and, in particular, Article 33 thereof,

Having regard to the outcome of the consultations with the concerned national regulatory authorities and the transmission system operators of Austria and Hungary,

Having regard to the favourable opinion of the Board of Regulators of 9 April 2019, delivered pursuant to Article 15(1) of Regulation (EC) No 713/2009,

¹ OJ L211, 14.8.2009, p. 1.

² OJ L72, 17.3.2017, p.1.

³ OJ L72, 17.3.2017, p. 29.

Whereas:

1. INTRODUCTION

1.1. The incremental capacity process at the interconnection point Mosonmagyaróvár

- (1) According to Article 28 of the CAM NC, following the consultation and the finalisation of the design phase for an incremental capacity project, the involved transmission system operators (“TSOs”) shall submit a proposal for the incremental capacity project to the relevant national regulatory authorities (“NRAs”) for coordinated approvals. Within six months of receipt of the complete project proposal by the last of the relevant NRAs, those NRAs shall publish coordinated decisions on the project proposal. The TSOs shall invite network users to make binding commitments through a capacity allocation mechanism that is in line with either Article 29 or Article 30 of the CAM NC⁴. In case the project successfully passes the economic test, meaning the project has received sufficient binding commitments, the TSOs shall proceed with the project towards its commissioning.
- (2) Gas Connect Austria GmbH (“GCA”) and Földgázszállító Zártkörűen Működő Részvénytársaság Zrt (“FGSZ”), TSOs in Austria and in Hungary respectively, have been developing the ROHUAT/BRUA⁵ corridor which foresees phased interconnection capacity increases in Bulgaria, Romania, Hungary and Austria.
- (3) In May 2017, the planned “ROHUAT open season” to get binding commitments from network users for the incremental capacities at the interconnection points Csanádpalota (from Romania to Hungary and from Hungary to Romania) and Mosonmagyaróvár (from Hungary to Austria) was cancelled by a decision of FGSZ⁶. The ROHUAT project was subsequently split into two separate projects, referred to as “ROHU”⁷ with respect to the Romanian-Hungarian interconnection point at Csanádpalota, and an incremental capacity project at Mosonmagyaróvár with respect

⁴ According to Article 29 of the CAM NC and following the approval by the NRAs of the project proposal in line with Article 28 of the CAM NC, the concerned TSOs shall offer the incremental capacity as standard bundled products in the annual yearly capacity auction to get binding commitments from network users. The binding commitments for incremental capacity. In line with Article 30 of the CAM NC, TSOs may under certain conditions and subject to the approval of the concerned NRAs use an alternative allocation mechanism to get binding commitments from network users.

⁵ Commission Delegated Regulation (EU) 2018/540 of 23 November 2017 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest, OJ L90/38, 6.4.2018.

⁶ <https://fgsz.hu/en-gb/tajekoztatas-a-rohuat-open-season-rol> [no longer available].

⁷ <http://www.transgaz.ro/index.php/en/open-season-ro-hu-1>.

to the Hungarian-Austrian part (“HUAT project”). Those two projects were developed further.

- (4) In October 2017, FGSZ and Transgaz, the concerned Romanian TSO, launched an open season procedure to get binding commitments for incremental capacities from network users at the interconnection point Csanádpalota. The ROHU open season was carried out in accordance with the transitional provisions of Article 31 of the CAM NC, which excludes the application of Articles 26 to 30 thereof⁸.
- (5) GCA and FGSZ carried out an assessment of market demand for the HUAT project in accordance with Article 26 of the CAM NC. On 27 July 2017, the TSOs jointly published the demand assessment report, which concluded that there is sufficient non-binding interest from network users in incremental capacity in the HUAT project to initiate an incremental capacity project in the meaning of Article 3(9) of the CAM NC⁹.
- (6) GCA and FGSZ carried out a joint public consultation under Article 27 (3) of the CAM NC for the project to enable physical flows from Hungary’s Virtual Trading Point (“VTP”) to Austria’s VTP via the interconnection point Mosonmagyaróvár¹⁰. The consultation took place between 19 October and 19 November 2017.
- (7) GCA carried out technical studies for entry gas flows from the Mosonmagyaróvár interconnection point via the Baumgarten gas hub to the GCA-TAG transfer point¹¹ via a looping¹² allowing flows in both directions.
- (8) Following the completion of the steps foreseen in Articles 26 and 27 of the CAM NC, and in view of the provisions of Article 28 of the CAM NC, GCA and FGSZ submitted separately their proposals for the HUAT project for approval to the respective concerned NRAs.
- (9) Following the approval of the HUAT project proposal and its publication, GCA and FGSZ shall offer the incremental capacity in the annual yearly capacity auction to request binding commitments from network users. Based on the binding commitments, the economic test of Article 22 of the CAM NC shall be carried out,

⁸ Decision no. 1123/28.07.2017 of the ANRE President. Available at:

http://www.transgaz.ro/sites/default/files/decizie_anre_1123-2017_os_rulebook_rohue.pdf.

⁹ Demand assessment report for incremental capacity between Austria (Market Area East) and Hungary,

<https://www.gasconnect.at/fileadmin/Fachabteilungen/ST/DE/MDAR-HU-AT-27Jul2017.pdf>.

¹⁰ Joint public consultation for Mosonmagyaróvár,

https://www.gasconnect.at/fileadmin/Fachabteilungen/ST/DE/20171019_Consultation_Art_27_Moso.pdf.

¹¹ GCA project GCA2015/05, dated 29 June 2017.

¹² GCA project Mosonmagyaróvár to Baumgarten and v.v., GCA2017/01, dated 21 September 2017.

leading to either the continuation of the HUAT project towards commissioning in case of a positive outcome, or the termination of the HUAT project in case of a negative outcome.

- (10) Either outcome of the economic test terminates the current incremental capacity process for the interconnection point at Mosonmagyaróvár. Upon such termination, GCA and FGSZ shall initiate a new incremental capacity process at Mosonmagyaróvár in compliance with the requirements of Article 26(1) of the CAM NC.

1.2. Context, scope and principles of the Decision

- (11) The incremental capacity process¹³ is a harmonised Union-wide process to offer incremental capacity in response to market demand for such capacity. Any investment decision for an incremental capacity project is subject to an economic test¹⁴ to determine the economic viability of the project. Prior to the performance of the economic test, the NRA shall set the so-called “f-factor”. This factor determines the extent to which the cost of the project needs to be covered by network users, the remaining part of the cost being socialised. A positive result of the economic test implies that the revenues from the binding commitments are sufficient to cover the non-socialised part of the costs of the project. If the f-factor is set to 1, the risks of the project are entirely borne by the network users who have been allocated the incremental capacity. In case of a negative economic test, the process is concluded and the incremental capacity project is abandoned.
- (12) The role of the concerned NRAs in the incremental capacity process – starting from the proposal by the TSOs developing the project – include setting and approving the terms and conditions under which the binding commitments can be requested from network users, as well as the parameters of the economic test. The NRAs may decide to carry out the economic test themselves or to have the TSOs do it. In case the incremental project is implemented, it becomes subject to NRAs’ oversight in the same way as other TSO investment.
- (13) To ensure that captive network users are not exposed to undue risks from an incremental capacity project, NRAs can set and approve the parameters of the economic test in a risk-mitigating way. For instance, in deciding on the f-factor, they can set it equal to 1, which ensures, if the project is developed, that all costs will be borne by the users of the incremental capacity. NRAs can also decide on an

¹³ Recital 11 of the CAM NC.

¹⁴ Article 3(10) of the CAM NC.

appropriate mandatory minimum premium that corresponds to a level of capacity bookings that is below the level of the offered incremental capacity, making the economic test more demanding¹⁵. NRAs additionally decide on the approved estimate of CAPEX and OPEX, and on an appropriate WACC/discounting factor.

- (14) Therefore, with a f-factor of 1, no costs are socialised and the binding commitments of network users alone need to pay for the project in full to achieve economic viability. In case the result of the economic test is negative, the project is terminated¹⁶ as an incremental capacity project before its implementation. Therefore, in both of these cases (successful test with a f-factor of 1 or a negative result of the economic test), there is no stranded asset risk or any cash flow risks directly attributable to the incremental capacity project.
- (15) With a mandatory minimum premium that corresponds to a required level of capacity bookings below 100% of the offered incremental capacity, the economic test is more demanding, as the unit price of incremental capacity is such that the full project will be paid for even if there is unallocated capacity¹⁷, limiting the risk of asset stranding.
- (16) Furthermore, the incremental capacity process allows the alignment of complementary and competing incremental projects by way of requesting binding commitments from network users in parallel auctions in the annual yearly capacity auction and running the respective economic tests for all projects. In case there are two competing incremental projects, the outcome could be that none of the projects are economically viable, one of the projects is viable and the other one is not, or both projects are viable. In all cases, only the viable incremental projects would be implemented, ruling out any stranded asset risk.
- (17) In view of the foregoing, the Agency notes that this Decision is not on the technical or economic merits of the HUAT project, nor on whether an investment in the HUAT project shall be made, but only to define the parameters of the economic test so that the project can be tested on the market. As indicated above, it will be the result of this

¹⁵ The higher mandatory minimum premium corresponds to requiring that the full project is already paid for without all capacity being allocated, thus making every unit of capacity more expensive.

¹⁶ The termination as an incremental capacity project does not imply that the TSO cannot develop further the infrastructure investment under consideration. Projects can for instance have benefits that may not be fully valued by the market, such as the improvement of security of supply. Such benefits are for instance assessed when a project is developed as a “project of common interest” (PCI) in accordance with Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure (“TEN-E Regulation”). The same technical infrastructure project can be an incremental capacity project and a PCI. However, the incremental capacity process and the processes foreseen for PCIs in the TEN-E Regulation are separate processes with different finalities.

¹⁷ Capacity that is offered in the incremental auction and remains unsold is to be distinguished from the capacity set aside according to Article 8(8) of the CAM NC as the latter capacity is not offered in the incremental auction.

test which determines whether the project is viable or not. Furthermore, the Agency strives to define the parameters of the economic test in such a way so as to keep the TSOs' risk and financial position similar to their current position, i.e. to make sure that there are no further risks or potential detrimental effects, including those of stranded assets, and that captive customers are not exposed to undue risks of the investment.

- (18) The Agency notes that, as required by Article 22(3) of the CAM NC, the HUAT project shall be initiated only if the economic test has a positive outcome on both sides of the Mosonmagyaróvár interconnection point for at least one offer level. With this Decision, the Agency aims to ensure that the HUAT project be tested on the market and possibly implemented based on rules and conditions that are consistent with those of other incremental capacity projects of GCA and FGSZ, regardless of whether those projects are competing or complementary.

2. PROCEDURE

2.1. Proceedings held by the NRAs

- (19) On 6 April 2018 and 9 April 2018 respectively, the HUAT project proposal was submitted by the TSOs to the Hungarian NRA (Magyar Energetikai és Közműszabályozási Hivatal, "MEKH") and the Austrian NRA (E-Control, "ECA"), for approval.
- (20) On 27 April 2018, ECA issued a decision approving the HUAT project proposal¹⁸.
- (21) On 5 October 2018, MEKH issued a decision rejecting the HUAT project proposal¹⁹.

2.2. Proceedings held by the Agency

- (22) On 10 October 2018, the Agency shared with ECA and MEKH its observation that no coordinated decisions had been reached within 6 months of receipt of the HUAT project proposal by the last receiving NRA, as ECA issued a decision approving the project proposal and MEKH issued a decision rejecting the project proposal.

¹⁸ https://www.e-control.at/documents/20903/388512/V+INC+G+02_18+Bescheid+GCA+MOSON_270418.pdf/5e24ed3d-5085-4ee4-a12e-9f8ca27c4c21.

¹⁹ http://mekh.hu/download/0/28/60000/10490_2018.pdf.

- (23) The Agency informed ECA and MEKH that pursuant to Article 8(1) of Regulation (EC) No 713/2009, the Agency shall decide on the HUAT project proposal.
- (24) The Agency found that the HUAT project proposal²⁰ submitted by the TSOs to ECA and MEKH is complete, with the following remarks:
- (a) The TSOs submitted separate project proposals that are considered together as the HUAT project proposal;
 - (b) FGSZ's proposal does not contain specific measures to prevent delays and minimise the impact of delays as foreseen by Article 28(1)(c) of the CAM NC.
- (25) The Agency additionally found that the separate project proposals are technically aligned, with the following remarks:
- (a) GCA's proposal and FGSZ's proposal are aligned, except for the national parameters for the economic test under Article 28(1)(d) of the CAM NC;
 - (b) The timeline of the planned project implementation is not aligned between the two sides of the border, with commissioning of the incremental capacity foreseen as of the gas year 2022/23 in Austria and as of the gas year 2024/25 in Hungary.
- (26) On 14 November 2018, the Agency consulted, via a handover meeting, ECA and MEKH on the HUAT project proposal.
- (27) On 16 November 2018, the Agency published on its website a notice inviting third parties to send, by 18 January 2019, any observations they may have on the subject of the HUAT project proposal. The Agency published the non-confidential comments received from third parties on its web site on 21 February 2019.²¹
- (28) On 10 December 2018, 17 January 2019 and 13 February 2019, the Agency convened hearings on the HUAT project proposal with the concerned NRAs and TSOs, i.e. with ECA, MEKH, GCA and FGSZ. During the hearings, the Agency presented its assessment approach and preliminary findings on the HUAT proposal, and the parties

²⁰ GCA's proposal is available at https://www.e-control.at/documents/20903/388512/20180503+B1_Antrag+GCA_090418_PE+1161_Kopplungspunkte+Mosonmagyar.pdf/cbe74ae9-f53c-9e17-fecc-69b8c7498f08; FGSZ's proposal was published at: https://fgsz.hu/en-gb/Documents/Incremental_project_proposal_Mosonmagyarovar_FGSZ.pdf (no longer available).

²¹

https://www.acer.europa.eu/Official_documents/Public_consultations/Closed%20public%20consultations/Pages/Observations_to_public_notice_on_the_incremental_capacity_project_proposal_on_the_cross-border_point_at_Mosonmagyaróvár_of.aspx.

shared, *inter alia*, observations regarding the need for the HUAT project and the relationship between HUAT and other projects in the region.

- (29) The Agency requested additional information from the concerned TSOs and NRAs on 16 November 2018, which was provided by 28 November 2018. At the request of the Agency, the parties submitted further information throughout the proceeding.
- (30) On 13 February 2019, the Agency presented and discussed with the concerned NRAs and TSOs its main assessments and considerations on the HUAT project proposal, including the general approach and the assessed main parameters in preparation of the Agency's decision on the HUAT project proposal.

3. AGENCY'S COMPETENCE TO DECIDE

- (31) Pursuant to Article 7(7) of Regulation (EC) No 713/2009, the Agency shall decide on the terms and conditions for access to and operational security of gas infrastructure connecting at least two Member States (cross-border infrastructure), in accordance with Article 8 of the same Regulation.
- (32) According to Article 8(1)(a) of Regulation (EC) No 713/2009, for cross-border infrastructure, the Agency shall decide upon those regulatory issues that fall within the competence of NRAs, which may include the terms and conditions for access and operational security, only:
 - “a) where the competent NRAs have not been able to reach an agreement within a period of six months from when the case was referred to the last of those regulatory authorities; or*
 - b) upon a joint request from the competent NRAs.”*
- (33) According to Article 8(2) of Regulation (EC) No 713/2009, the terms and conditions for access and operational security shall include, among others, a) a procedure for capacity allocation; and b) a time frame for allocation.
- (34) According to Article 8(3) of Regulation (EC) No 713/2009, where a case has been referred to the Agency, the Agency shall provide its decision within a period of 6 months from the day of referral.
- (35) In view of the outcome of the NRA proceedings conducted by ECA and MEKH, the Agency notes that:
 - (a) The HUAT project concerns cross-border infrastructure;
 - (b) The provisions of Article 28 of the CAM NC concern the approval of the submitted HUAT project proposal, including the terms and conditions for

access to infrastructure capacity, by the concerned NRAs in coordinated decisions;

(c) ECA and MEKH did not take coordinated decisions by 9 October 2018, as ECA approved the HUAT project proposal in its decision of 27 April 2018, whereas MEKH rejected it in its decision of 5 October 2018.

(36) The Agency considers that the provisions of Articles 7(7) and 8(1)(a) of Regulation (EC) No 713/2009 are met; therefore, the Agency became responsible to adopt a decision concerning the HUAT project proposal on 9 October 2018.

4. SUMMARY OF THE HUAT PROJECT PROPOSAL

(37) The HUAT project proposal concerns an incremental capacity project to increase the capacity at the interconnection point Mosonmagyaróvár from Hungary to Austria.

(38) The proposal covers:

(a) The marketing of incremental capacity according to offer levels²² I and II at the interconnection point Mosonmagyaróvár;

(b) The allocation of capacities subject to a positive outcome of the economic test according to Article 22 of the CAM NC on both sides of the interconnection point for at least one of the offer levels;

(c) The entitlement of network users who have been allocated capacity to, in case of a positive economic test for at least one of the offer levels, to step back from their concluded capacity contracts by 24 April 2019 (“step-back date”) without the obligation to give a reason;

(d) The entitlement of GCA and FGSZ, respectively, to carry out a second economic test according to Article 22 of the CAM NC subsequently to the step-back date.

(39) The detailed proposal includes the terms and conditions that will be applicable to the incremental capacity auction, and the parameters of the economic test to decide whether to implement the HUAT project as proposed, or to terminate it, as follows:

(a) Two offer levels, corresponding to two technical implementation levels of the HUAT project, with offer level I amounting to 5,740,470 kWh/h of entry

²² Article 3(5) defines “offer level” as “the sum of the available capacity and the respective level of incremental capacity offered for each of the yearly standard capacity products at an interconnection point”.

capacity in Austria and exit capacity in Hungary, and offer level II amounting to 10,007,100 kWh/h of entry capacity in Austria and exit capacity in Hungary.

- (b) The respective general rules and conditions of the TSOs as applicable to the capacity booking contracts that network users have to sign when they are allocated capacity. In addition, the respective TSOs extend a step-back right to network users that can be exercised until 24 April 2019, 15:59 CET, against the payment of a termination fee, which is equal to 0.033% of the value of the bid in Austria and to 10% of the value of the bid in Hungary, respectively. To participate in the incremental capacity auction, network users are required to post a collateral, which is equal to the collateral foreseen in the general terms and conditions in Austria and to 5% of the value of the bid in Hungary.
- (c) The envisaged timeline. The HUAT project proposal timelines foresaw that the incremental capacity according to both offer levels was to be offered in the 2018 annual yearly capacity auction. The proposal states further that unbundled entry capacity in Austria will be marketed for a maximum²³ of 15 years from the gas year 2022/23 to the gas year 2036/37, whereas unbundled exit capacity from Hungary and the bundled capacity product will both be marketed for a maximum of 15 years from the gas year 2024/25 to the gas year 2038/39.
- (d) GCA's proposal mentions that it applies internationally recognised project management standards to minimise and mitigate delays, whereas FGSZ's proposal does not include such information.
- (e) The proposed parameters for the economic test of Article 22 of the CAM NC are as presented in Table 1:

²³ Article 11(3) of the CAM NC allows for incremental capacity that the offer levels may be offered in yearly capacity auctions for a maximum of 15 years after the start of the operational use.

Table 1. Overview of proposed parameters and inputs for the economic test of Article 22 of the CAM NC

Parameters	For Austria	For Hungary
Estimated Reference price	0.77 EUR/kWh/h/a (offer level I and II)	631.25 HUF/kWh/h/a (offer level I and II)
Assumed auction premium	0 EUR/kWh/h/a (offer level I and II)	0 HUF/kWh/h/a (offer level I and II)
Estimated minimum mandatory premium	1.40 EUR/kWh/h/a (offer level I)	8706.69 HUF/kWh/h/a (offer level I)
	1.27 EUR/kWh/h/a (offer level II)	6451.64 HUF/kWh/h/a (offer level II)
Supplemental volume fee	Not applicable	0 HUF/MWh (offer level I)
		83.29 HUF/MWh (offer level II)
Assumed level of binding commitments	1,913,490 kWh/h/a (offer level I)	5,740,470 kWh/h/a (offer level I)
	6,714,000 kWh/h/a (offer level II)	10,007,100 kWh/h/a (offer level II)
Discount factor	5.188 %	19.3 %
Estimated increase of the allowed or target revenue (present value)	87,120,578.66 EUR (offer level I)	167,096,667,677 HUF (offer level I)
	191,838,394.96 EUR (offer level II)	218,325,889,812 HUF (offer level II)
f-factor	0.50 (offer level I)	1.00 (offer level I and II)
	0.75 (offer level II)	

- (f) FGSZ's proposal states explicitly that the provisions of Article 28(1)(e-g) are not applicable to the HUAT project, whereas GCA's proposal does not give any information on these provisions.

5. SUMMARY OF THIRD PARTY OBSERVATIONS

- (40) The Agency received observations from 9 third parties in response to its public notice.
- (41) Central European Gas Hub (CEGH) supports the HUAT incremental capacity project based on its potential to enable market integration between Austria and Hungary and to reduce the price spread between the two gas hubs. CEGH argues that, based on

recent market observations, there is a significant price difference between the Central European Gas Exchange (CEGHIX) and the Central Eastern Europe Gas Exchange (CEEGEX) markets. In CEGH's view, the lack of direct flows from Hungary to Austria implies that price differentials cannot be arbitrated by the traded markets, thus leading to an inefficient allocation of resources. CEGH is therefore of the view that interconnection capacity in the direction Hungary to Austria is needed to allow efficient gas trading arbitrage spreads and to ensure diversification of gas supply sources and routes.

- (42) The Croatian Energy Regulatory Agency (HERA) welcomes the HUAT investment based on its potential benefits of diversifying gas supply sources, enhancing market liquidity and facilitating gas flows across the regional market. HERA argues that the positive market demand assessment for incremental capacity at Mosonmagyaróvár shows that there is interest from market participants in the route. Moreover, HERA maintains that, since HUAT has been identified as a project of common interest (PCI), it would provide broader benefits to the internal European gas market.
- (43) Engie is of the view that the HUAT project cannot be looked at in isolation from the situation in the region. In particular, the risks of regulatory or political nature have increased. For example, in Romania legislation is proposed which may undermine the economic feasibility of forward flow for ROHU phase II. This means, according to Engie, that subscribers for HUSKAT capacity and those interested in HUAT capacity are now left wondering if the main source of gas envisaged for these capacities will still be accessible. In addition, little information has been given to the market on the timetable, the technical capacities, and the access condition of the new pipeline bringing gas to Hungary via Turkstream. Despite the presence of natural gas producer areas and natural gas consumer areas in the concerned region, it is regulation and legislation that are making any participation in open season or incremental auction procedures extremely difficult for shippers.
- (44) Eustream does not support the HUAT project based on the potential economic implications of the HUAT project and some regulatory aspects, e.g. ensuring security of supply and fair market competition. Eustream claims that following up the HUAT incremental process could negatively affect the competing route (HUSKAT) which is currently undergoing the alternative allocation procedure. The procedure should be finalized by the 3 May 2019, including the expiration of the step-back rights on 29 March 2019.
- (45) Hungarian Gas Trade Ltd (MFGK) does not support the implementation of the HUAT project due to the growing uncertainties surrounding the production of gas at Romanian offshore gas fields, brought up by the recent amendments of the Romanian regulations that could lead to unfavourable pricing and taxation conditions for the offshore gas producers. MFGK is also of the view that the inclusion of HUAT costs into the regulatory assets base would raise more the Hungarian transmission tariffs,

representing a potential barrier of regional gas trade for wholesalers, and thus negatively influencing access of regional markets to alternative gas sources, concentrating them to the Austrian virtual trading point.

- (46) MET Austria GmbH is of the opinion that any type of auction requiring network users to take binding commitments on HUAT shall take place only after the clarification of the main regional projects: a final investment decision on Krk LNG Terminal, the closing of the ROHU Open Season, the ongoing HUSKAT Open Season as a competitive route to HUAT, and Turk Stream II.
- (47) OMV supports the HUAT project and considers essential the role of Central European markets in order to exploit the potential gas supply from the Romanian Black Sea gas fields. OMV is of the view that the HUAT project could contribute to increasing the interconnectivity of the region with the more liquid Austrian gas hub. Moreover, the demand assessment performed for the HUAT project showed interest from shippers in having a direct physical connection from Hungary to Austria. In addition, OMV points out the significant price spread between the Hungarian and the Austrian hubs, which are observed as particularly relevant when gas demand in Austria is higher than in Hungary. Additionally, OMV is of the view that the HUAT incremental process has not been carried out in compliance with the procedural steps set by the CAM NC because the process has been stopped before the market participants could make their bids for capacity. Finally, OMV argues that splitting the original ROHUAT project into two separate investments led to a significant change in the tariffs structure, which cannot be explained by additional infrastructure measures resulting from the splitting of the project.
- (48) RWE welcomes the development of projects in the CEE region and is of the view that having more projects competing for the most economically viable proposal can be beneficial for the market. Even though RWE considers HUSKAT more convenient for the company's portfolio, it is still interested in having the competing HUAT project available in order to choose the economically superior route. For this reason, RWE suggests to go further with the HUAT incremental capacity procedure by performing a market test in the next annual capacity auction in July 2019.
- (49) Úrad pre reguláciu sieťových odvetví (URSO), the Slovak NRA, submitted an observation in support of Eustream's observation.

6. ASSESSMENT OF THE PROJECT PROPOSAL

6.1. Legal framework

- (50) Article 28(1) of the CAM NC sets out the required information that a project proposal shall include.

- (51) Article 22(1) of the CAM NC sets out the parameters of the economic test to be carried out for each offer level of an incremental capacity project after binding commitments of network users for contracting capacity have been obtained by the involved TSOs. These parameters include the present value of binding commitments of network users for contracting capacity, the present value of the estimated increase in the allowed or target revenue of the TSO associated with the incremental capacity included in the respective offer level, and the f-factor.
- (52) Article 23(1) of the CAM NC provides that the NRA shall set the level of the f-factor for a given offer level, taking into account the amount of technical capacity set aside, the positive externalities of the incremental capacity project, the duration of the binding commitments of network users and the future demand forecast.
- (53) Article 24 of the CAM NC provides that individual economic test parameters of the involved TSO for a given offer level shall be combined into a single economic test. It sets the parameters thereof, determines when the outcome of the single economic test application shall be positive and foresees that, in case a redistribution of revenues could lead to a decrease in the level of binding commitments of network users for the contracting capacity required for a positive single economic test outcome, TSOs may submit to the relevant NRAs for coordinated approvals the mechanisms for such a redistribution of revenues.
- (54) Article 25(1) of the CAM NC specifies the information which the TSOs shall submit to the relevant NTAs for approval for each offer level.
- (55) Article 33 of Commission Regulation (EU) 2017/460 (“TAR NC”) provides that the minimum price at which TSOs shall accept a request for incremental capacity is the reference price. The same provision foresees that in case the allocation of all incremental capacity at the reference price would not generate sufficient revenues for a positive economic test outcome, a mandatory minimum premium may be applied in the first auction or in the alternative allocation mechanism in which the incremental capacity is offered. It provides further that the range of the level for such a premium shall be submitted to the relevant NRAs for approval in accordance with Article 25(1)(c) of the CAM NC. Finally, it foresees that a mandatory minimum premium approved by the NRAs shall be added to the reference price for the bundled capacity products at the respective interconnection point.
- (56) Article 8(8) and (9) of the CAM NC provide that an amount at least equal to 10% of the incremental technical capacity at the concerned interconnection point shall be set aside subject to a stakeholder consultation and regulatory approval.
- (57) Article 28(2) of the CAM NC sets out the requirements for the coordinated NRA decisions, while Article 28(3) of the CAM NC sets out the notification requirements to offer the incremental capacity in the annual yearly capacity auction.

- (58) Article 29 of the CAM NC sets out the allocation mechanism for the binding stage of the incremental capacity auction. Paragraph 3 thereof foresees the possibility to run a second auction, once, after the completion of the annual yearly capacity auction to minimise the potential auction premia.
- (59) Article 11(3), (4), and (10) of the CAM NC provides that, when offering incremental capacity, the offer levels may be offered in yearly capacity auctions for a maximum of 15 years after the start of operational use, while as from 2018, annual yearly capacity auctions shall start on the first Monday of July each year, unless otherwise specified in the auction calendar. The same Article foresees the publication requirements regarding the binding commitments of network users and the results of the economic tests.

6.2. The Agency's assessment of the project proposal according to the legal framework

- (60) The Agency assessed the HUAT project proposal in view of the legal requirements of the CAM NC and TAR NC set out in the previous section.
- (61) For the sake of assessing the consistent application of the CAM NC and the TAR NC, the Agency also applied comparative assessments of the parameters and the methods proposed on the Austrian and Hungarian sections of the HUAT project to those already approved by the NRAs and in use for comparable incremental capacity projects in the concerned Member States.

6.2.1. Assessment of the offer levels under Article 28(1)(a) of the CAM NC

- (62) The Agency notes that GCA and FGSZ propose to offer available incremental capacity according to two offer levels in the annual yearly capacity auction. If both offer levels return positive economic tests, the higher of the two must be implemented.
- (63) The Agency notes that offer level I includes 5,740,470 kWh/h of incremental capacity, corresponding to 90% of the technical incremental capacity to be implemented according to this offer level, with 10% of the technical incremental capacity set aside according to Article 8(8) and 8(9) of the CAM NC.
- (64) The Agency notes that offer level II includes 10,007,100 kWh/h of incremental capacity, corresponding to 90% of the technical incremental capacity to be implemented according to this offer level, with 10% of the technical incremental capacity set aside according to Article 8(8) and 8(9) of the CAM NC.

- (65) The Agency notes that these offer levels reflect the range of expected demand for incremental capacity according to the non-binding demand²⁴ levels as assessed by GCA and FGSZ under Article 26 of the CAM NC and consulted²⁵ on under Article 27(3) of the CAM NC.

The Agency finds the proposed offer levels compliant with the requirements of the CAM NC.

6.2.2. Assessment of the rules and conditions under Article 28(1)(b) of the CAM NC

- (66) The Agency notes that the HUAT project proposal requires the successful network user (bidder) to enter into separate contracts with the TSOs in Austria and in Hungary, each such contract being subject to the framework contract of the respective TSO.
- (67) The Agency notes that in both Austria and Hungary the relevant TSO proposes to apply to the HUAT project the general rules and conditions for capacity users as developed and applied by GCA and FGSZ, accordingly.
- (68) The Agency notes that the relevant NRAs have approved the respective general rules and conditions²⁶.
- (69) The Agency notes that GCA and FGSZ propose to extend a step-back right to the network users (bidders), in order to accommodate the risks they incur of opposing economic test results of the ROHU²⁷ open season procedure and the HUAT project²⁸.
- (70) The Agency notes that the HUAT project proposal extends the step-back right under the following main rules and conditions:

- (a) The step-back right is valid until 24 April 2019 in both Austria and Hungary;

²⁴ Demand assessment report for incremental capacity between Austria (Market Area East) and Hungary, p. 11. Cf. footnote 9.

²⁵ Joint public consultation for Mosonmagyaróvár. Cf. footnote 10.

²⁶ ECA approved GCA's general rules and conditions in its decision of 27 September 2013 (V AGB G 04/2013). MEKH approved FGSZ's general rules and conditions in its decision 10115/2018.

²⁷ The ROHU open season procedure has been extended and is scheduled to close on 14 June 2019, which is ahead of the annual yearly capacity auction that is held on the first Monday of July, <http://www.transgaz.ro/sites/default/files/Downloads/announcement%20OS%20extension%20eng%2022.02.2019.pdf>.

²⁸ Meeting Minutes of Alignment meeting for Incremental project „Physical flow from Hungary (VTP) to Austria (VTP) via the E/X point Mosonmagyaróvár (MOSON INC)”, 25th of October 2017.

- (b) The termination fee to be paid amounts to 0.033% of the total value of the undiscounted accepted bid in Austria and to 10% of the total value of the undiscounted accepted bid in Hungary, respectively.
- (71) The Agency finds FGSZ's proposed step-back fee excessive when compared to the fee levels used by GCA for the same project and by FGSZ for other projects, and in particular the ROHU project to which the step back right is indirectly connected as indicated by FGSZ²⁹, and considering that the right expires well before actual construction could take place. FGSZ's termination fee in the case of ROHU project amounts to 0.033% of the total value of the undiscounted bid.
- (72) The Agency notes, as an illustration of the foregoing, that under the proposed step-back terms and conditions, in case a network user steps out of a contract for annual bundled capacity amounting to 1,148,094 kWh/h/a (20% of HUAT offer level I) for 15 years, the following would occur:
- (a) The total bid would have a value of EUR 37,370,460 in Austria and EUR 493,233,478 in Hungary;
 - (b) The termination fee would amount to EUR 12,332 in Austria and EUR 49,323,347.80 in Hungary, meaning the fee would be about 4,000 times higher in Hungary than in Austria;
 - (c) Applying the rate set by FGSZ for the ROHU project to the HUAT project would result in a termination fee of EUR 162,767.
- (73) The Agency is of the view that when a termination fee is applied, it should reflect the actual costs which the TSOs may incur due to the execution by network users of step-back rights before their expiration, and that in this sense the value of the step-back right (the step-back fee) should be reflective of the actual cost that the TSOs may incur.
- (74) The Agency notes that Article 17(7) of the CAM NC requires that capacity auctions are binding. The Agency notes that the presence of step-back rights delays the moment at which the results of the capacity auction become binding for network users to the time when the step-back rights expire, being optional in the meantime. For this reason, the Agency notes that it is at the time of the expiration of the time window during which network users may use the step-back rights that the capacity auction results

²⁹ Cf. footnote 28.

become known and the economic test can be completed, i.e. the economic test can only be carried out after the expiration of all step-back rights.

- (75) In the case of the HUAT project, the Agency notes that the binding commitment phase of the complementary incremental ROHU project is scheduled to be completed before the date of the annual yearly capacity auction. Therefore, the bidders for the HUAT incremental capacity will have access to the results at these interconnection points before the HUAT incremental auction is held. For this reason, the Agency finds the proposal to accommodate, via the step-back option, risks which bidders for HUAT capacity face in view of the unknown test results for other incremental capacity projects not applicable to the HUAT project, as by 3 May 2019 network users will also have access to the final results of the potentially competing HUSKAT incremental capacity project³⁰.
- (76) In view of the timelines of the HUAT, HUSKAT and ROHU projects foreseen for getting binding commitments from network users, as known at the date of the adoption of this Decision, the Agency concludes that the reason to extend the step-back right for the HUAT project is no longer relevant. Network users interested in moving gas via various interconnection points would be able to align their bids in the HUAT project auction to the outcome of capacity allocation at other key interconnection points, even if no step-back rights were foreseen in the HUAT project timeline.
- (77) The Agency concludes that there shall be no step-back right included in the rules and conditions for participation in the bidding for incremental capacity at the Mosonmagyaróvár interconnection point, neither on the Austrian side, nor on the Hungarian side.
- (78) The Agency notes that the HUAT project proposal requires network users (bidders) to post a collateral. In the case of GCA, the collateral is equal to the one defined in GCA's general rules and conditions³¹. In the case of FGSZ, network users (bidders) have to post collateral of 5% of the total undiscounted value of the network user's bid in the auction. The Agency notes that FGSZ has not motivated in the HUAT project proposal the need to set a collateral that deviates from its general rules and conditions.

³⁰ HUSKAT rulebook for binding alternative allocation mechanism according to the Commission Regulation (EU) No. 459/2017, http://www.gaztranzit.hu/en/balmenu/huskat/alternative-allocation-procedure/Documents/HUSKAT%20Rulebook_finalized.pdf.

³¹ The collateral amounts to the one specified in GCA's general rules and conditions of 23 September 2013 (<https://www.e-control.at/documents/20903/-/-/316460fb-1832-4eb3-8cb7-30c9d16e702e>): "In the case of a capacity contract with a term of one year, the amount of the cash deposit or bank guarantee is equal to three times the amount of the network user charge payable for the first month of the service (own translation)".

The Agency, considering that FGSZ's standard collateral³² amounts to 10,000,000 HUF, or approximately 31,250 EUR³³, finds that an appropriate level of the collateral for the Hungarian part of the HUAT project proposal.

- (79) The Agency concludes that the collaterals shall be those foreseen in the respective TSOs' general rules and conditions³⁴.

6.2.3. Assessment of the timelines under Article 28(1)(c) of the CAM NC

- (80) The Agency notes that for both capacity offer levels I and II, entry capacity from Hungary to Austria will be available in Austria from the gas year 2022/23, whereas exit capacity from Hungary to Austria will only be available in Hungary from the gas year 2024/25.
- (81) The misalignment of the first offer of (unbundled) incremental capacity by GCA and FGSZ is due to the postponement of the commissioning date in Hungary by two years. FGSZ clarified in the hearings that the delay is due to the environmental legal requirements for the project³⁵.
- (82) The Agency notes that the HUAT project proposal foresees to offer bundled capacity for 15 years from the gas year 2024/25 to the gas year 2038/39.
- (83) The Agency notes that the proposal for the bundled capacity for the maximum of 15 years is aligned to the indicated market interest as reported in the demand assessment report³⁶ according to Article 26 of the CAM NC. The Agency additionally notes that GCA and FGSZ consulted with network users on offering incremental capacities for 15 years with a starting date of 1 October 2022 in their public consultation³⁷ according to Article 27(3) of the CAM NC.

³² Section 12.4 of FGSZ's general rules and conditions sets the collateral at 10,000,000 HUF:
https://fgsz.hu/file/documents/0/0819/4d_melleklet_general_conditions_of_contract_regarding_network_usage_contracts.pdf.

³³ Calculated with an exchange rate of 1 EUR = 320 HUF. For applicable exchange rates of the Hungarian Forint to the Euro and any calculations involving such exchange rates pursuant to this Decision, the Euro Foreign Exchange Reference Rates as published by the European Central Bank shall be used:
https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/index.en.html

³⁴ Cf. footnote 31 for Austria and footnote 32 for Hungary.

³⁵ Minutes of the hearing of 17/01/2019.

³⁶ Demand assessment report for incremental capacity between Austria (Market Area East) and Hungary, p. 11. Cf. footnote 9.

³⁷ Joint public consultation for Mosonmagyaróvár, p. 2. Cf. footnote 10.

- (84) The Agency, taking note of ECA's decision³⁸ of 27 April 2019, concludes that the timeline in the HUAT project proposal to offer bundled capacity for the gas years 2024/25 to 2038/39 is compliant with the requirements of the CAM NC, in particular with Article 10(3) thereof.
- (85) The Agency notes that neither GCA nor FGSZ have included in the HUAT project proposal specific measures to prevent delays and minimise the impact of delays.
- (86) In view of the delayed commissioning by 1 October 2024 of the HUAT project in case of a positive economic test, compared to the timeline for implementation by 1 October 2022 that was set out in the public consultation, the Agency concludes that GCA and FGSZ must implement measures to minimise delays and mitigate the impact of delays as required by Article 28(1)(c) of the CAM NC. As a minimum, GCA and FGSZ should adhere to internationally recognised project management standards.

6.2.4. Assessment of the parameters defined in Article 22(1) under Article 28(1)(d) of the CAM NC

6.2.4.1. *Assessment of the parameters related to the present value of binding commitments of network users for contracting capacity under Article 22(1)(a) of the CAM NC*

- (87) The parameters to calculate the binding commitments of network users include the reference price, the potential auction premium, the potential mandatory minimum premium, the expected amount of contracted incremental capacity for establishing the mandatory minimum premium, and the discount factor. The discount factor that is necessary to calculate the present value is assessed in section 6.2.4.4 below.

Reference price

- (88) The Agency notes that GCA's proposal does not explicitly indicate that the reference price is floating. However, the Agency takes note that GCA is not allowed to apply a fixed reference price according to the Austrian regulatory framework.³⁹ On the Hungarian side, the reference price is described as "floating".
- (89) The Agency notes that Article 33 of the TAR NC requires that the reference price be set according to the applicable reference price methodology in the country.

³⁸ ECA's decision of 27 April 2018 (V NKO G 03/18) which required GCA to adjust its timeline to offer bundled incremental capacity for 15 gas years as of 1 October 2024.

³⁹ ECA's decision of 27 April 2018.

- (90) The Agency notes that GCA proposes a reference price of 0.77 EUR/kWh/h/a.
- (91) The Agency notes that the proposed reference price is aligned to the applicable regulation for setting tariffs in Austria, which is the *Gas-Systemnutzungsentgelte-Verordnung* (“GSV”)⁴⁰, and to the reference prices used in other incremental procedures in Austria⁴¹, and ECA has approved the reference price in its decision⁴² of 22 February 2018.
- (92) The Agency concludes that the GCA’s proposed reference price is approved as it meets the requirement of Article 33 of the TAR NC.
- (93) The Agency notes that FGSZ proposes a reference price of 1.97 EUR/kWh/h/a⁴³ (631.25 HUF/kWh/h/a).
- (94) The Agency notes that the proposed reference price for the HUAT project is the same as the reference price approved by MEKH, and applied by FGSZ in the comparable ROHU incremental capacity project.⁴⁴
- (95) The Agency concludes that the FGSZ’s proposed reference price is approved as it meets the requirement of Article 33 of the TAR NC.

Potential auction premium

- (96) The Agency remarks that the potential auction premium is an outcome of the auction and is not set beforehand.
- (97) The Agency notes that the HUAT project proposal assumes an auction premium of 0 EUR/kWh/h/a in Austria and 0 HUF/kWh/h/a in Hungary.
- (98) The Agency concludes that the HUAT project proposal is treating correctly the potential auction premium by assuming it is zero, until the outcome of the auction is known.

⁴⁰ Gas-Systemnutzungsentgelte-Verordnung 2013, <https://www.e-control.at/documents/20903/388512/GSNE-VO+2013%2C+Fassung+vom+07.01.2019.pdf>.

⁴¹ HUSKAT rulebook for binding alternative allocation mechanism according to the Commission Regulation (EU) No. 459/2017, http://www.gaztranzit.hu/en/balmenu/huskat/alternative-allocation-procedure/Documents/HUSKAT%20Rulebook_finalized.pdf.

⁴² ECA decision of 22 February 2018 (V MET G 05/17).

⁴³ Cf. footnote 33.

⁴⁴ <http://www.transgaz.ro/index.php/en/open-season-ro-hu-1>.

Mandatory minimum premium

- (99) The Agency notes that the allocation of all incremental capacity at the reference price would not generate sufficient revenues for a positive test outcome, neither in Austria, nor in Hungary. According to Article 33(3) of the TAR NC, a minimum mandatory premium is therefore justified for the HUAT project proposal in both Austria and Hungary.
- (100) The Agency notes that GCA proposes for offer level I a mandatory minimum premium in line with Article 33(4) of TAR NC that amounts to 1.40 EUR/kWh/h/a, or approximately twice the reference price. This premium corresponds to a minimum required level of allocated incremental capacity equal to 1,913,490 kWh/h/a⁴⁵, which would turn the economic test positive for this offer level, other things being equal. The Agency additionally notes that GCA proposes for offer level II a mandatory minimum premium of 1.27 EUR/kWh/h/a. This premium corresponds to a minimum required level of allocated incremental capacity equal to 6,714,000 kWh/h/a⁴⁶, which would turn the economic test positive for this offer level, other things being equal.
- (101) The Agency notes that the mandatory minimum premia for both offer levels are aligned to the Austrian GSV and that ECA has approved these values in its decision of 22 February 2018.
- (102) The Agency approves both mandatory minimum premia proposed by GCA as they are compliant to the requirements of Article 33(3) and (4) of TAR NC.
- (103) The Agency notes that FGSZ proposes for offer level I a mandatory minimum premium of 26.90 EUR/kWh/h/a⁴⁷ (the equivalent of 8,607.69 HUF/kWh/h/a). This mandatory premium is about ten-fold higher than the reference price. The Agency furthermore notes that FGSZ proposes for offer level II a mandatory minimum premium of 20.16 EUR/kWh/h/a⁴⁸ (the equivalent of 6,451.64 HUF/kWh/h/a). For offer level I, FGSZ assumes 5,740,470 kWh/h/a⁴⁹ to be allocated to network users. For offer level II, FGSZ assumes 10,007,100 kWh/h/a⁵⁰ to be allocated to network users. Additionally, in the case of offer level II, FGSZ proposes a volume-based supplemental fee amounting to 0.26 EUR/MWh (the equivalent of 83.29 HUF/MWh).

⁴⁵ Approximately 33% of offer level I.

⁴⁶ Approximately 67% of offer level II.

⁴⁷ Cf. footnote 33.

⁴⁸ Cf. footnote 33.

⁴⁹ 100% of the offered incremental capacity at offer level I.

⁵⁰ 100% of the offered incremental capacity at offer level II.

- (104) In light of the above, the Agency finds the level of mandatory minimum premia proposed by FGSZ excessive as the proposed values are well beyond the requirements of Article 33(4) of the TAR NC, which state that the minimum mandatory premium shall enable to pass the economic test. The Agency also finds the level of the proposed mandatory minimum premium not in line with Article 33(3) of TAR NC, which requires that the decision on whether and in which auctions to apply a mandatory minimum premium shall be taken in accordance with Article 41(6)(a) of Directive 2009/73/EC⁵¹.
- (105) Additionally, the Agency finds that the proposed targeted volume-based supplemental fee for offer level II at the exit point Mosonmagyaróvár is neither compliant with Article 4(3)(a)(ii) of TAR NC, which requires any flow-based commodity charge to be set in a way that is the same at all entry points and the same at all exit points⁵², nor with Article 33 of TAR NC, which does not foresee a volume-based fee in the tariff principles for incremental capacity.
- (106) For the sake of providing an opportunity to a greater number of network users to access capacity in the HUAT project and to avoid having a very high share of the technical capacity committed to a single or few network users for up to 15 years, the Agency finds reasonable to foresee the use of a lower level of binding capacity commitments at which the economic test will be passed in Hungary than the one proposed. The Agency is of the view that such an approach takes into account the parameters of expected future flows of gas into Hungary from various sources, namely via the ROHU project, and a major project promoted by a large incumbent gas supplier in the region, as recommended in the opinion of the Energy Community Secretariat⁵³ in consideration of avoiding potential detrimental effects on competition. The Agency is of the view that such an appropriate lower level should be 4,305,352.5 kWh/h/a for offer level I (75% of offer level I) and 7,505,325 kWh/h/a for offer level II (75% of offer level II), instead of the proposed level of 100% of available capacity to be auctioned, in order to allow sufficient flexibility for handling gas from all potential sources and suppliers.

⁵¹ In defining the terms and conditions for the minimum premia, "...tariffs or methodologies shall allow the necessary investments in the networks and LNG facilities to be carried out in a manner allowing those investments to ensure the viability of the networks and LNG facilities", OJ 14.8.2009, p. 125.

⁵² The proposed reference price methodology for Hungary includes a flow-based commodity charge to be levied at all exit points, which is estimated at 0.13 EUR/MWh (equivalent of 42.19 HUF/MWh, converted at 1 EUR = 320 HUF). Cf. the Hungarian consultation documents in light of the requirements laid out in Article 26 of the TAR NC, <http://www.mekh.hu/fulfilment-of-the-consultation-requirement-set-by-article-26-of-tar-nc>.

⁵³ Opinion 1/2019 on the exemption of the Gastrans natural gas pipeline project from certain requirements under Directive 2009/73/EC by the Energy Agency of the Republic of Serbia, Pt. 181.

6.2.4.2. Assessment of the parameters related to the present value of the estimated increase in the allowed or target revenue of the transmission system operator associated with the incremental capacity included in the respective offer level under Article 22(1)(b) of the CAM NC

- (107) The parameters to establish the estimated increase in the allowed or target revenue are the capex levels and the discount factor. The discount factor is assessed in section 6.2.4.4 below.
- (108) The Agency compared the estimated costs of the HUAT project with values available in the Agency's Unit Investment Costs (UIC) Report⁵⁴. The Agency notes that in Austria, the CAPEX for offer level I, as approved by ECA, are below the average UIC values available in the Agency's Report (-10%), and higher than the average (+16%) for offer level II. The Agency finds that for both offer levels CAPEX unit value estimates are within the range of reasonable average UIC values.
- (109) The Agency notes that in Hungary the proposed CAPEX estimates are over the average UIC values by 33% for offer level I and by 35% for offer level II. The Agency finds that in both offer levels the proposed CAPEX estimates are within the upper range of observed UIC values and considerably higher than average UIC values.
- (110) The Agency notes that in Austria the CAPEX values as approved by ECA are considered with a 10% positive margin as a hedge against possible excess CAPEX incurred by GCA. In Hungary, MEKH did not approve any CAPEX, but in its proposal FGSZ hedges against possible increases of CAPEX by applying a 25% margin of CAPEX contingencies, increased by inflation. MEKH shared with the Agency its views on the costs, and in particular, the margin of CAPEX contingencies, in which it deems that a 25% CAPEX contingency margin is too extreme and a 10% margin would be reasonable. The Agency takes note of MEKH's view⁵⁵.
- (111) The Agency finds the CAPEX values in GCA's proposal, as approved by ECA, reasonable, as being close to observed average UIC values. The Agency is of the view that, in the context of estimating the increase of the allowed or target revenue, the

⁵⁴ https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/UIC%20Report%20-%20Gas%20infrastructure.pdf UIC are composite numbers dependent on the values of several major inputs (cost items), namely material, labour, services, and land access. UIC were also informed to the Agency by FGSZ as the basis for their cost estimates for HUAT. The Agency notes that inflation in the EU since 2015 to 2019 has been low, with the seasonally and calendar adjusted GDP deflator on basis 2010 being 108.521 at the beginning of 2016 (1Q 2016) and 110.086 at the end of 2018 (4Q 2018), i.e. the cumulative inflation rate from 2015 to 2019 is 1.44% (<http://appsso.eurostat.ec.europa.eu/nui/show.do?wai=true&dataset=TEINA110>), For this reason, the values from the UIC report are still relevant and may be used for reference by TSOs.

⁵⁵ Guidance note provided by MEKH to the Agency on 22 February 2019.

value of CAPEX as proposed by FGSZ should be adjusted downwards, by using a 10% CAPEX contingency margin rather than the one proposed by FGSZ, which is considerably higher than the observed average UIC values.

- (112) The Agency agrees with FGSZ's view that the eventual implementation of the HUAT project should be handled in a way that minimises FGSZ's risk exposure. However, the Agency notes that in its proposal, while not providing quantitative evidence of higher risks, FGSZ deploys at least six risk mitigation strategies, namely:
- (a) high margin of potential CAPEX upward variation, which uses the UIC values of the Agency's UIC report marked up by 25% contingencies and increased by inflation;
 - (b) WACC / discount rate of 19.3% p.a., compared to rates in the range of 8-9% used for other projects in Hungary and to a rate of 4.62% set by MEKH for the current regulatory period and a rate of 8.78% for the previous regulatory period⁵⁶;
 - (c) f-factor of 1, meaning that all project costs, even marked upwards by contingencies and inflated, will be carried by the successful capacity bidders if the HUAT project passes the economic test;
 - (d) assuming no project upside whatsoever after the end of the calendar period for which capacity will be contracted (15 years), and no revenue from reserved capacity contracting, i.e. assuming that no capacity will be sold other than the one for which binding auction bids are made, and then only for 15 years;
 - (e) setting a requirement for firm commitments for at least 90% of the technical project capacity in order to define the terms and conditions for passing the economic test, such capacity being 100% of the offered capacity;
 - (f) requiring the payment of very high fees for the use of step-back rights in the incremental capacity auction.
- (113) In particular, the Agency is of the view that the estimated increase in the allowed or target revenue of the TSOs, as included in the respective offer levels, is best determined by using the NRA methodologies and models in place for that purpose,

⁵⁶ See p. 214 of the ECA Report (2018): Methodologies and parameters used to determine the allowed or target revenue of gas transmission system operators;

https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/Consultant%20Report.pdf.

for the current regulatory period in Austria⁵⁷ and in Hungary⁵⁸, respectively, and as discussed with the Agency by ECA and MEKH. In the view of the Agency, such an approach would allow the treatment of all projects proposed by the promoters on fair terms which are known to all parties concerned, while at the same time reasonably protecting the financial positions of the TSOs as regulated entities. Accordingly, the Agency assessed the estimated increase in the allowed or target revenue of the TSOs by using the relevant methodologies and cash flow models of ECA and MEKH, respectively.

- (114) The Agency concludes that the present value of the estimated increase of the allowed or target revenue as proposed in the HUAT project proposal cannot be approved, neither for Austria, nor for Hungary.
- (115) With respect to Austria, the Agency does not approve the proposed parameter because it has to be amended for the timeline that considers the first offer of bundled incremental capacity in the gas year 2024/25 for 15 years, instead of the starting gas year 2022/23 as it has been considered in GCA's proposal.
- (116) With respect to Hungary, the Agency does not approve the proposed parameter because two important inputs to calculate the parameter have to be adjusted. First, the CAPEX estimate needs to be revised downwards to consider the lower contingency margin as explained in paragraphs (109) to (111). Additionally, the discount factor is revised downwards as explained in section 6.2.4.4.

6.2.4.3. Assessment of the parameters related to the f-factor under Article 22(1)(c) and Article 23(1) of the CAM NC

- (117) Article 23 of the CAM NC specifies the conditions which the NRA shall take into account when setting the level of the f-factor for a given offer level. The Agency assessed the proposed f-factors by GCA and FGZS by using the criteria as provided in Article 23(1) of the CAM NC, as well as by assessing the alignment of the proposed f-factors with those used recently for other incremental capacity projects in Austria and in Hungary, namely the HUSKAT and ROHU projects. The Agency shared its assessments and findings with the concerned parties during hearings held by the Agency.

⁵⁷ METHODE GEM § 82 GWG 2011 FÜR DIE FERNLEITUNGEN ÖSTERREISCHISCHER FERNLEITUNGSNETZBETREIBER, valid from 01.01.2017 until 31.12.2020, <https://www.e-control.at/en/marktteilnehmer/gas/netzentgelte/methodenbeschreibung>.

⁵⁸ A Magyar Energetikai és Közmű-szabályozási Hivatal módszertani útmutatója a földgáz rendszerhasználati díjak évenkénti megállapításának rendszeréről a 2017-2020. közötti árszabályozási ciklusban, http://mekh.hu/download/a/1a/20000/modszertani_utmutato_foldgaz_ii.pdf.

- (118) The Agency notes the different f-factors used on the Austrian and on the Hungarian side, which would lead to the socialisation of part of the HUAT project costs in Austria by all its network users, while in Hungary the HUAT project cost would be covered exclusively by the commitments of network users contracting capacity in the HUAT project.
- (119) The Agency assessed the pattern of major benefits expected to be delivered in case the HUAT project is implemented, by assessing the arguments of the concerned parties provided during the hearings at the Agency and the observations of third parties. The Agency shared with the concerned parties its finding that in Austria considerable benefits may accrue to parties other than the TSO or system users, in the form of positive externalities in terms of market diversification and improved competition via access to new sources of gas. The Agency also shared with the concerned parties its finding that in Hungary the main benefits – and also the main risks – would be directly related to the TSO and system users, rather than being present as project externalities.
- (120) For the above reasons, the Agency finds reasonable the f-factors as proposed by the TSOs, and as approved by ECA on the Austrian side, as such f-factors will allow the patterns of benefits accruing to various groups and entities to be matched with the pattern of costs. In particular, the Agency finds it reasonable that in Austria part of HUAT project's cost would be socialised, i.e. attributed to all who benefit from improvements of market gas supply and competition, while in Hungary the cost should be carried out by those who use HUAT's capacity. The Agency is of the view that such a difference in the f-factors in Austria and in Hungary reflects national circumstances, in terms of different project risks and project benefits, and does not see a need for a full alignment.
- 6.2.4.4. *Assessment of the discount factor under Article 22(1)(a) and (b) of the CAM NC*
- (121) The economic test pursuant to Article 22 of CAM NC relies on present values (i.e. meaning that costs and revenues occurring over a number of years have to be discounted to a single reference point in time).
- (122) The Agency notes the very significant difference in the discount rate proposed by ECA on the Austrian side (5.188%) and the one proposed by FGSZ on the Hungarian side (19.3%). The Agency notes that the value of the discount rate proposed by FGSZ on

the Hungarian side is an outlier compared to the range of discount rates generally set by NRAs (including by MEKH) in the EU⁵⁹.

- (123) The Agency notes that FGSZ's proposal does not provide justifications for the use of this particularly high discount rate. The Agency takes note of FGSZ's view expressed during the hearings that the HUAT project is subject to a great number of uncertainties and consequently to higher risks compared to other FGSZ projects.
- (124) In particular, the Agency takes note of the possible variations in the expected gas flows to and from Hungary via the interconnection points with Ukraine, Romania, Serbia, Croatia and others, which, depending on the moment and the degree at which a variation may occur, may lead to a net change of inflows and outflows ranging from well below HUAT's technical capacity to well above its technical capacity. The Agency notes that FGSZ reported that the risks associated with the implementation of the HUAT project are: i) that it may lead to lower utilisation rates of FGSZ's existing infrastructure (stranded assets risk); and ii) higher costs may divert capacity demand towards other (competing) projects, namely HUSKAT.
- (125) The Agency is of the view that the setting of the f-factor at 1, combined with conservatively assessed level of CAPEX (including a 10% contingency margin instead of a 25% margin) and OPEX already covers most of FGSZ's risks directly attributable to the project. The Agency notes that the implementation of a binding capacity auction for the HUAT project is a way to address concerns regarding the risks and the possible detrimental market effects of the HUAT project. In case the economic test is passed and the HUAT project is implemented with an f-factor of 1 in Hungary, FGSZ, as a regulated entity, will not be exposed to either stranded asset or cash flow risks directly attributable to the HUAT project. In case the economic test is not passed, FGSZ's risk and financial position will be identical to its current position, i.e. there will be no further risks or potential detrimental effects, either. In Austria, GCA's proposal is already approved by ECA in view of the potential balance of costs, risks, and potential detrimental effects.
- (126) For the above reasons, the Agency is of the view that applying in parallel many overlapping risk mitigation strategies builds up unrealistic hurdles in the conditions which a successful economic test must meet, thus essentially precluding a proper estimate of the feasibility of the project, even if network users commit to using capacity with high CAPEX and OPEX and an f-factor of 1. The Agency finds that such simultaneous use of many risk hedging tools is not proportionate to the level of FGSZ's risk exposure that can be attributed directly to the project.

⁵⁹ https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/Consultant%20Report.pdf.

- (127) The Agency recalls that, as required by Article 22(3) of the CAM NC, the HUAT project shall be initiated if the economic test has a positive outcome on both sides of the Mosonmagyaróvár interconnection point for at least one offer level, and implemented based on rules and conditions that are consistent with other incremental capacity projects of GCA and FGSZ. In case that no offer level results in a positive outcome of the economic test, the specific incremental capacity process shall be terminated. This means that the HUAT project as currently proposed will proceed only if there are sufficient contracted revenues coming from the commitment of network users, thus minimising the risk of the HUAT project becoming a stranded asset.
- (128) The Agency notes that the use by FGSZ of a particularly high discount rate in the project proposal results in the undervaluation of the present value of future cash flows from sales of capacity in Hungary by at least a factor of 2 compared to the present value (PV) of cash flows from sales of capacity in Austria. The Agency notes at the same time that CAPEX, being front-loaded expenditure in time, would be discounted by GCA and FGSZ on a more equal footing, despite the use of very different discount rates.
- (129) The Agency notes that the proposal of FGSZ to use a discount rate of 19.3% would depreciate the PV of the project's earnings in Hungary much more compared to their value in Austria.
- (130) The Agency notes that the discount rate used by MEKH for other comparable projects, such as the ROHU project (8.9%), the HUSKAT project (8.7%) and previously the ROHUAT project (8.69%), are much lower than the one proposed by FGSZ for the HUAT project, and that the rate set by MEKH for the current regulatory period is 4.62%. The Agency takes note of MEKH's suggestion to use for the Hungarian part of the HUAT project a discount rate of 8.47%, and concurs with MEKH's view as it is in line with the current practice for other recent projects⁶⁰.
- (131) In order to enable a proper assessment of the economics of the project, and for the sake of consistency when assessing the merits of the HUAT project proposal against the merits of other incremental capacity project proposals, the Agency finds that the usual ECA and MEKH practices for setting the WACC for a given regulatory period without taking inflation into account for the period shall be applied.

⁶⁰ Cf. footnote 55.

6.2.4.5. Assessment of the requirements related to the single economic test under Article 24 of the CAM NC

- (132) The Agency notes that GCA and FGSZ did not use the option to submit a mechanism for redistribution of revenues from incremental capacities for coordinated approvals by the relevant NRAs under Article 24(4) of the CAM NC.
- (133) In the absence of a redistribution mechanism, the single economic test shall only be positive when both underlying tests, meaning the separate economic tests for the respective Austrian and Hungarian sections of the HUAT project, have a positive outcome, as laid out in Article 24(3) of the CAM NC.

6.2.5. Assessment of the parameters foreseen in Article 28(1)(e-g) of the CAM NC

- (134) The Agency notes with respect to Article 28(e) and (f) of the CAM NC that the alternative allocation mechanism of Article 30 of the CAM NC is not available to the HUAT project as proposed, because the project does not meet the condition that more than 2 entry-exit systems be involved.
- (135) The Agency notes with respect to Article 28(g) of the CAM NC that neither in Austria nor in Hungary a fixed price approach is followed.
- (136) The Agency finds that the optional content foreseen in Article 28(1)(e-g) of the CAM NC is not present in the proposals of the promoters, and that in this sense the proposals are aligned.

6.2.6. Assessment of the detrimental effects on competition or the effective functioning of the internal gas market under Article 28(2) of the CAM NC

- (137) The Agency is of the view that the HUAT project proposal should be considered in the light of:
- (a) the potential exposure of the TSOs to risks and financial burdens due to the HUAT project, which generally refer to the risk of having a lower capacity utilisation rate of existing infrastructure and hence the need to increase tariffs, thus also leading to potentially higher delivered commodity (gas) cost;
 - (b) the sequencing of the implementation of various infrastructure projects in Austria, Hungary and in the wider region;
 - (c) the balance between risks and potential detrimental effect on competition and the effective functioning of the internal market in case the HUAT project goes ahead and is commissioned vs. the risks and the effects in case the HUAT project is not implemented;

- (d) any other system development, gas supply, and capacity utilisation effects that may reveal significant risks of the project or detrimental effect on competition and the effective functioning of the internal market, both in case the HUAT project is commissioned and in case it is not commissioned.
- (138) For the purpose of the identification of potential detrimental effect on competition and the effective functioning of the internal market, the Agency carried out an analysis to identify feasible flow patterns under various scenarios. It took into consideration potentially complementary and potentially competing projects, as well as possible future changes in gas flow patterns, including scenarios where the incremental capacity of the HUAT project may be needed. The Agency additionally took into account the observations received from third parties in response to its public notice.
- (139) The Agency notes, as indicated by third parties, that at this time the ability of shippers to move gas from Southeast Europe (Bulgaria, Croatia, Greece, Romania, and others, including Black Sea gas) to Central Europe (Austria, Czech Republic, Hungary, Slovakia, and others), is limited in terms of both gas volumes and available capacity. The Agency is of the view that the HUAT project, if implemented, could improve the ability of shippers to move gas, and significantly contribute to market integration and competition on the points of juncture between markets in Southeast and Central Europe.
- (140) The Agency takes note of the joint public consultation on the HUAT project that was carried out according to Article 27(3), which states that “[a]n impact on existing infrastructure is for the time being not expected.”⁶¹
- (141) The Agency concludes that there is no compelling evidence supporting with sufficient certainty the risk of occurrence of detrimental effects on competition or the effective functioning of the internal gas market that could be ascribed to the realisation of the HUAT project. The HUAT project would open a new interconnection point and provide capacity from Hungary to Austria enabling the gas supply connectivity from Southeast Europe to Central Europe. This new connection can provide access to new gas supply from sources in the Black Sea and to more counterparties, thus having a potentially positive impact in terms of competition, market integration and security of gas supply in the region.

⁶¹ https://www.gasconnect.at/fileadmin/Fachabteilungen/ST/DE/20171019_Consultation_Art_27_Moso.pdf.

7. CONCLUSION

- (142) In consideration of the results of the non-binding phase of the HUAT incremental capacity process, as evidenced by the demand assessment report of 27 July 2017 for incremental capacity between Austria (Market Area East) and Hungary, prepared by GCA and FGSZ;
- (143) In consideration of the subject matter of the proposals of the TSOs, namely:
- the marketing of incremental capacity at offer level I and offer level II at the interconnection point Mosonmagyaróvár from Hungary to Austria;
 - the allocation of capacities subject to a positive outcome of the economic test on both sides of the interconnection point for at least one of the above offer levels;
 - the proposed entitlement of network users to whom capacity has been allocated upon a positive economic test for at least one of the above offer levels to step back from their concluded capacity contracts by 24 April 2019 (“step back date”) without the obligation to give reason for this decision; and
 - the proposed entitlement of GCA and of FGSZ, accordingly, to carry out a second economic test subsequently to the above-mentioned step back date.
- (144) Pursuant to Article 22 (1) of the CAM NC, and in particular the provision that *“the economic test set out in this Article shall be carried out by the transmission system operator(s) or by the national regulatory authority, as decided by the national regulatory authority, for each offer level of an incremental capacity project after binding commitments of network users for contracting capacity have been obtained by the involved transmission system operators”*.
- (145) Pursuant to Article 29 and Article 11 (4) of the CAM NC, and acting on the proposal for HUAT of GCA and FGSZ, respectively,

HAS ADOPTED THIS DECISION:

Article 1: Approval of proposals

1. The Agency approves the HUAT project proposal to carry out a binding phase for marketing of incremental capacity at offer level I and offer level II at the interconnection point Mosonmagyaróvár from Hungary to Austria (the HUAT project), in which binding commitments for contracting capacity shall be requested in an auction from network users by GCA and FGSZ, with amendments to the general investment rules and conditions and to the parameters for carrying out an economic test for the HUAT project as specified below.

2. The binding phase of the marketing of incremental capacity at offer level I and offer level II at the interconnection point Mosonmagyaróvár from Hungary to Austria shall be carried out by GCA and FGSZ in compliance with Articles 11 and 29 of the CAM NC. The binding commitments shall be made available by GCA and FGSZ to network users and to ECA and MEKH, respectively, and to the Agency no later than the next business day after the closing of the bidding round, in compliance with Article 11(10) of the CAM NC.
3. The economic test shall be performed without delay by ECA and MEKH by using the results of the binding phase provided by GCA and FGSZ, respectively, and its results communicated to GCA, FGSZ and to the network users who participated in the auction and to the Agency no later than two (2) business days after the closing of the bidding round, in compliance with Article 11(10) of the CAM NC.
4. In case the conditions of Article 29(3) of the CAM NC are met, a new auction (hereafter “second auction”) shall take place no later than seven (7) business days after the closing of the original bidding round of the annual yearly capacity auction. The results of the second auction will be communicated to the network users, ECA and MEKH and the Agency no later than one (1) business day after the closing of the bidding round of that auction by analogy with Article 11(10) of the CAM NC.
5. In the event that a second auction is organised, the economic test shall be performed without delay by ECA and MEKH by using the results of the binding phase of the second auction, provided by GCA and FGSZ, respectively. The results shall be communicated to GCA, FGSZ, the network users who participated in the auction, and the Agency no later than two (2) business days after the closing of the bidding round of the auction, by analogy with Article 11(10) of the CAM NC.

Article 2: General investment rules and conditions for the binding phase

1. The general rules and conditions for the binding phase of the marketing of incremental capacity at offer level I and offer level II at the interconnection point Mosonmagyaróvár from Hungary to Austria shall be those of GCA and FGSZ as indicated in their respective proposals, with the amendments outlined below.
2. There shall be no step-back rights. The collaterals shall be those foreseen in the general rules and conditions of GCA and FGSZ, respectively.
3. In the context of the economic test, timelines shall be identical for GCA and FGSZ and foresee the first use of bundled incremental capacity in Austria and in Hungary on 1 October 2024. All economic parameters calculations shall consider the paid use of capacity by successful bidders for fifteen (15) years, the first one of which starts on 1 October 2024.
4. In case of a positive result of the economic test for the HUAT project according to the requirements of Article 22(3), GCA and FGSZ shall implement the HUAT project by 1 October 2024. GCA and FGSZ shall submit to ECA and MEKH, respectively, and

to the Agency a project implementation schedule including delay mitigation strategies, and shall report on HUAT project's implementation progress by 31 December annually until 31 December 2023 and on 1 October 2024 to ECA and MEKH, respectively, and to the Agency.

5. In case no positive result of the economic test for the HUAT project is achieved according to the requirements of Article 22(3), GCA and FGSZ shall terminate the HUAT project. Following the requirements of Article 26 of the NC CAM, GCA and FGSZ shall assess market demand for a new incremental capacity project between Austria and Hungary, which can be an amendment to, or a replacement of, the HUAT project proposal.

Article 3: Economic test parameters

1. For the economic test of the HUAT project, the following terms and conditions shall apply:
 - a. The offer levels shall be the following: offer level I: 5.740.470 kWh/h/a, offer level II: 10.007.100 kWh/h/a, for both sides of the border;
 - b. Capacity set-aside: 10% (both sides of the border, already deducted to determine the offer levels);
 - c. Minimum capacity level commitments in order to consider the economic test passed for offer level I shall be the equivalent of 1,913,490 kWh/h/a for 15 consecutive years in Austria and the equivalent of 4,305,352.5 kWh/h/a for 15 consecutive years in Hungary;
 - d. Minimum capacity level commitments in order to consider the economic test passed for offer level II shall be the equivalent of 6,714,000 kWh/h/a for 15 consecutive years in Austria and the equivalent of 7,505,325 kWh/h/a for 15 consecutive years in Hungary;
 - e. For calculating the present value of binding commitments, the following parameters shall be used:
 - i. Reference prices, minimum and auction premiums shall be the following:
 - Reserve/Reference price shall be 0.77 EUR/kWh/h/a in Austria and 631.25 HUF/kWh/h/a in Hungary⁶²;

⁶² Exchange rate to Euro to be applied in all calculations where exchange rate conversions are needed is the Official Daily Exchange Rate of the European Central Bank on 30 April 2019 as posted on that day on the Bank's web site
https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/index.en.html

- Fixed mandatory minimum premium for offer level I shall be 1.40 EUR/kWh/h/a in Austria and 3,441.41 HUF/kWh/h/a in Hungary;
 - Fixed mandatory minimum premium for offer level II shall be 1.27 EUR/kWh/h/a in Austria and HUF 2,421.74 HUF/kWh/h/a in Hungary;
 - There shall be no volume based fee in either Austria or Hungary for offer level I or level II. This does not preclude that a flow-based commodity charge be set in compliance with Article 4(3) of the TAR NC.
- ii. Minimum contracted capacity to pass the economic test shall be the one at which the calculated PV of the project as of the day of the economic test is EUR 34,693,081 for offer level I and EUR 114,590,577 for offer level II in Austria (after application of the f-factor) and HUF 105,373,000,000 for offer level I and HUF 137,701,000,000 for offer level II in Hungary.
 - iii. Discount rates shall be equal to the regulatory WACC and shall be 5.188% in Austria and 8.47% in Hungary.
- f. Present value of binding commitments shall cover the present value of the estimated increase in allowed revenues multiplied by the f- factor. The f-factor shall be 0.5 for offer level I and 0.75 for offer level II in Austria, and 1 for both offer levels in Hungary.
 - g. No extended time horizon shall be used for the HUAT project in either Austria or Hungary.
 - h. The HUAT project proposal concerns only two entry-exit systems and thus the condition laid out in Article 30(2)(a) of the CAM NC for using an alternative allocation mechanism is not met.
 - i. No fixed price methods shall be followed in either Austria or Hungary.
2. In calculations, no inflation escalation shall be used.

Article 4

This Decision is addressed to Gas Connect Austria GmbH, Földgázszállító Zártkörűen Működő Részvénytársaság Zrt, E-Control, and Magyar Energetikai és Közműszabályozási Hivatal.

Done at Ljubljana on 9 April 2019.


For the Agency
Director ad interim
Alberto POTOTSCHNIG

In accordance with Article 19 of Regulation (EC) No 713/2009, the addressees may appeal against this Decision by filing an appeal, together with the statement of grounds, in writing at the Board of Appeal of the Agency within two months of the day of notification of this Decision.