ACER
Agency for the Cooperation of Energy Regulators

Board of Appeal

DECISION OF THE BOARD OF APPEAL OF THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS

6 August 2019

(Application for annulment – ACER Decision No. 05/2019 – Competence of ACER - Inadmissibility)

Case number	A-004-2019 (consolidated)
Language of the case	English
Appellants	Appellant I. Hungarian Energy and Public Utility Regulatory Authority ('HEA' or 'Appellant I.') Represented by: Attila Nyikos, Vice President for International Affairs Appellant II. Földgázszállító Zártkörűen Működő Részvénytársaság ('FGSZ' or 'Appellant II.') Represented by: Hegymegi-Barakonyi és Társa Baker and Mckenzie and Baker and Mckenzie CVBA/SCRL
Defendant	Agency for the Cooperation of Energy Regulators ('the Agency' or 'ACER') Represented by: Alberto Pototschnig, Director *ad interim* and by DALDEWOLF SCRL

Interveners	President of the Energy Regulatory Office ('ERO')
	Represented by: Maciej Bando;
	Regulatory Office for Network Industries ('RONI')
	Represented by: Ljubomir Jahnatek, Chairman
	(Both on behalf of Appellant I.);
Application for	Revision or annulment of Decision of the Agency for the Cooperation of Energy Regulators No. 05/2019 of 9 April 2019 ('Decision No. 05/2019' or 'Contested Decision')

THE BOARD OF APPEAL

composed of Andris Piebalgs (Chairman), Nadia Horstmann (Rapporteur), Yvonne Fredriksson, Jean-Yves Ollier, Mariusz Swora, Michael Thomadakis (Members).

Registrar: Andras Szalay

gives the following

Decision

I. Background

Legal background

1. According to Recital 11 of Commission Regulation (EU) 2017/459[1] ('CAM NC'), the incremental capacity process is a harmonised Union-wide process to offer incremental capacity in response to market demand. In accordance with Article 22 of the CAM NC, any investment decision for an incremental capacity project is subject to an economic test.

2. The economic test shall be carried out by the transmission system operators ('TSOs') or by the national regulatory authority ('NRA'), as decided by the NRA, 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.

Facts giving rise to the dispute

3. The Agency, after sharing its observations on 10 October 2018 that no coordinated decision has been reached within six months, informed the relevant NRAs, E-Control and HEA, that, pursuant to Article 8(1) of Regulation (EC) No 713/2009[2], the Agency shall decide on the HUAT project proposal.

4. On 9 April 2019, the Agency adopted its Decision No 05/2019 on the Incremental Capacity Project Proposal for the Mosonmagyaróvár Interconnection Point approving the HUAT project proposal. This is the Contested Decision.

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[1] Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems

[2] Regulation (EC) 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators

5. On 11 April 2019, the Contested Decision was published on the Agency's website.

Procedure

6. On 6 June 2019 Appellant I., on 7 June 2019 Appellant II. filed an appeal against the Contested Decision with the registry of the Board of Appeal. The appeals were registered, respectively, under the case number A-004-2019 and A-005-2019. On 11 June 2019, Appellant II. amended its notice of appeal and attached two further annexes to it.

7. On 7 June 2019, the announcement of appeal in A-004-2019 was published on the website of the Agency, while that in A-005-2019 was issued on 11 June 2019.

8. On 7 June 2019 (A-004-2019) and on 11 June 2019 (A-005-2019) the Defendant was notified upon the appeals as well as upon the request of the Appellants to suspend the application of the Contested Decision.

9. On 13 June 2019 (in A-004-2019) and on 14 June 2019 (in A-005-2019), by the invitation of the Registrar, the Defendant made observations to the suspension requests.

10. By the deadline, two entities, ERO and RONI, filed their requests with the Registry to leave to intervene in the case A-004-2019, both on behalf of Appellant I. The Board of Appeal invited the main Parties to make observations to those requests to which Appellant I. submitted its observations on 19 June 2019.

11. On 25 June 2019, in accordance with Article 19(5) of the Rules of Procedure of the Board of Appeal ('Rules of Procedure'), the Registrar communicated the composition of the Board of Appeal to the Parties of both appeal cases.

12. On 28 June 2019 (in A-004-2019) and on 2 July 2019 (in A-005-2019), the Defendant filed its Defences with the Registry of the Board of Appeal.

13. On 3 July 2019, the Board of Appeal dismissed the requests for the suspension of the application of the Contested Decision both in the cases A-004-2019 and A-005-2019, in the form of a reasoned order, in compliance with Article 26 of the Rules of Procedure.

14. On 4 July 2019, the Chairman of the Board of Appeal granted the claimed confidentiality for certain documents by the request of Appellant I. and Appellant II.

15. On 8 July 2019, the Board of Appeal granted the right to intervene to ERO and to RONI, both on behalf of Appellant I. The Interveners received access to the non-confidential version of the case documents. None of the Interveners lodged a supplementary submission with the Registry.

16. On 8 July 2019, Appellant II. requested an extension of deadline for its Reply to the Defence from 10 July 2019 to 24 July 2019. Appellant II. claimed that the service of the defence was made to another e-mail address that they indicated in the cover sheet of the appeal which resulted in a delay of one day in their internal proceedings. It was further referred that, according to Appellant II., the delay for the Reply was unreasonable. On 19 July 2019, the Chairman of the Board of Appeal granted an extension of two working days, with also regard to other procedural deadlines of the appeal proceeding.

17. On 10 July 2019, within the deadline set, Appellant I. lodged its comments to the Defence with the Registry.

18. On 12 July 2019, the Registrar notified the main Parties and Interveners of the case A-004-2019 and the Parties of the case A-005-2019 that upon the decision of the Chairman of the Board of Appeal, in compliance with Article 19(3) h) of the Rules of Procedure, appeal cases A-004-2019 and A-005-2019 were being consolidated into A-004-2019 (consolidated) where HEA will be called as ‘Appellant I.’ and FGSZ as ‘Appellant II.’. In accordance with the decision, the consolidation did not affect the procedural deadlines and the Parties were not supposed to re-send their

previous submissions. The initial case files (A-004-2019 and A-005-2019) were not being used for further registration and the submissions referred to the previous case numbers after the decision on consolidation will be redirected *ex officio* to the consolidated case file.

19. On 12 July 2019, Appellant II. submitted its Reply to the Defence with reference to the case number A-005-2019 which was redirected and registered *ex officio* in the case file A-004-2019 (consolidated).

20. On 12 July 2019, the Registrar, by the request of Appellant II., summoned the Parties as well as the expert-witnesses requested by Appellant II. to an oral hearing to be held on 25 July 2019, via teleconference.

21. On 15 July 2019, the Registrar granted access to Appellant I. to the non-confidential case file A-005-2019 and to Appellant II. to the non-confidential case file A-004-2019 in which cases they did not participate as parties. The Registrar invited the Appellants, since the consolidation of the cases was not necessarily foreseeable when the Appellants requested the confidential treatment of certain documents in the initial cases, to state whether the marked confidential documents may be shared with the other Appellant. To the invitation Appellant I. stated that the access to the marked confidential documents from the initial case file A-004-2019 could be granted to Appellant II. On 22 July 2019, Appellant II. was served with the confidential case documents of A-004-2019. Appellant II. did not make a statement regarding the confidential documents of the initial appeal case A-005-2019.

22. On 17 July 2019, Appellant II. submitted procedural requests concerning the oral hearing as well as other matters. As for the oral hearing, Appellant II. requested that the hearing would be held in Ljubljana or via videoconference. Appellant II. stated that neither a public hearing, nor the identification of the Parties could be ensured via teleconference and, therefore, a teleconference could not ensure a fair, impartial and public hearing. Appellant II. requested at least 90 minutes to summarize its pleas at the hearing. In its reply of 19 July 2019, the Board of Appeal referred to the principle of procedural economy which entails cost and time efficiency and to Article

17(7) of the Rules of Procedure which enables teleconference. The Board of Appeal further referred to the available technical means at its disposal and that the selected teleconference format ensures equal access to all Parties and other participants. The Board of Appeal clarified that the schedule of the hearing was published on the website of the Agency and the audience might be granted with access rights to the teleconference. The identification of the Parties and other speakers was ensured by the fact that the access rights were given through the e-mail addresses confirmed for the purpose of the appeal proceeding, the Parties were invited to communicate the potential speakers on their behalf prior to the hearing and the speakers will be invited to state their names and positions at the beginning of their statements.

23. On 19 July 2019, the Defendant filed its Rejoinder to the Registry of the Board of Appeal.

24. On 22 July 2019, the Registrar notified the Parties that several members of the Board of Appeal were approached by lobbyists who alleged to act on behalf of a Party of the appeal case at hand. He declared that those submissions were not admissible, they were not considered as case documents and would be ignored in the decision-making procedure of the Board of Appeal. On 25 July 2019, in the oral hearing, by request of the Defendant, the Registrar confirmed that those approaches were not attempted on behalf of the Defendant. On 29 July 2019, by the request of Appellant I., the Registrar confirmed that no person alleged that they acted on behalf of Appellant I.

25. On 22 July 2019, the Registrar, upon the decision of the Chairman of the Board of Appeal, notified the Parties that the date of closure of the written procedure will be 24 July 2019.

26. On 24 July 2019, the Board of Appeal replied to further procedural requests of Appellant II. made on 17 July 2019. In its reply, concerning the date of the closure of the written procedure, the Board of Appeal referred to Article 16(4) of the Rules of Procedure and that the notification of the closure was compliant with the rules. Further, the Board of Appeal refused that the confidentiality claim of Appellant II.

was not decided and, for the sake of clarity, ordered the decision granting the confidential treatment of the claimed documents be re-sent.

27. On 25 July 2019, by the request of Appellant II., upon the summons sent on 12 July 2019, the Board of Appeal held a public oral hearing, via teleconference in presence of audience, in compliance with Article 17(7) of the Rules of Procedure. Appellant I. notified the Board of Appeal prior to the hearing that it did not intend to make an oral statement. At the hearing the Parties were granted with an equal overall timeframe of 90 minutes for their statements, in compliance with the request of Appellant II.

28. On 29 July 2019, the Parties were served with the draft summary minutes of the hearing. On 5 August 2019, after considering the requests of the Parties concerning the content of the draft minutes, the Parties were served with the finalized summary minutes.

Main arguments of the Parties

29. The Appellants and Interveners argue, individually or collectively, that the Agency: (i) was not competent to adopt the Contested Decision, at all or with the content included therein; (ii) adopted a decision which is not intelligible and is non-executable; (iii) adopted the Contested Decision without the required favourable opinion of the Board of Regulators, considering illegalities during the latter's voting procedure in this case; (iv) violated procedural rules and fundamental procedural guarantees when adopting the Contested Decision; and (v) adopted a decision which is insufficiently reasoned and is vitiated by manifest errors of assessment, infringing several provisions of EU Law and fundamental rights. With regard to above, HEA requests that the Contested Decision be annulled. It also requests that the Board of Appeal order the Agency to establish and publish rules of procedure for cases where the Agency is carrying out a contentious procedure in accordance with Article 8(1) of Regulation (EC) 713/2009. FGSZ requests that (i) the Contested Decision be annulled due to a lack of competence of ACER; (ii) alternatively, that the Board of Appeal annul Article 2(4) of the Contested Decision insofar as it obliges FGSZ in

case of a positive outcome of the economic test for the HUAT project to implement the HUAT project, submit a project implementation and report on the HUAT project and to remit the remainder of the case to the competent body of ACER; and (iii) further in the alternative, to remit the entire case to the competent body of ACER.

30. The Defendant contests all claims and arguments, claiming that the Appellants' arguments and pleas are based on an erroneous interpretation of the relevant legal rules and the relevant regulatory framework and on an erroneous interpretation of the law. As such, they are unfounded and the appeal should be dismissed in its entirety.

II. Admissibility

Admissibility of the appeals

Ratione temporis

31. Article 19(2) of Regulation (EC) 713/2009 provides that "[t]*he appeal, together with the statement of grounds, shall be filed in writing at the Agency within two months of the day of notification of the decision to the person concerned, or, in the absence thereof, within two months of the day on which the Agency published its decision."*

32. The Contested Decision was communicated to the addressees of the decision on 9 April 2019. The appeals were received by the registry of the Board of Appeal on 6 June 2019 and 7 June 2019, respectively.

33. Therefore, the appeals are admissible *ratione temporis*.

Ratione materiae

a) Annulment of the Contested Decision

34. Article 19(1) of Regulation (EC) 713/2009 states that decisions referred to in Article 7, 8 and 9 of this Regulation may be appealed before the Board of Appeal.

35. The Contested Decision was issued, among others, on the basis of Articles 7(7) and 8 of Regulation (EC) 713/2009, which are explicitly mentioned in its introductory part.

36. As concerns the requests for annulment of the Contested Decision submitted by both Appellants, therefore, since the appeals fulfil the criterion of Article 19(1) of Regulation (EC) 713/2009, the appeals are admissible *ratione materiae*.

b) Ordering the Agency to establish rules of procedure

37. HEA's appeal, supported by the Polish NRA (´ERO´) and Slovak NRA (´RONI´), also includes a request that the Board of Appeal order the Agency to establish and publish rules of procedure for cases when the Agency is carrying out a contentious procedure in accordance with Art. 8(1) of Regulation (EC) 713/2009. Such a request is separate from an appeal of a specific decision adopted by the Agency, under Article 19(1) of Regulation (EC) 713/2009. It is a request which implies that the Board of Appeal order the Agency to adopt a general and abstract act, with legal effects for any future situation. Even if the Board of Appeal were to annul the Contested Decision, the adoption of such an act would not be required as a remedy for this specific situation.

38. Furthermore, it is clear from the terms of the appeal that what HEA wishes is for the Board of Appeal to force the Agency to adopt abstract and general rules applicable to any and all future similar instances. Regulation (EC) 713/2009 does not provide HEA with legitimacy to make such a request. Article 19(1) only empowers NRAs to "appeal against a decision referred to in Articles 7, 8 or 9". There is no right to appeal against an omission by the Agency to adopt general rules and procedures on a given topic. The absence of such a right to appeal cannot be circumvented by including a request of this nature in an appeal against a specific decision.

39. It must also be noted that, under Article 19(1) of Regulation (EC) 713/2009, the Board of Appeal is only empowered to decide on appeals from decisions adopted by the Agency, and it is in this context that Article 19(4) of Regulation (EC) 713/2009 grants the Board of Appeal the right to *"exercise any power which lies within the competence of the Agency"*, or to *"remit the case to the competent body of the Agency"*. There is no legal basis for the Board of Appeal to order the Agency to adopt a general and abstract act, unless: (a) such an act could be deemed to constitute a decision falling under Article 19(1) of Regulation (EC) 713/2009, and had been subject to an appeal; or (b) the adoption of such a general and abstract act were indispensable as a remedy to ensure compliance with EU Law when readopting a decision annulled by the Board of Appeal, following its remittance to the competent body of the Agency. As a more general observation, it should be stressed that it is not for the Board of Appeal to substitute itself to the Agency in deciding whether or not to adopt acts which are not subject to its review.

40. It should also be stressed that the Agency´s governance issues, including the need for Rules of Procedure, are decided upon by its Administrative Board, composed of a Chairman, Vice-Chairman and members of the European Commission, the European Parliament and the Council of the European Union, and that there are already three sets of Rules of Procedure within ACER, which governing the functioning of its bodies.

41. In light of the above, HEA's request that the Board of Appeal order the Agency to establish and publish rules of procedure for cases when the Agency is carrying out a contentious procedure in accordance with Art. 8(1) of Regulation (EC) 713/2009 must be deemed inadmissible.

c) Review by the Board of Appeal of Board of Regulators preparatory acts

42. The Appellants and the Interveners argue that the Agency was not entitled to adopt the Contested Decision because it failed to obtain the necessary favourable opinion

from the Board of Regulators, considering the claim of the unlawfulness of the way in which the Board of Regulators' voting occurred in this case.

43. By and large, this set of arguments by the Appellants is a challenge to the lawfulness and validity of a voting procedure and of a deliberation of the Board of Regulators. However, the Board of Appeal is not competent, in general, to assess the lawfulness and validity of a voting procedure, of a deliberation, or of a preparatory act of the Board of Regulators, and it is not competent to assess the validity of the ones in dispute in the present case, in particular.

44. In the context of the present appeal, it is not necessary, nor is it the role of the Board of Appeal, to discuss whether the preparatory acts in question, adopted by the Board of Regulators, could be appealed autonomously before the General Court of the European Union ('GCEU'). In any case, even if such an appeal were admissible, no such appeal occurred in the present case, and the two months deadline for such an appeal, since the preparatory acts in question, has elapsed. In the present proceedings, the Board of Appeal need only determine whether it is competent to assess the validity of a voting procedure, of a deliberation, or of a preparatory act of the Board of Regulators.

45. As a general point of EU Law, the Court has made it clear that, generally, an *"irregularity in the preparatory act may be raised in challenging the final act"*, and that, indeed, preparatory acts are usually only subject to appeal when appealing the final decision they relate to, even when the preparatory act was adopted by a different EU institution from the one which adopted the final decision.[3] However, this case-law assumes that the Court faced with the appeal of the final decision is also competent to assess the validity of the preparatory act. Specifically, this case-law refers to situations where the preparatory act in question relates to *"the conduct of an* [EU] *institution other than the defendant institution"*,[4] e.g. a situation where the

[3] See: Decision of the Board of Appeal of 16 December 2015 in Case A-001-2015 *E-Control*, paras 34-36 (and case-law quoted therein).
[4] Case C-445/00 *Austria v Council* ECLI:EU:C:2003:445, para 33.

Court is called on to assess the validity of an act adopted by the Commission, as a preliminary step to the adoption of an act by the Council. In such cases, the Treaty gives the Court the competence to control the acts of both institutions.

46. Differently, in the present proceedings, the Appellants are asking the Board of Appeal – in the context of an appeal against a decision of the Agency's Director, which it is competent to review – to decide on the validity of a deliberation of the Board of Regulators, which it is not empowered by law to review.

47. It is true that, in some cases, a judicial body may be required to carry out the review of a procedural step incidentally to the review of a final decision. However, a call for such incidental review cannot, in itself, empower a judicial body to review acts of bodies which it is not empowered to review. It cannot be used to infringe the principle of conferral of powers. Thus, for example, a national court would not be empowered to review an act adopted by the European Commission, even in the context of reviewing an administrative act of a Member State to which the Commission's act were an essential preparatory act. In such a situation, were a national court to believe the Commission's act to be invalid, it would have to refer the issue to the CJEU under the procedure of Article 267 TFEU, so that the CJEU could exercise its exclusive competence to assess the validity of acts of EU institutions. The procedure of Article 267 TFEU is not available to the Board of Appeal, as it is not a *"court or tribunal of a Member State"*.

48. Furthermore, the Board of Appeal is a *sui generis* body within the structure of the Agency. It is not only limited by the principle of conferral of powers, but also bound by the need to respect the institutional balance with the other bodies of the Agency. The Board of Appeal does not believe that it was ever the EU legislator's intent for the Board of Appeal to control the voting procedure adopted by the Member States' regulators gathered in the Board of Regulators.

49. As noted above, under Article 19(1) of Regulation (EC) 713/2009, the Board of Appeal's competence is strictly limited to reviewing decisions referred to in Articles

7, 8 or 9 of Regulation (EC) 713/2009. As has been previously stressed by the Board of Appeal: *"The powers of review of the Board of Appeal are narrowly defined by Article 19(1) of the ACER Regulation and confined to appeals against the decisions of the Agency referred to therein"*.[5]

50. When confirming the Board of Appeal's right to reject the appeal against an opinion of ACER issued under Article 7(4) of Regulation (EC) 713/2009, the GCEU noted that such an opinion was *"not a decision for the purpose of Article 19 of Regulation No 713/2009, which may be the subject of an administrative appeal by virtue of that article"*, and thus *"not an act which may be the subject of such an appeal"*. The Court added: *"one of the conditions for the admissibility of an administrative appeal brought pursuant to Article 19(1) of Regulation No 713/2009 is that the measure which is the subject of the appeal is a decision adopted under Articles 7, 8 or 9 of that Regulation"*.[6] The Court has thus confirmed that only the acts which fall within the scope of Article 19(1) of Regulation (EC) 713/2009 can be reviewed by the Board of Appeal.

51. Under this provision, the Board of Appeal is not empowered to revise the lawfulness of deliberations, or any act (preparatory or otherwise), of the Board of Regulators. And no other provision empowers the Board of Appeal to do so. When carrying out its review of a decision listed in Article 19(1) of Regulation (EC) 713/2009, which may only be adopted following a favourable opinion of the Board of Regulators, the Board of Appeal must limit itself to ascertaining the existence of the opinion, but cannot itself ascertain its validity. It may further be noted that this framework is not altered by the new ACER Regulation, specifically Articles 28(1) and 2(d) of Regulation (EU) 2019/942.

52. The fact that the issue of the Board of Appeal's competence to rule on this part of the Applications was not raised by ACER does not prevent the Board of Appeal from raising the matter *ex officio* (as is indeed its duty).[7]

[5] See, e.g.: Decision of the Board of Appeal of 16 December 2015 in Case A-001-2015 *E-Control*, para 20.
[6] Case T-63/16 *E-Control* EU:T:2017:456, para 61.
[7] See, e.g.: Case T-64/98 *Automec* ECLI:EU:T:1990:42, paras 41-42.

53. It follows that, insofar as the Appeals request the Board of Appeal to assess the validity of preparatory acts adopted by the Board of Regulators, they must be deemed inadmissible.

54. The Board of Appeal observes that this conclusion on inadmissibility does not deprive the Appellants of effective judicial review. First, as noted above, it has not been excluded that the Board of Regulators' preparatory acts in question could have been subject to autonomous appeal before the GCEU, namely to safeguard procedural rights of Members of the Board of Regulators. Second, following the present Appeal, the Appellants have the right to appeal the Contested Decision to the GCEU. In the context of that appeal they may raise any and all legal arguments which the GCEU is competent to decide upon, keeping in mind that the GCEU's competence is not delineated in the same narrow scope as that of the Board of Appeal.

55. Even though the Board of Appeal finds this part of HEA´s Appeal inadmissible, this plea must, subsidiarily, be dismissed as unfounded upon its merits, as will be set out below in the Second Plea.

Ratione personae

56. Article 19(1) of Regulation (EC) 713/2009 provides that "*any natural or legal person, including national regulatory authorities, may appeal against a decision referred to in Articles 7, 8 or 9 which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person*."

57. The Appellants are equally addressees of the Contested Decision and, thus, further assessment on their direct and individual concern is not needed.

58. The Appeals are therefore admissible *ratione personae*.

III. Merits

Remedies sought by the Appellants

59. HEA requests the Board of Appeal to annul the Contested Decision.

60. FGSZ requests the Board of Appeal to:
    a) annul the Contested Decision for lack of competence of ACER;
    b) alternatively, to annul Article 2(4) of the Contested Decision insofar as it obliges the Appellant in case of a positive outcome of the economic test for the HUAT project to implement the HUAT project, submit a project implementation and report on the HUAT project and to remit the remainder of the case to the competent body of ACER;
    c) further in the alternative, to remit the entire case to the competent body of ACER.

61. As a preliminary point, the Board of Appeal deems it necessary to highlight that the requests of both Applicants would require some constructive interpretation and/or further measures by the Board of Appeal, were the Applicants' arguments to be deemed successful.

62. Indeed, HEA requests only the annulment of the Agency's decision, but if this were to occur there would be a need for a (new) decision of the Agency on this matter. Thus, the Board of Appeal would either have to decide the matter itself or remit it to ACER's competent body.

63. As for FGSZ's requests, they seem to be ill phrased. It is only if the Contested Decision were annulled, at least in part, that there would be a reason to remit the case to the competent body of ACER. There is no legal basis for the Board of Appeal to remit a case back to the competent body of the Agency if the Agency's decision were valid.

Thus, FGSZ's request (c), mentioned above, cannot be an alternative, as it is subordinate and complimentary to request (a).

First Plea: Competency of ACER

64. The Appellants argue that the Agency was not competent to adopt the Contested Decision.

65. HEA argues that, when adopting the Contested Decision, the Agency was bound by the same obligations and had the same powers as the NRAs in whose stead it was deciding, and thus it was not empowered to amend the TSO's proposed project's costs unilaterally or to require it to proceed with the project. Specifically, it argues that:
    a) the Agency should have assessed the HUAT project in light of the requirements of Directive 2009/73/EC[8] ('Gas Directive') concerning the general objectives of the regulatory authority, specifically Article 40(a) and (d) thereof, and failure to take these provisions into account is a manifest error of assessment and violation of the law;[9]
    b) the NRAs had no power, under Regulation (EU) 2017/459[10] ('CAM NC'), namely Article 28(2) thereof, to amend a project, and could only approve or reject it;[11]
    c) HEA had no power, under Hungarian legislation, to oblige a TSO to execute an investment, considering that Hungarian law requires TSOs to bear the investment costs and related risks of an agreed project, which cannot be passed on through the regulated tariff;[12]

[8] Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC ('Gas Directive').
[9] See paras 12-14 of Appellant I.'s Appeal.
[10] Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 (´CAM NC´).
[11] See para 12 of Appellant I.'s Appeal.
[12] See para 12 of Appellant I.'s Appeal.

66. HEA later clarified its position as meaning that the Contested Decision *"indirectly (on a one step away condition) requires the construction by ordering the auction and market tests to be carried out"*.[13]

67. FGSZ, in what concerns the Agency's lack of competence to adopt the Contested Decision, argued that, although the Contested Decision claims it only defines the parameters of the economic test to determine the viability of the HUAT project, *"effectively, Article 1 of the Contested Decision orders FGSZ to carry out a binding phase for marketing of incremental capacity as specified in the general investment rules and conditions of Article 2 of the Decision and to carry out the economic test set forth in Article 3 of the decision"*, meaning that the Agency imposed an obligation on FGSZ to execute the investment in case of a successful auction (a conditional obligation to allocate major assets to this project, implement it and bear its risks).[14] Starting from this observation, FGSZ argues that:

    a) Articles 7(7) and 8(1)(a) of Regulation (EC) 713/2009 do not provide a legal basis for the adoption of the Contested Decision, because the Contested Decision exceeds the decision-making power granted to the Agency by those provisions. According to FGSZ, those provisions only allow for the adoption of decisions relating to the *"terms and conditions for access to and operational security of cross-border infrastructures"*, concerning *"strictly regulatory issues in the narrow sense, notably a procedure and time frame for capacity allocation, shared congestion revenues and charges"*, and do not empower the Agency to adopt a decision *"obliging the construction of new infrastructure"*. FGSZ argues that this interpretation is confirmed by the history of the legislative process and the teleology of these provisions. FGSZ believes the Contested Decision is *ultra vires* to the extent that its Article 2(4) requires FGSZ to implement the HUAT project by 1 October 2024, provided the result of the economic test under Article 22(3) CAM NC and Article 3 of the Contested Decision are positive.[15]

[13] See para 3 of Appellant I.'s Reply.
[14] See paras 99-100 of FGSZ's Appeal.
[15] See paras 41 and 45-59 and 94-95 of FGSZ's Appeal.

b) Article 28(2) CAM NC does not empower the Agency to adopt the Contested Decision, when the NRAs have been unable to reach an agreement, because neither it nor any provision in Chapter V of this Regulation contains a specific provision granting the Agency that power. Article 28(2) only grants the Agency powers relating to an alternative allocation method, which is not at stake in the Contested Decision;[16]

c) Article 33 of Regulation (EU) 2017/460 ('TAR NC')[17] sets forth the tariff principles for incremental capacity and does not empower the Agency to adopt the Contested Decision, and namely to approve the proposed reference price, to assess the mandatory premium level and find it excessive, and to reject the targeted volume-based supplemental fee for offer level II at Mosonmagyaróvár;[18]

d) No other provision of EU Law empowers the Agency to adopt the Contested Decision. Namely, no legal basis can be found in Regulation (EU) 347/2013 (´TEN-E Regulation´)[19];[20]

e) The Agency cannot be competent to adopt the Contested Decision because this would infringe the general principle that a Member State, and consequently its NRAs and TSOs, cannot be obliged to construct new, potentially loss-making, infrastructure against their will, in violation of Articles 16, 17 and 51 of the Charter of Fundamental Rights (freedom to conduct a business and right to property), without an explicit legal basis in EU Law and without passing the test of proportionality. In the present case, the HUAT project was not included by the Hungarian NRA in the Hungarian Ten-Year Network Development Plan (´TYNDP´) and thus Article 22 of the Gas Directive does not apply. FGSZ believes that it cannot be held that ACER has this power with the argument that there is no EU mechanism

[16] See paras 60-67 of FGSZ's Appeal.

[17] Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas ('TAR NC').

[18] See paras 68-70 of FGSZ's Appeal.

[19] Regulation (EU) 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (´TEN-E Regulation´).

[20] See paras 71-84 of FGSZ's Appeal.

to ensure the building of an infrastructure considered necessary by an EU body, but contested by NRAs, as this implies making an expansive interpretation of EU Law;[21]

f) The Agency is not competent to adopt the Contested Decision, to the extent that it requires FGSZ to implement an infrastructure project, because HEA is not competent to do so, under Hungarian Law, and this restricted competence of the Hungarian NRA is consistent with EU Law. Under Hungarian Law, the NRA cannot amend the financial proposal of the TSO, because the TSO bears the risk of the investment and any overrun costs of the project cannot be socialized. FGSZ argues that the Gas Directive does not envisage NRAs to have such power.[22]

68. FGSZ also argues that the Agency took on the HUAT case prematurely, at a time *"when the dossier was not sufficiently prepared and the NRAs had not conducted the required cooperation and coordination phase under the CAM NC"*, violating the principle of good administration and Article 41 of the EU Charter of Fundamental Rights. It believes the Agency could not have decided on this case without the NRAs having previously cooperated and attempted to reach a common approach, which did not occur in this case. FGSZ sees this as an issue of competence or, alternatively, a violation of procedural requirements.[23]

69. Under Article 7(7) of Regulation (EC) 713/2009:

"The Agency shall decide on the terms and conditions for access to and operational security of electricity and gas infrastructure connecting or that might connect at least two Member States (cross-border infrastructure), in accordance with Article 8".

70. Under Article 8(1) and (2) of Regulation (EC) 713/2009:

"1 – For cross-border infrastructure, the Agency shall decide upon those regulatory issues that fall within the competence of national regulatory authorities, which may include the terms and conditions for access and operational security, only:

[21] See paras 85-89 and 96 of FGSZ's Appeal.
[22] See paras 96-109 of FGSZ's Appeal.
[23] See paras 190-198 of FGSZ's Appeal.

(a) where the competent national regulatory authorities 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 national regulatory authorities.

The competent national regulatory authorities may jointly request that the period referred to in point (a) is extended by a period of up to six months.

When preparing its decision, the Agency shall consult the national regulatory authorities and the transmission system operators concerned and shall be informed of the proposals and observations of all the transmission system operators concerned.

2 – The terms and conditions for access to cross-border infrastructure shall include:

(a) a procedure for capacity allocation;

(b) a time frame for allocation;

(c) shared congestion revenues; and

(d) the levying of charges on the users of the infrastructure referred to in Article 17(1)(d) of Regulation (EC) No 714/2009 or Article 36(1)(d) of Directive 2009/73/EC."

71. The CAM NC Regulation aims, *inter alia*, at ensuring the smooth functioning of the internal gas market, namely by ensuring availability of sufficient network capacity. TSOs play a decisive role in ensuring this objective is met. Since gas must often be transported along one or more Member State(s) before it reaches the consumers of a given Member State, EU internal market Law is concerned with setting up a framework under which TSOs of transit countries provide sufficient capacity in their networks to meet the needs of other Member States, but do not exploit their position of economic strength to the detriment, ultimately, of consumers in other Member States. One of the ways TSOs could exploit their position of economic strength, achieving artificially high tariffs (prices), is through reduction of output, by not investing in additional infrastructure which would (profitably) increase network capacity.

72. At the same time, as is characteristic of economic *ex ante* regulation, the imposition of obligations upon TSOs – including obligations relating to incremental capacity projects – is balanced with the assurance of sufficient remuneration for their services.

73. The HUAT project is an incremental capacity project encompassing Hungary and Austria. Such projects, as defined in Article 3(9) CAM NC, are preceded by an incremental capacity process. This is a *"process to assess the market demand for incremental capacity that includes a non-binding phase, in which network users express and quantify their demand for incremental capacity, and a binding phase, in which binding commitments for contracting capacity are requested from network users by one or more transmission system operators"*.[24]

74. Incremental capacity processes are regulated in Chapter V CAM NC.

75. A crucial step of the incremental capacity process is the economic test, set out in Article 22 CAM NC. According to Article 22(1) CAM NC, the economic test:

    "shall be carried out by the transmission system operator(s) or by the national regulatory authority, as decided by the national regulatory authority (…) and shall consist of the following parameters:

    (a) the present value of binding commitments of network users for contracting capacity, which is calculated as the discounted sum of the following parameters:

    (i) the sum of the respective estimated reference prices and a potential auction premium and a potential mandatory minimum premium multiplied by the amount of contracted incremental capacity;

    (ii) the sum of a potential auction premium and a potential mandatory minimum premium multiplied by the amount of available capacity that was contracted in combination with the incremental capacity;

    (b) 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, as approved by the relevant national regulatory authority in accordance with Article 28(2);

    (c) the f-factor".

[24] Article 3(11) CAM NC.

76. Article 22(2) CAM NC determines when the outcome of the economic test is positive and when it is negative. In function of that result, Article 22(3) CAM NC states:

"An incremental capacity project shall be initiated if the economic test has a positive outcome on both sides of an interconnection point for at least one offer level that includes incremental capacity. In case more than one offer level results in a positive outcome of the economic test, the offer level with the largest amount of capacity that resulted in a positive outcome shall be used for proceeding with the incremental capacity project towards commissioning. In case no offer level results in a positive outcome, the specific incremental capacity process shall be terminated".

77. The f-factor, one of the parameters of the economic test which must be carried out, must be determined by the respective NRA in accordance with what is provided for in Article 23(1) CAM NC:

"When applying the economic test referred to in Article 22, the national regulatory authority shall set the level of the f-factor for a given offer level, taking into account the following:

(a) the amount of technical capacity set aside in accordance with Article 8(8) and (9);

(b) positive externalities of the incremental capacity project on the market or the transmission network, or both;

(c) the duration of binding commitments of network users for contracting capacity compared to the economic life of the asset;

(d) the extent to which the demand for the capacity established in the incremental capacity project can be expected to continue after the end of the time horizon used in the economic test".

78. Whenever the offer of bundled capacity products is at stake, as provided in Article 24(1) CAM NC, *"individual economic test parameters of the involved transmission system operators for a given offer level shall be combined into a single economic test"*. In parallel to Art. 22(1) and (2) CAM NC, Article 24(2) and (3) CAM NC then set out the parameters for the single economic test covering more than one Member State, and how to determine if the outcome of the test is positive or negative.

79. Article 25 CAM NC clarifies that the relevant TSO(s) should submit *"for approval"* of the relevant NRA(s) the information required to set the parameters for the economic test. It is only *"following the approval by the relevant* [NRA]*"* that the requirements relating to the economic test shall be published by the relevant TSO (as set out in Article 28(3) CAM NC).

80. The rules applicable to the determination of the components of the economic test are completed by Article 33 TAR NC, including a mechanism to facilitate achieving a positive economic test outcome, the "mandatory minimum premium". In accordance with Article 33(4) TAR NC, this premium must be submitted to the relevant NRAs for approval, in accordance with Article 25(1)(c) CAM NC.

81. Article 26(1) and (2) CAM NC requires TSOs to periodically assess market demand for incremental capacity projects, and to produce a market demand assessment report identifying *"whether an incremental capacity project is initiated"*.[25] The article further regulates how non-binding demand indications are to be made and received, for the purposes of demand assessment (including, in Article 26(11), the possibility of fees by TSOs for processing such indications, so that they do not have bear costs which are unaccompanied by income).

82. As provided in Article 27(1) CAM NC, *"if the demand assessment report identifies demand for incremental capacity projects"*, *"the design phase"* of the incremental capacity project *"shall start"* the next day. For that purpose, TSOs active at the respective interconnection point *"shall conduct technical studies"* to design the project and coordinated offer levels.[26] The TSOs concerned must submit a draft project proposal to public consultation within 12 weeks, including cost estimates, offer levels for bundled capacity, provisional timelines, etc.[27] In preparing these draft project proposals, TSOs

[25] These assessments can even be undertaken at shorter time-lapses, as provided for in Article 26(5) CAM NC.
[26] Article 27(2) CAM NC.
[27] Article 27(3) CAM NC.

"shall closely cooperate with the involved national regulatory authorities and coordinate across borders in order to enable offers of incremental capacity as bundled products".[28]

83. Once the design phase procedure foreseen in Article 27 is concluded, Article 28(1) CAM NC requires the TSOs in question to *"submit the project proposal for an incremental capacity project to the relevant national regulatory authorities for coordinated approvals"*, and to publish the proposal with specific minimum information, which is enumerated in the clauses of this provision.

84. As provided in Article 28(2) CAM NC, the relevant NRAs have 6 months, following receipt of the project proposal, to *"publish coordinated decisions on the project proposal"*, including justifications. The provision further details the procedure to be followed, requiring NRAs to inform, consider the other's views, and cooperate with each other in this process, taking all reasonable steps to work together and reach a common agreement, and requiring them to consider potential detrimental effects on competition or on the effective functioning of the internal gas market.

85. The final subparagraph of Article 28(2) CAM NC states:

    "Where the relevant national regulatory authorities cannot reach an agreement on the proposed alternative allocation mechanism within the 6 months period referred to in the first subparagraph, the Agency shall decide on the alternative allocation mechanism to be implemented, following the process set out in Article 8(1) of Regulation (EC) No 713/2009".

86. Article 3(3) CAM NC defines an *"alternative allocation mechanism"* as an *"allocation mechanism for offer level or incremental capacity designed on a case-by-case basis by the transmission system operators, and approved by the national regulatory authorities, to accommodate conditional demand requests"*.

[28] Article 27(4) CAM NC.

87. Article 28(3) CAM NC states that, upon the publication of the NRAs' decisions foreseen in Article 28(2) (or, necessarily, of the Agency decision adopted through the procedure of Article 8(1) of Regulation (EC) No 713/2009, which replaces them in the situations foreseen in the final subparagraph of Article 28(2)), the relevant TSOs are required to jointly publish a notice including the same information enumerated in the clauses of Article 28(1) CAM NC, approved by the NRAs (or Agency), plus a contract template related to the capacity offered.

88. The TSOs in question are then required to auction the incremental capacity in accordance with Article 29 CAM NC. Depending on the binding offers obtained in this auction, the economic test previously defined will have a positive or negative outcome.

89. The previously mentioned provisions set out an incremental capacity process divided into several stages:
    (i) TSOs are required to assess demand for incremental capacity through non-binding demand indications.
    (ii) If the market demand assessment report concludes that there is demand for incremental capacity projects, TSOs must design an incremental capacity project, submit it to public consultation and revise it according to feedback received.
    (iii) TSOs must then submit the incremental capacity project for coordinated approval by the relevant NRAs. This proposal includes the details of the economic test to be carried out.
    (iv) The relevant NRAs have six months to arrive at a coordinated decision on the project proposal and, if they fail to reach an agreement, the Agency is called on to adopt the decision on the project proposal, under the procedure set out in Article 8(1) of Regulation (EC) 713/2009.
    (v) If the decision is approved by the NRAs, or by the Agency, the involved TSOs must carry out the auctioning (through binding commitments) of the incremental capacity.

(vi) If the auction arrives at a positive economic test outcome on both sides of an interconnection point, for at least one offer level, the incremental capacity project must be initiated; otherwise, the project is terminated.

90. It is at stage (iv), as described above, that the present dispute takes place. In the present case, the Hungarian and Austrian NRAs did not arrive at a coordinated decision on the project proposal within six months. Indeed, the Austrian NRA approved the project proposal, and HEA rejected the projected proposal. It is not in dispute that the six months deadline elapsed without an agreement having been reached between the NRAs. This is the only requisite for the activation of the competence of the Agency set out in both the final subparagraph of Article 28(2) CAM NC and in Article 8(1) of Regulation (EC) 713/2009.

91. In this regard, FGSZ's argument that the Agency took on the HUAT case prematurely is without merit. FGSZ accurately points out that NRAs are required by Article 28(2) of the CAM NC to cooperate and coordinate their assessment of proposals for incremental capacity projects submitted to them by the TSOs. However, in the present proceedings, it is not for the Board of Appeal to assess whether the NRAs complied with these obligations. The Board of Appeal's jurisdiction, within the context of the present Plea, is limited to determining whether the Agency was empowered to adopt the Contested Decision, with its respective content and timing.

92. As noted above, the Agency acted in a timely fashion, only after the six months deadline for the publication, by the Hungarian and the Austrian NRAs, of coordinated decisions on the project proposal. Regardless of whether the NRAs sufficiently implemented their obligation to collaborate and regardless of the reasons which led to this result, at the end of the six months deadline the Austrian and Hungarian NRAs had arrived at differing conclusions and published contradictory decisions on the project proposal. It was this failure to reach an agreement within the CAM NC's deadline that empowered, and indeed required, the Agency to act.

93. To find that, in such situations, the Agency would only be empowered to act after the NRAs had duly cooperated with each other would be to deprive this safeguard mechanism of its *effet utile*. Following the set deadline, the Agency's competence to act in such circumstances cannot be dependent on the actions of the NRAs, because this mechanism of intervention by the Agency exists, to a large extent, precisely to protect the effectiveness of the EU's rules on the internal gas market when one or more NRAs do not act in the manner required to ensure that effectiveness.

94. The Board of Appeal further notes that FGSZ's position, reinforced at the oral hearing,[29] according to which, if NRAs were unable to agree on the project, the Agency should have referred the case back to the NRAs to continue discussing it, unless and until they reached agreement, explicitly deprives of effectiveness and of any meaning the rules setting a deadline for agreement between the NRAs, and instructing the Agency to step in and to decide within a deadline. Additionally, if there had been an obligation on the Agency to foster further collaboration between the NRAs, *quod non*, this would have been practically impossible given that the disagreement between NRAs only became formal on 5 October 2018, i.e. four days before the six months deadline requiring the Agency to act.

95. This can also not be seen as an infringement of essential procedural requirements, because cooperation between the NRAs is required prior to the Agency being empowered to act, in this case, by adopting the Contested Decision. It is an obligation which rests upon the NRAs and applies only during the procedure carried out by the NRAs. Once NRAs have been unable to arrive at a joint decision, hypothetically because they did not cooperate with each other, the Agency is empowered to act and cooperation between the NRAs is not a part of the procedure before the Agency. At that stage, cooperation between the Agency and the NRAs is required, but this did indeed take place, and FGSZ has not argued that it did not.

[29] See p. 4 of the Summary minutes of the oral hearing of 25 July 2019 ("ACER had to simply refer back the case to the member states").

96. As for the argument that the *"dossier was not sufficiently prepared"*, suffice it to say that FGSZ did not specify what it meant by this claim, and it is not apparent from its Appeal in what way it is claiming that the "dossier" lacked elements that allowed the Agency to carry out its functions. Para 24 of the Contested Decision expressly states that the project proposal was found to be complete, with only some remarks, and at the handover meeting of 14 November 2018 both NRAs agreed on the project proposal completeness and fulfilment of the formal requirements set out by the CAM NC.[30]

97. In any case, the Agency could, and did, conduct meetings of its own, invited the TSOs, NRAs and interested third parties to submit comments, and carried out its own analysis and research, in full compliance with the principle of good administration. All of these steps by the Agency would have been capable of overcoming the hypothetical gaps which the "dossier" could have had originally. And indeed, FGSZ itself was in the position to provide the Agency with any and all information it deemed useful for the Agency to ponder before arriving at its decision.

98. Appellant II.'s argument that the Agency took on the HUAT case prematurely must, thus, be dismissed as unfounded.

99. Both Appellants have argued that the Contested Decision effectively imposes on FGSZ the obligation to construct the HUAT infrastructure. The Board of Appeal recognizes that the Contested Decision may, indirectly, lead to an obligation for the HUAT infrastructure to be constructed. However, firstly, such an obligation will only be created if the auctioning process described above as stage (v) leads to a positive economic test outcome, which is not yet known and is dependent on factors which are external to the Agency and to the Contested Decision. Secondly, such an obligation would never result from the Contested Decision itself (just like it would not result from the NRAs' coordinated decision on the HUAT project, had it been arrived at), but from the CAM NC, and, specifically, the combined reading of Articles 22(3), 28 and 29 thereof. The argument that the Agency is not competent to impose on FGSZ the construction of the infrastructure

[30] Annex 21 to ACER´s Defence. Handover meeting 14 November 2018, p. 3.

must, thus, be dismissed as unfounded, as this is neither the content, nor the legal effect, of the Contested Decision.

100. The Board of Appeal agrees with FGSZ that the Agency's power to adopt the Contested Decision in the present case does not derive from the final subparagraph of Article 28(2) CAM NC (because it relates exclusively to alternative allocation methods, which is not at stake in the Contested Decision), from Article 33 TAR NC, or from the TEN-E Regulation. In any case, it must be noted that the Agency did not argue that these provisions and Regulations were the legal basis for its adoption of the Contested Decision.

101. Indeed, the Contested Decision states, in its recitals, that it is adopted under Articles 7(7) and 8 of Regulation (EC) 713/2009, and the Agency reaffirmed this legal basis in the present proceedings. The recitals of the Contested Decision also mention Chapter V of the CAM NC (without specifying a specific provision) and Article 33 TAR NC, but not as a legal basis.

102. As for FGSZ's argument that Articles 7(7) and 8 of Regulation (EC) 713/2009 do not provide a legal basis for the adoption of the Contested Decision, the Board of Appeal firstly observes that, in this specific case, the Minutes of meetings in which the NRAs and TSOs took place, quoted by the Agency,[31] cannot be used to show that the Appellants agreed that Article 8 of Regulation (EC) 713/2009 was an adequate legal basis for the adoption of the Contested Decision.

103. Secondly, the Board of Appeal observes that the dispute between FGSZ and the Agency, in this regard, begins with a divergence on whether Articles 7(7) and 8 of Regulation (EC) 713/2009 may be used as a legal basis whenever (as the Agency clearly spells out in its Defence[32]): (i) the decision in question concerns cross-border infrastructure within the EU; (ii) the matter falls within the competence of NRAs (and the successful completion of the cross-border infrastructure in question is dependent on the

[31] See paras 75-76 of ACER's Defence.
[32] See paras 79-81 and 83 of ACER's Defence.

decision of both NRAs); and (iii) the NRAs in question have not been able to reach an agreement within a period of six months or upon a joint request of the competent NRAs.

104. Article 7(7) of Regulation (EC) 713/2009 empowers the Agency to decide on *"terms and conditions for access to* (…) *gas infrastructure connecting or that might connect at least two Member States"*, and to do so in accordance with Article 8. Article 8(1) of Regulation (EC) 713/2009 awards the Agency the power (and duty) to decide *"upon those regulatory issues that fall within the competence of national regulatory authorities"* when NRAs were unable to reach a required agreement within six months from when the case was referred to them. This provision specifically states that these regulatory issues *"may include the terms and conditions for access and operational security"*, which necessarily implies that they may include other matters. It is, thus, unnecessary, for the purposes of the present proceedings, to determine whether the subject matter of the Contested Decision falls within the concept of "conditions for access" to cross-border infrastructure, since it does not have to fall within that concept in order for Article 8 of Regulation (EC) 713/2009 to award the Agency the competence to adopt the Contested Decision. There is no reason to adopt a restrictive interpretation of a provision which was left open by the EU legislator.

105. The Board of Appeal finds that the Agency is competent to adopt a decision on the proposed HUAT project, under Article 8(1) of Regulation (EC) 713/2009, because:

a) the decision in question concerned the HUAT project, which is cross-border infrastructure within the EU;
b) the decision in question fell within the competence of the Austrian and Hungarian NRAs, under Article 28(2) CAM NCM, and they were required to take coordinated decisions; and
c) the Austrian and Hungarian NRAs did not reach an agreement before the expiry of the six months deadline.

106. This conclusion is confirmed by a teleological interpretation of the applicable EU legislation, the goal of which is to ensure the effective functioning of the internal gas

market. If NRAs were able to prevent cross-border infrastructures whose construction is required by EU Law from being constructed, simply by refusing to arrive at a decision, or even by arriving at a decision contrary to EU Law, the internal gas market would be seriously hampered. The applicable legal framework thus arrives at a compromise solution, whereby Member States are first given the chance to jointly decide the terms under which cross-border infrastructures will be developed, within the limits set by EU Law, and, failing agreement between them, the Agency is called on to decide, subject to judicial review. This same problem arises whenever a joint or coordinated decision by at least two NRAs is required, relating to any aspect of cross-border infrastructures, and it calls for the same solution, reason for which a general provision providing for this solution was included in Article 8(1) of Regulation (EC) 713/2009, even if the solution is then repeated or reaffirmed sporadically in some provisions.

107. This conclusion is also confirmed by an overall, systematic interpretation of EU Law on the internal gas market, which repeatedly determines the deadline of six months for joint or coordinated decisions to be arrived at by NRAs. In what concerns this specific dispute, Article 28(2) CAM NC also stipulates the same deadline of six months, which, read in conjunction with Regulation (EC) 713/2009, is the deadline after which the Agency is called on to take a decision with cross-border impact on which NRAs were unable to agree.

108. It should also be noted that the EU legislator has recently reaffirmed and clarified its intention to grant the Agency the competence to act in accordance with the above presented interpretation. Specifically, Article 6(10)(§1)(a) and (§2)(a) of Regulation (EU) 2019/942[33] (the new version of Regulation (EC) 713/2009, repealing the latter) states:

"ACER shall be competent to adopt individual decisions on regulatory issues having effects on cross-border trade or cross-border system security which require a joint decision by at least two regulatory authorities, where such competences have been conferred on the regulatory authorities under one of the following legal acts:

[33] Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators.

(a) a legislative act of the Union adopted under the ordinary legislative procedure; (…) *ACER shall be competent to adopt individual decisions as specified in the first subparagraph in the following situations:*

(a) where the competent regulatory authorities have not been able to reach an agreement within six months of referral of the case to the last of those regulatory authorities (…)*".*

109. It is the Board of Appeal's view that, in what is relevant for the present proceedings, these provisions of the new Regulation (EU) 2019/942 merely reaffirm, in a clearer phrasing, the solution which already derives from the previous ACER Regulation. That being said, it should also be noted that, were the Contested Decision to be annulled on the basis of a lack of competence, its re-adoption would take place under the above quoted provisions of the new ACER Regulation.

110. In light of the above, the Board of Appeal concludes that the Agency was competent to adopt a decision concerning the proposed HUAT project, under Article 8(1) of Regulation (EC) 713/2009, read in conjunction with Article 28(2) CAM NC.

111. The question remains whether the Agency was competent to adopt this specific decision concerning the proposed HUAT project, i.e. a decision with the content which was included in the Contested Decision.

112. In this regard, the Appellants argue, first, that, under the CAM NC, neither the NRAs nor the Agency may amend an incremental capacity project proposal, and can only approve or reject it.

113. The Board of Appeal has already addressed similar arguments before, in Case A-001-2017 (consolidated), para 57 *et seq.*, in Case A-001-2019, paras 53 *et seq.*, and in Case A-003-2019 (consolidated), para 142 *et seq.*. The Board of Appeal hereby reaffirms its previous decisions in this regard.

114. Indeed, as the Board of Appeal held in the above-mentioned cases, the absence of provisions explicitly mentioning the possibility of changing a proposal or requesting an amendment to a proposal submitted by TSOs cannot, of itself, exclude the possibility for such changes or amendments. Article 8(1) of Regulation (EC) 713/2009 neither excludes nor provides for the Agency's power to make changes or amendments to proposals. But the powers granted to the Agency by this provision must be interpreted in light of its purposes. The Agency's powers should be determined taking into account Recital 5 of Regulation (EC) 713/2009 and the fact that it is only called on to decide in such cases in light of a non-conventional situation, created by lack of agreement between the NRAs.

115. If the Agency had no discretion to modify the TSOs' proposal and was compelled to request an amendment, the decision-making process could become inefficient if the NRAs and/or TSOs were not willing to reach an agreement, since the proposals could go back and forth many times, causing significant delays or a stalemate. In the case at hand, it was also not an alternative for the Agency to simply reject the incremental capacity project proposal, because that would entirely frustrate the purpose and goals of Chapter V of the CAM NC. Chapter V of the CAM NC refers repeatedly to the need for approval of the project proposal, and its specific terms, by the NRAs. As Chapter V of the CAM NC is meant to ensure that infrastructures are built when certain requisites are met, and these requisites are subject to regulatory control, it would deprive Chapter V of its *effet utile* if NRAs and the Agency were unable to change the project proposal themselves, but instead needed to ask the TSOs to change it. This would either be a purely formal step, that the TSO would not be able to refuse, in which case it would be superfluous and contrary to the principle of good administration, or the TSO would have the right to refuse to change the terms of the project, and the obligations and goals of Chapter V would not be met.

116. Additionally, as was recalled by the Agency,[34] it has also previously been clarified by the Board of Appeal that the Agency's discretionary power in such circumstances is not unlimited. It is circumscribed by various conditions and criteria which limit the

[34] See para 140 of ACER's Defence.

Agency's discretion, namely (in this case), those set out in Chapter V of the CAM NC and in Article 8(1) of Regulation (EC) 713/2009.

117. The Appellants argue, secondly, that the Agency, when adopting the Contested Decision, was bound by the same obligations and had the same powers as the NRAs in whose stead it was deciding. In this regard, it must, from the outset, be stressed that the Agency's competence to adopt the Contested Decision derives directly and immediately from EU Law, specifically from Article 8(1) of Regulation (EC) 713/2009. The Agency is not exercising a delegated or derived competence (from the NRAs), it is exercising a competence which is its own, granted to it by the EU legislator via the ACER Regulation, when the respective requisites are met.

118. In this light, it must also be clarified that the Agency is not itself bound by the Gas Directive, which is addressed to the Member States. This is not to say that the Agency, as a body of the European Union, is not required to interpret EU Law in a systematic approach, or to observe the principle of sincere cooperation with the Member States, namely when acting on obligations which are also foreseen in Directives directed at Member States. However, in the present case, there is – expectably – no discrepancy between the Gas Directive and the above discussed legal framework deriving from the mentioned EU Regulations on the internal gas market.

119. HEA indicates only two specific provisions of the Gas Directive which it claims that the Contested Decision runs counter to: clauses (a) and (d) of Article 40. Clause (a) requires the promotion of competition, security and environmental sustainability, effective market opening and appropriate conditions for effective and reliable operation of the internal gas market. Clause (d) sets as an objective the promotion of cost-effective approaches to the development of secure, reliable and efficient non-discriminatory systems that are consumer-oriented. The Board of Appeal sees no merit in the argument that the Contested Decision runs counter to these objectives. Moreover, even if the Contested Decision did run counter to these objectives, this would at most be an issue of the lawfulness of the decision's substance, not of the Agency's competence to adopt

it. It should also be noted that HEA failed to mention the objective laid out in clause (c), which is also imposed on NRAs by the Gas Directive and is of particular relevance in the present dispute: *"eliminating restrictions on trade in natural gas between Member States, including developing appropriate cross-border transmission capacities to meet demand and enhancing the integration of national markets which may facilitate natural gas flow across the Community"*.

120. Furthermore, the core of the Appellants' arguments on this point is that, under Hungarian Law, HEA is not competent to require FGSZ to implement an infrastructure project, as the Appellants claim the Agency has done in the Contested Decision.

121. The Board of Appeal begins by reaffirming its previous decision according to which it is not for the Board of Appeal to interpret the Law of the Member States. It is, therefore, not for the Board of Appeal to confirm whether Hungarian Law indeed allows or does not allow the Hungarian NRA to adopt a decision with a content identical to that of the Contested Decision. In any case, such a determination is not required to determine the Agency's competence to adopt the Contested Decision. Furthermore, neither the Agency's Director nor its Board of Appeal should make *ad hoc* exceptions to a harmonised, Union-wide incremental capacity process, in order to adapt to Hungarian Law. Doing so would be discriminatory and contrary to the primacy of EU Law and the goal of creating an internal gas market.

122. The Board of Appeal notes that this argument of the Appellants is predicated on the erroneous premise that the Contested Decision imposes on FGSZ the obligation to build an infrastructure project. It does not. The Contested Decision merely changes some of the parameters of the economic test which must be implemented to determine whether the construction of the new infrastructure is economically viable. The obligation to build that infrastructure derives directly from the CAM NC and is conditional upon the results of the economic test and an auction, which cannot be known beforehand. FGSZ may disagree with the level of remuneration which is set by the Agency, within the economic test, in the exercise of *ex ante* regulation, and it may believe that this level of

remuneration does not sufficiently remunerate costs or risks, but those are arguments of substance about the merits of the Contested Decision. If the level of remuneration were inadequate, the decision would be unlawful, but not because of the Agency's lack of competence to adopt it.

123. The Appellants also argued that the reason why the Hungarian NRA is prevented, under Hungarian Law, from amending the proposal, is that this would result in imposing on the TSO the obligation of bearing the risk of the investment, in the context of a Member State where any overrun costs of the project cannot be socialized. Without having to assess whether this is so under Hungarian Law, in the abstract, suffices to say that this argument is predicated on an erroneous perception of the Contested Decision and of its underlying legal framework. The fundamental idea behind the economic test is that no incremental capacity project should go ahead unless it is viable and there is sufficient demand on the market to justify it and make it profitable (be it with or without a degree of socialization of costs). This is an expression of the necessary respect for undertakings' fundamental rights not to be forced to carry out obligations in the general interest without adequate compensation for the costs incurred. The Contested Decision is, thus, meant to ensure a sufficient degree of remuneration and to avoid the risk of the TSO having to bear overrun costs (namely by setting the f-factor at 1 and by determining the remuneration of capital at a comparatively high level, in accordance with the Hungarian NRA's own assessment). Again, if FGSZ believes that this objective was not met, that disagreement relates to the lawfulness of the decision as to its substance, and would not, in itself, deprive the Agency of the competence to adopt the Contested Decision.

124. FGSZ has also argued that EU Law allows for a solution allegedly adopted in Hungarian Law, under which the TSO may not be obliged to develop an infrastructure if it is not interested in the terms set for the investment. According to this view, the infrastructure would only be built if another undertaking, interested in the terms set for the investment, were to come forward and be chosen in a tender opened by the NRA. It relies, in that regard, on the fact that Article 22(3) CAM NC states simply that an *"incremental capacity project shall be initiated if the economic test has a positive*

outcome", without specifying who shall initiate it. In connection with this argument, FGSZ argues that the Agency is not competent to address the Contested Decision to FGSZ, thereby leading it to develop the infrastructure in question if there is a positive economic test outcome, but that the Agency should, instead, merely declare that the infrastructure should be developed (by someone). This view rests on an erroneous interpretation of the EU legal framework.

125. There can be no effective internal gas market if Member States are free to decide whether or not to build infrastructure which is needed to ensure sufficient (and profitable) supply in other Member States. In order to ensure the proper functioning of the EU internal gas market, the CAM NC requires that infrastructures be built to ensure that gas distribution networks supply enough capacity to meet demand, within the limits of viability and profitability. In order to ensure that this objective is met, it cannot be left up to TSOs to freely determine the parameters of the economic test used to determine the project´s viability, which will allow an auction to identify its demand and profitability. That would result in allowing TSOs to fix whatever degree of remuneration they wished when assessing demand for gas (at their chosen level of remuneration). In other words, it would allow escaping the obligation imposed by EU Law to implement incremental capacity projects, even if there were demand for such projects at reasonable levels of remuneration, by determining an economic test which would only be favourable if demand were willing to pay levels of remuneration significantly above competitive levels.

126. For this reason, the CAM NC, not only sets out mandatory parameters for the economic test, but also requires the specific definition of these parameters to be approved in coordinated decisions by the respective NRAs, in accordance with Article 28(2) CAM NC (see Articles 22(1) and 25). But EU Law (and, in particular, the CAM NC and Regulation (EC) 713/2009) protects the effective functioning of the internal gas market by: limiting the freedom of NRAs in determining the economic test and in setting the other parameters for the assessment of proposed projects; setting a deadline for the NRAs to agree; and awarding competence to the Agency to decide on the proposed project if the NRAs do not agree within the deadline.

127. It would be contrary to the logic and goals of internal gas market rules to create an obligation to assess demand, as a preliminary step to imposing the obligation to develop incremental capacity projects, if an NRA of a transit State were free to set the economic test with characteristics that lead to a high level of remuneration of its national TSOs, paid by the consumers of other Member States. The destination Member State would then have only two options: either agree to the higher degree of remuneration, to the detriment of its consumers, or accept the non-building of the incremental capacity project, restricting output to the detriment of its consumers. Accordingly, NRAs must respect the parameters set out in Article 22(1), and further specified, in what concerns the f-factor, in Article 23(1) CAM NC.As for the argument that the Agency could not address the Contested Decision to FGSZ, it is manifestly without merit. In the present case, acting under Article 8(1) of Regulation (EC) 713/2009, the Agency has taken on the decision that should have been adopted by the relevant NRAs within the six months deadline, under Article 28(2) CAM NC. The whole incremental capacity process described in Chapter V of the CAM NC, including the submission of the incremental capacity project for approval, is one which takes place between the involved TSOs and the relevant NRAs. The incremental capacity process is necessarily carried out by the existing TSO, and not by a hypothetical, unknown future TSO, who could potentially win a future tender for the building of an infrastructure deemed necessary, but in which the TSO weren't interested. As such, the incremental capacity project must be submitted by the existing TSO to the NRA (Article 28(1) CAM NC) – as indeed the HUAT project was submitted by FGSZ to HEA –, and the NRAs must adopt coordinated decisions on the approval, amended approval, or rejection of the project. These decisions by the NRAs on the project are necessarily addressed to the TSO who submitted it – as indeed HEA's decision relating to the HUAT project was addressed to FGSZ.

128. Furthermore, on the Appellant´s argument that the CAM NC does not allow requiring a TSO to build an infrastructure under financial conditions it is not interested, the Board of Appeal notes that this argument is based on a misconception of the Agency´s role. The Agency merely sets out the parameters of the economic test to determine the viability of

the HUAT project in the Contested Decision, without ordering anyone to construct the infrastructure. If the project is viable under the economic test, its construction will depend on whether there is demand on the market. As for the indirect effects of the decision, which may potentially result from the change of the economic test, the final subparagraph of Article 8(1) of Regulation (EC) 713/2009 specifically requires the Agency, when preparing a decision under this provision, to consult the NRA and the TSOs concerned. If the decision were not meant to create legal obligations to TSOs, there would be no need to refer to the TSOs as concerned parties, nor would they have any procedural rights in the proceedings of Article 8(1) of Regulation (EC) 713/2009. And yet, FGSZ considered itself a concerned party, participated in the proceedings before the Agency as a concerned party, and continues to invoke procedural rights in the present appeal.

129. Additionally, the Appellant´s argument that the CAM NC does not allow requiring a TSO to build an infrastructure under financial conditions it is not interested in is vague and cannot overshadow all the other provisions of Chapter V CAM NC which clearly establish the incremental capacity process as one which takes place between the (existing) TSOs and the NRAs, and clearly imposes a sequence of obligations upon the TSOs, leading up to the (possible) construction of the infrastructure in the case of a positive economic test outcome. Furthermore, FGSZ's position is inherently inimical to the teleology and nature of *ex ante* regulation. FGSZ is a regulated, certified and independent entity whose main task is to operate, maintain and develop a transmission grid under the supervision of the NRAs and ACER, and are members of the European Network of Transmission System Operators for Gas (´ENTSOG´). In return for providing access to the transmission grid, TSOs receive network access tariffs from users. Being a TSO carries with it special obligations, as it also carries special guarantees. The TSO may be required to provide services of public interest, but is ensured adequate remuneration in exchange for those obligations. FGSZ's position would imply that the TSO would have no obligation to meet additional demand, and could simply choose not to carry out an investment deemed necessary by the NRA or Agency, because it wished to obtain a higher remuneration. In this market, it is precisely because competition at the level of infrastructure is generally absent and economies of scale require concentration of supply

that *ex ante* regulation is required. It should be highlighted that FGSZ does not explain what would happen if, in a hypothetical tender for the construction of the infrastructure, no other undertaking (which could have to bear higher costs than those born by the existing TSO, due to entry costs) stepped forward to build the infrastructure.

130. It should also be stressed, in a systematic approach to the EU Law on the internal gas market, which was defended by the Appellants, that Article 13(2) of the Gas Directive requires Member States to ensure that TSOs have the obligation to *"build sufficient cross-border capacity to integrate European transmission infrastructure accommodating all economically reasonable and technically feasible demands for capacity and taking into account security of gas supply"*.

131. FGSZ argued, inclusively at the oral hearing, that its view of EU Law in this regard is supported by Article 22(7) of the Gas Directive.[35] The Board of Appeal found that assessment erroneous. Article 22 of the Gas Directive requires TSOs to submit TYNDPs to the TSOs (including new infrastructure to be built), namely so as to ensure that demand is met. This is an overall plan which is separate from the market assessment and obligations which may derive therefrom, set out in Chapter V of the CAM NC. In any case, Article 22 of the Gas Directive actually reinforces that EU law on the internal gas market requires TSOs to invest in infrastructure to guarantee that demand is met (subject to appropriate remuneration). Article 22(7) sets out safeguard mechanisms for what happens if the TSO could have built an infrastructure foreseen in its own plan, and failed to do so. The NRA can then step in and require that the investment be carried out, by requiring the TSO to do it, organising a tender procedure open to any investors, or obliging the TSO to carry out a capital increase to finance the necessary investments and allow independent investors to participate in the capital. This provision does the exact opposite to what is suggested by FGSZ: it confirms that the priority is ensuring that the infrastructure is built, and two out of three possibilities offered to NRAs in this situation involve imposing on the TSO the obligation to construct the infrastructure (by itself or with injection of outside capital). As for the discretionary margin that this provision

[35] See pp. 4-5 and 7 of the Summary minutes of the oral hearing of 25 July 2019.

leaves to NRAs to choose between these three options, it must be noted that this provision only applies to the specific situation regulated in it, i.e. investments foreseen in the TYNDP, and so it does not apply to the special incremental capacity process foreseen in Chapter V of the CAM NC.

132. In light of all the above, the Appellants' First Plea must be dismissed in its entirety as unfounded.

Second Plea: Requirement of favourable opinion of Board of Regulators and lawfulness of voting procedure

133. As noted above, the Appellants and the Interveners argue that the Agency was not entitled to adopt the Contested Decision because it failed to obtain the necessary favourable opinion from the Board of Regulators, considering the argued unlawfulness of the way in which the Board of Regulators' voting occurred in this case. The Board of Appeal finds that this part of the Appeals is inadmissible. However, as noted in para 55, the Board of Appeal deems it important, in the present case, to point out that, even if this part of the Appeals were admissible, it would have to be dismissed as unfounded.

134. The set of arguments put forward by the Appellants in this regard will herein be grouped into those relating to the argued unlawfulness of the second round of voting by the Board of Regulators, and those relating to the claimed unlawful influencing of Board of Regulators members by the Agency's Director.

2.1. Unlawfulness of second round of voting

135. The Agency's Director initially submitted a draft of the Contested Decision to the 81st meeting of the Board of Regulators, which took place on 20 March 2019. During this meeting, the draft decision was withdrawn from immediate presential voting, by

unanimous decision of the Board of Regulators (including of HEA and of the Austrian NRA), and instead submitted to electronic voting with a 3 working day deadline.[36]

136. The minutes of the Board of Regulators meeting state, in this regard:

"7. [redacted] "

"20. [redacted] "[37].

137. On 26 March 2019, following the first round of electronic voting, Board of Regulators members received an email from the Director of the Agency.[38] This email noted that [redacted]

[36] See para 50(a) to (e) of Appellant I.'s Appeal.
[37] Annex XVI to Appellant I.'s Appeal (emphasis added). See also para 50(f) and (g) of Appellant I.'s Appeal.
[38] See para 50(i) of Appellant I.'s Appeal.

[39]

138. In reply to the Agency's Director's email of 26 March 2019, the Hungarian member of the Board of Regulators, on behalf of HEA, sent an email on 27 March 2019, to the Agency's Director and to all Board of Regulators members, stating that [40]

139. The Agency's Director replied to this email on the same day, in a message also sent to all Board of Regulators members, [41]

140. On the same day, the representative of HEA replied to the Agency's Director, copying all Board of Regulators members,

[39] Annex XX to Appellant I.'s Appeal.
[40] Annex XXI to Appellant I.'s Appeal.
[41] Annex XXI to Appellant I.'s Appeal.

[42]

141. On 27 March 2019, the Chair of the Board of Regulators weighed in on this discussion, in an email to all Board of Regulators members. The Chair expressed the opinion that, pursuant to the Board of Regulators' Rules of Procedure ('RoP'), members should strive to reach a consensus, failing which a decision is put to a vote and required a two thirds majority, failing which the Chair is to use his/her best offices to seek to facilitate agreement. The Chair welcomed the possibility for further discussion to allow members and the Director to address concerns and make it possible for the Agency to adopt the decision within the legal deadline.[43]

142. On the same day, HEA's representative replied to all Board of Regulators members, disagreeing with the Chair's interpretation of the Board of Regulators' RoP and presenting an alternative interpretation for the RoP, reinforcing the conclusion that only one round of voting was permissible.[44]

143. On 28 March 2019, the Chair of the Board of Regulators replied to the last email of HEA's representative, providing further details on her interpretation of the Board of Regulators' RoP, specifically Article 6(4). The Chair argued that the only way to ascertain whether the required majority was reached within the Board of Regulators, so as to activate the Chair's obligation to attempt to facilitate agreement, was to hold a vote, and that such ascertainment was not possible at the stage of an orientation discussion, as claimed by HEA's representative. The Chair also noted that, in its March meeting, the Board of Regulators had simply decided to hold a vote according to a specific procedure, and not to limit the number of votes which could be held in the future. The Chair stressed that the Board of Regulators could decide not to re-discuss an issue, if it so wished. Finally, the Chair also noted she had written to all Board of Regulators members to assess the chances for an agreement between sufficient members to allow the adoption

[42] Annex XXI to Appellant I.'s Appeal.
[43] Annex XXVIII to Appellant I.'s Appeal.
[44] Annex XXVIII to Appellant I.'s Appeal.

of a favourable opinion, and invited members to use the upcoming meeting of the working group in Milan, on April 3rd, to further debate the issue, together with the Agency's Director, in a spirit of good cooperation.[45]

144. On 29 March 2019, HEA's representative sent an email to all Board of Regulators members, replying to the Chair's invitation for debate, providing a comprehensive letter with HEA's arguments against the draft decision.[46]

145. On 1 April 2019, the Chair of the Board of Regulators invited Board of Regulators members to indicate whether they agreed to submit the revised draft to what HEA described as a *"further single-round electronic procedure"* voting, i.e. a second round of voting, using the electronic voting procedure.[47] The Chair's email further described [redacted][48]

146. HEA argues that the submission of this deliberation to the consideration of the Board of Regulators' members, as well as the submission of the draft decision to the first vote and then to the second vote, was irregular, because *"the circulation of the e-mail* [initiating the Board of Regulators' voting] *was not appropriate as the email address of some of the designated BoR members was not included, only the alternates of those regulatory authorities received the submission for BoR opinion"*.[49] However, this is not an issue in the present proceedings. HEA did not actually argue, in its Appeal, that this

[45] Annex XXVIII to Appellant I.'s Appeal.
[46] Annex XXXI to Appellant I.'s Appeal.
[47] See para 50(k) of Appellant I.'s Appeal.
[48] Annex XXII to Appellant I.'s Appeal.
[49] See para 50(g), (k) and (o) of Appellant I.'s Appeal.

flaw is such that it should imply the invalidity of both voting procedures. In fact, HEA necessarily does not believe that this irregularity is an impediment to the validity of the voting, since it noted the first vote had the same irregularity, and yet it argued, and continues to argue, that the first vote was valid and implied the rejection of the Agency's draft decision.

147. On 3 April 2019, three hours prior to the expiry of the voting deadline, HEA's representative informed the Board of Regulators by email that the voting deadline had been set at merely 52 hours, whereas it legally had to be set at a minimum of 72 hours. It also communicated its opinion that ███ .[50]

148. In reply to HEA's email, the Chair of the Board of Regulators extended the deadline to vote to 12:30 PM on 4 April, i.e. more than 72 hours after the issue was put to a vote of Board of Regulators members.[51]

149. On 4 April 2019, following the lapse of the voting deadline, an email was sent on behalf of the Chair of the Board of Regulators to all Board of Regulators members informing them of the result of the vote, which were as follows: 22 agreed to the use of the EP, 3 members were against the use of the EP (███) and one member abstained (███).[52]

150. Also on 4 April 2019, the Agency's Director sent an email to the Chair of the Board of Regulators stating that ███

[50] See para 50(l) and Annex XXIII of Appellant I.'s Appeal.
[51] See para 50(m) and Annex XXV of Appellant I.'s Appeal.
[52] See para 50(n) and Annex XXVI of Appellant I.'s Appeal.

[redacted] Accordingly, the Director submitted to the Board of Regulators a revised draft decision, with a new section added to clarify its scope.[53]

151. On the same day, an email was sent on behalf of the Chair of the Board of Regulators to all Board of Regulators members submitting the revised draft of the Agency's decision to single-round electronic voting procedure by Board of Regulators members.[54]

152. The second electronic voting procedure on the revised draft was launched on 4 April 2019 and allowed the members of the Board of Regulators to cast their vote by 9 April 2019.

153. On 9 April 2019, an email was sent on behalf of the Chair of the Board of Regulators to all Board of Regulators members, informing them of the result of the second vote, which was the following: 20 members in favour, 4 members against ([redacted] [redacted]) and 2 abstentions ([redacted]).[55]

154. In its Appeal, HEA maintains that the vote launched on 21 March 2019 was valid and was concluded with the Decision not receiving a favourable opinion, which HEA argues must be deemed an *"opinion"* of the Board of Regulators which is *"final and binding"*[56], and which *"constituted rights in good faith to the concerned parties (meaning the lack of obligation to go on with the process)"*[57]. HEA adds that, in its opinion, the *"BoR RoP is unambiguous, there shall be only one vote in the same question, if there are no significant changes in the circumstances (Art. 6.4, «the decision shall be put to a vote»)"*.[58] This position is also put forward by FGSZ, which describes the Board of Regulators' procedure in this case as violating the principle of good administration.[59]

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[53] See Annex XXVII of Appellant I.'s Appeal.
[54] See para 50(o) and Annex XXVIII of Appellant I.'s Appeal.
[55] See para 50(p) and Annex XXIX of Appellant I.'s Appeal.
[56] See paras 51 and 53(a) of Appellant I.'s Appeal.
[57] See para 56 of MEKH's Appeal.
[58] See paras 54, 56-57 and 63 of Appellant I.'s Appeal.
[59] See para 200 of FGSZ's Appeal. Position also supported by ERO's Intervention, paras 14-15, and by RONI's Intervention, Section 1.

155. The interpretation underlying these positions would result in preventing the Agency from deciding on a given matter, even when a decision is within its reach. These positions are unfounded on the basis of the rules applicable to Board of Regulators procedure, as well as on the legal obligations resting upon it and its members.

156. Rather, the result was the inability of the Board of Regulators to reach an agreement on this matter.[60] Indeed, under Article 14(3) of Regulation (EC) 713/2009: *"The Board of Regulators shall act by a two-thirds majority of its members present. Each member or alternate shall have one vote"*. In this instance, there was neither a two-thirds majority in favour of approving (although there almost was), nor in favour of rejecting, the Agency's draft decision. HEA's representative himself recognized this.[61] There was, in this instance, no Board of Regulators decision which could be deemed "final and binding".

157. In essence, HEA's position implies that, if the Agency submits a draft proposal to the Board of Regulators for approval, and the Board of Regulators does not reach a two thirds majority either way on the proposal, no matter when this occurs (e.g., even if there is abundant time left before the lapse of the Agency's deadline) or why this occurs (e.g., if it is due to some minor, easily solvable issue), the procedure is brought to an end and no further action can be taken by the Agency's Director or the Board of Regulators on that case. This is, however, a misunderstanding of the nature and rules of this procedure, and of the legal obligations which rest upon the Agency as a whole in procedures such as these, and on the Board of Regulators and on the Director, in particular.[62]

158. HEA recognizes that Regulation (EC) 713/2009 and the Board of Regulators' Rules of Procedure are silent on the issue of what happens in a situation such as this one.[63] But this does not mean that a given solution is not imposed by EU Law, which must be

[60] As noted in ACER Defence, para 279.
[61] Annex XXI to Appellant I.'s Appeal.
[62] See para 283 of ACER's Defence.
[63] See para 52 of Appellant I.'s Appeal.

arrived at by applying the method of interpretation of EU Law as clarified by the case-law of the CJEU, with a strong focus on teleological and systematic interpretation. Indeed, HEA also believes that a given solution is imposed by EU Law, but it believes that the solution should be that the procedure before ACER is immediately deadlocked. According to HEA, only two outcomes are possible at that point: (i) the issue will be decided by the European Commission; or (ii) the Agency adopts a decision to bring the procedure to a close, after which the TSOs in question would reinitiate a cooperation procedure under Article 26(1) CAM NC.[64] In the present proceedings, there is no need for the Board of Appeal to take a position on these options put forward by HEA. It must also be mentioned that, in its Reply, HEA has seemingly contradicted its own position on the possibility of a second vote, by stating: *"In any event if a draft decision is not supported by the legally required majority of the Board of Regulators, it is the duty of the Agency to revise and amend it in order to convince the majority…"*.[65]

159. The absence of a two thirds majority (in favour) would ultimately prevent the Agency from adopting that draft decision, in the absence of a positive opinion by the Board of Regulators, given the wording of Article 17(3) of Regulation (EC) 713/2009. This is why a situation such as the one which occurred in the present case cannot be the end of the procedure. It would mean the Agency would, possibly needlessly, violate its obligation under EU Law to adopt a decision on this matter, within the deadline. Regardless of whatever interpretation is taken as to what would happen, in this case, if the Agency did not adopt a decision within the deadline, it is beyond doubt that the obligation to adopt a decision within the deadline is imposed on the Agency.

160. When he was made aware of the results of the first vote, the Agency as a whole, and its Director in particular, was still under an obligation to adopt a decision on the HUAT project by 9 April 2019. Thus, it was the Director's duty, at that point, to cooperate with the Board of Regulators to find a solution which would allow the issuing of a favourable opinion by the Board of Regulators to some draft decision. Just as, conversely, it was

[64] See para 52 of Appellant I.'s Appeal.
[65] See para 31 of Appellant I.'s Reply.

the duty of the Board of Regulators, collectively, and of its members individually, to cooperate with each other and with the Director to arrive at a favourable opinion to some draft decision.

161. And it was precisely these efforts at cooperation which the Director and the Chair of the Board of Regulators set in motion, as described above, and in accordance with the procedure agreed upon by Board of Regulators members and set out in its RoP. Not only after the failure to reach a two-thirds majority, but, indeed, right from the beginning. The very fact that the first vote was scheduled with a long time gap until the deadline for the adoption of the decision suggests that the Chair, and the Board of Regulators as a whole, wanted to leave a temporal buffer to allow for further discussions, revisions and a new round of voting, if this proved necessary.

162. Once the first vote was completed and the Chair of the Board of Regulators and the Agency's Director set in motion efforts of cooperation, it must be observed that, hypothetically, if the Director received feedback from a sufficient number of Board of Regulators members indicating that there would only be a two thirds majority for a decision which arrived at a different conclusion from the original draft decision, it would be expected of the Director to submit to the Board of Regulators a revised draft decision which would arrive at that different conclusion, so that it could be approved by the Board of Regulators and subsequently be adopted by the Agency.

163. But that is not what happened in this case. In this case, the draft decision narrowly missed the two-thirds favourable majority in the first voting, and the Director was convinced that there had been some misunderstandings as to the purpose and legal effects of the decision, and that relatively minor changes would be enough to allow for a two-thirds majority. And, indeed, the second round of voting proved the Director to be right.

164. HEA, and to a lesser degree FGSZ, also criticize the fact that the Agency's draft decision was not significantly amended between the first and the second rounds of voting.[66]

165. It must be pointed out that, in the present case, changes were carried out to the draft decision. Some other minor changes aside, a new section (1.2) was introduced, entitled "Context, scope and principles of the Decision", with an extension of 3 pages, including new paras 11 to 18. This section went into significant detail about the issues mentioned in its title. As the Agency noted, *"the operative part of the Contested Decision remained unchanged, as no new proposals* [were] *made"* by the Board of Regulators members, in that respect, which could make it possible to achieve a two-thirds majority in favour of the draft decision.[67] The Agency is accurate in its assertion that the *"fine tuning of the scope of a draft decision is a very crucial aspect in effective and qualitative decision-making, in order to ensure legal certainty"*, contributing to the fulfilment of the duty of due reasoning of the decision and to facilitate judicial review, and thus cannot be considered insignificant.[68]

166. While it is difficult to design a precise litmus test to quantify if changes are "significant", the outcome of this specific procedure substitutes such a test: the changes proved significant enough so that a draft decision which had previously not obtained a two-thirds majority, did obtain a two-thirds majority following the amendments. The Agency's Director was open and transparent about which changes had been introduced and why. Indeed, the changes had been brought about because the usefulness of a clarification of the scope had been raised both during the bilateral exchanges between the Director and the Board of Regulators members and at the meeting of the Gas Working Group of 3 April 2019 in Milan. In his email to the Chair of the Board of Regulators of 4 April 2019, the Director informed about

[66] See paras 50(k) and (o), 53(b), 55 and 63 of Appellant I.'s Appeal; para 31 of Appellant I.'s Reply; and paras 200-201 of FGSZ's Appeal. Position supported by RONI's Intervention, Section 1.
[67] See para 307 of ACER's Defence.
[68] See paras 310-311 of ACER's Defence.

[69]), because it became clear in the discussions with Board of Regulators members, especially with those who had abstained, that these clarifications would be enough to obtain a two-thirds favourable vote.

167. It should also be emphasized that, in its Reply, HEA itself stated that *"the scope of a decision and any so called «fine tuning» thereof are indeed a crucial aspect of decision-making"*. HEA's argument that a change to, in its own words, a "crucial aspect of decision making" should not count as a substantial change, because it does not relate to what it describes as the "merits" of the decision, cannot be upheld.[70]

168. It should also be recalled, as was pointed out by the Agency's Director in his email to the Board of Regulators of 27 March 2019, that there was already at least one precedent for the Board of Regulators voting twice on the same document, even with no amendments. Contrary to what is claimed by HEA[71], the two situations are analogous. The difference of legal basis HEA points to has no bearing on the procedure applicable to voting within the Board of Regulators, which is the same. This precedent shows the Board of Regulators' Rules of Procedure (´RoP´) allow for a second vote. Indeed, it is the Board of Appeal's understanding that the situation which occurred in this case is similar to several others which have occurred in the past before the Board of Regulators.

169. The Board of Appeal founds that the lesson to be derived from these precedents is that, whenever the Agency is required to adopt a document, and to do so must obtain a favourable opinion of the Board of Regulators, cooperation between these two bodies of ACER can lead to discussions and to new rounds of voting, if it is clear that some opinions may be changed and that a two-thirds majority will be possible.

[69] Annex XXVII to Appellant I.´s Appeal.
[70] See para 36 of Appellant I.'s Reply.
[71] See paras 57-58 of Appellant I.'s Appeal.

170. The preceding conclusions are reinforced by the letter and spirit of the Board of Regulators' RoP. As Article 1(1) makes clear, the point of the Board of Regulators is to *"encourage cooperation between the regulatory authorities at regional and Union level"*. Cooperation to achieve the goals of the EU rules on the internal energy market is, thus, the guiding principle of the Board of Regulators' activities. This logically and necessarily extends, not just to the relations between Board of Regulators members, but also to the Board of Regulators' relations with the Agency's Director.

171. The overarching importance of the duty of cooperation within the Board of Regulators is further stressed in the rules regarding voting, which also make it clear that there must be the possibility of a second vote on a revised decision, in order to achieve the goal of allowing the Agency to adopt a decision which it is obliged to adopt. Specifically:

a) *"Members may have an orientation discussion ahead of taking a decision on the draft proposals from the Director on the Agency's acts considered for adoption and may suggest amendments to the Director on his/her draft proposals. Such amendments may be given either orally at the orientation discussion or in writing within one week after the Board of Regulators meeting"*.[72]

b) *"Members should strive to reach consensus in taking decisions. In case consensus is not achieved, the decision shall be put to a vote. The Board of Regulators shall act by a two-thirds majority of Members present or represented. <u>Where the required majority is not reached, the Chair will use his/her best offices to seek to facilitate agreement</u>"*.[73]

172. Article 6(4) of the Board of Regulators' RoP sets up a three-step cascade system, as noted by the Agency:[74] (1) first, the Board of Regulators attempts consensus (ultimate manifestation of the duty of cooperation); (2) failing that, it votes to see if there is a two-thirds majority; (3) failing that, the Chair sets in motion discussions meant to facilitate an agreement.

[72] Article 6(3) of the Board of Regulators' RoP.
[73] Article 6(4) of the Board of Regulators' RoP (emphasis added).
[74] ACER Defence, para 279.

173. This provision explicitly indicates that, if the required two-thirds majority is not reached (as happened in this case), the Chair must use his/her best offices to seek to facilitate agreement. This necessarily implies the possibility of a second vote, otherwise the provision would be deprived of *effet utile*.[75] There would be no point of the Chair using her best offices to facilitate an agreement if no further vote could be taken and, thus, an agreement on the matter were no longer possible. HEA's argument that this could be interpreted as seeking an agreement if it is clear in an initial debate (orientation discussion) that there won't be a two-thirds majority cannot be accepted, because, unlike Article 6(3), this provision clearly sets up the above mentioned cascade system; and also because it is often impossible to know how every member will vote before holding a vote (nor is it clear that the practice of the Board of Regulators makes this a viable option). In the HUAT case, the Chair sought to promote the reaching of sufficient favourable votes, both directly and by inviting the Director to discuss the issue with Board of Regulators members.

174. HEA argues that the Agency *"should have circulated the outcome of the vote (and the detailed information of votes in favour, against or abstention) and proceed accordingly"*.[76] Firstly, it is unclear what HEA means by *"and proceed accordingly"*. Secondly, nowhere in the Board of Regulators' RoP does it say that the results of a Board of Regulators vote have to be communicated with the detailed information of which members voted in which way. While this may be the practice of the Board of Regulators, the communication of only the global results in a given instance can, thus, not be a basis for the invalidity of a voting procedure. This is all the more so because, even if this were a requirement, this would be a mere irregularity of publicity, thus potentially affecting the production of effects of the vote, but not its validity. Thirdly, HEA does not provide a legal basis for its argument that the Agency had this obligation, nor does it explain in what way this claimed irregularity affected – if at all – the procedure.

[75] As argued in ACER Defence, paras 281-282.
[76] See para 52 of Appellant I.'s Appeal.

175. HEA also argues that the Board of Regulators' second vote was invalid because *"it is unlawful to vote about the holding of an electronic procedure electronically, it must be a physical meeting"*.[77] HEA similarly argues that any decision to extend the deadline for electronic voting would have to be made at a physical meeting.[78]

176. This argument must be dismissed as manifestly unfounded. Under the Board of Regulators' RoP, it is up to the Chair to *"decide that a matter is urgent and* [the Chair] *may use the electronic procedure if the Members agree to the use of the electronic procedure in order to seek agreement to a proposal according to the following procedure"*.[79] Article 6(8) provides further details on the electronic voting procedure, but in relation to how it is initiated, that provision merely repeats that it is launched *"*[o]*n a decision of the Chair"*.[80]

177. Nothing in these provisions states or suggests that the decision to use the electronic voting procedure must be made at a physical meeting.[81] Furthermore, such an interpretation would be manifestly contrary to the spirit of the RoP and deprive the possibility of the electronic voting procedure of its *effet utile*. As the Agency has noted, the *"ratio of this provision is to facilitate decision-making"*, allowing for *"flexibility in the decision-making process for urgent matters"*, as was the case of this procedure, where the deadline of 9 April 2019 was imminent for the Agency.[82] Also, much of reason why an electronic voting system is needed is that it is often inconvenient to meet physically. If Board of Regulators members had to meet physically in order to agree to vote electronically, the usefulness of the electronic voting system would be reduced to situations in which it would not be deemed appropriate to vote immediately on the issue at a given meeting. It would not serve for situations in which an urgent decision was needed, but a physical presence with all or sufficient Board of Regulators members would not be possible in a timely fashion.

[77] See para 53 of Appellant I.'s Appeal.
[78] See para 53 of Appellant I.'s Appeal.
[79] Article 6(7) of the Board of Regulators' RoP.
[80] Article 6(8) of the Board of Regulators' RoP.
[81] See para 315 of ACER's Defence.
[82] See para 314 of ACER's Defence.

178. HEA argues still that the second vote infringed Article 6(8) of the Board of Regulators' RoP because: (a) it was initially launched with a deadline under the minimum required period of 3 working days; and (b) the Chair could not unilaterally extend the deadline, without a vote by the Board of Regulators.

179. This argument, too, must be deemed unfounded. Article 6(8) of the Board of Regulators' RoP clearly sets out that the electronic procedure is launched *"on a decision of the Chair"*, *"indicating the deadline for replying (of at least 3 working days)"*. The provision clearly leaves it up to the Chair to indicate the deadline in its communication to the Board of Regulators members launching the electronic voting procedure. The Chair is, however, limited by the minimum deadline set in that provision. In the present case, a lapse by the Chair meant that the deadline was set below the RoP's minimum. When this was pointed out to her, the Chair acted in accordance with her duties and extended the deadline to (slightly beyond) the set minimum. Just as the original competence to determine the deadline rested upon the Chair, the competence to rectify that determination, so as to ensure its compliance with the RoP, must also rest with the Chair. Indeed, it could be argued that the Chair's decision to extend the deadline was superfluous, since the RoP would take precedence and the Chair's decision to set the deadline under 3 working days would be deemed contrary to the RoP, with members being able to invoke the latter and vote until the end of the minimum deadline set in the RoP. There is no basis in the RoP for the idea that the extension of this voting deadline must be taken by a vote of Board of Regulators members, nor did HEA point to any such basis.

180. Although HEA's Appeal never quite articulates this issue clearly as an argument for the unlawfulness of the second vote, for the sake of completeness it seems useful to refer to HEA's claims that the Board of Regulators agreed on submitting the draft decision to a "single round" of electronic voting.[83] The only decision which is manifest in the Board of Regulators' minutes, quoted above, is to submit the draft decision to a "single-round

[83] See, e.g., para 55 of Appellant I.'s Appeal; and para 24 of Appellant I.'s Reply.

electronic voting". This merely means that the electronic voting will not be divided up into two rounds (the first allowing for exchange of input), as foreseen in Article 6(8) of the Board of Regulators' RoP. It cannot be read to mean that the Board of Regulators decided that there would be no further discussions and no further rounds of voting, if this first vote failed to lead to a two-thirds majority. In the emails quoted above, both the Chair and HEA refer also to the second round of voting as a "single-round electronic voting". Finally, it should be noted that HEA's representative stated, surprisingly, in his email of 27 March 2019, that the decision to have a single vote, *"and then it is over"*, was taken by the Agency's Director, the representative of the Austrian NRA and himself.[84] If such a "decision" had been reached (which it has not been determined), it is clear that such a "decision" would not be binding upon the Board of Regulators, nor would it have any impact on the lawfulness of the Board of Regulators' second vote.

181. It cannot be held, as HEA suggests, that repeating a vote following amendments to a draft decision to take into account the result of consultation with Board of Regulators members *"would pre-empt the role of the Board of Regulators and deprive it from its right to deny a favourable opinion"*.[85] Firstly, repeating the vote, in circumstances such as the ones under discussion, is actually an expectable behaviour for the Board of Regulators, considering its obligations under the ACER Regulation. Secondly, HEA itself recognizes, in the very same passage, that such a repetition does not deny the Board of Regulators from its right to deny a favourable opinion, because there is a time limit (*"as long as the time constraints of the procedure ensure it"*). What is more, no matter how many times the Board of Regulators decides to repeat a vote – and it is the Board of Regulators and its Chair that decides how many times it votes, not the Agency's Director –, it is still always the Board of Regulators' prerogative to continue to refuse a favourable opinion. In the present case, a two thirds majority of the Board of Regulators wished to vote again and used the opportunity of that second vote to approve the draft decision.

[84] Annex XXI to Appellant I.'s Appeal.
[85] See para 30 of Appellant I.'s Reply.

182. Additionally, and in what concerns all arguments regarding the unlawfulness of the second vote, it should be stressed that HEA repeatedly presented its point of view to all Board of Regulators members (as is illustrated, e.g., in the email of HEA's representative of 4 April 2019). The Chair of the Board of Regulators considered and discussed these arguments in emails to all Board of Regulators members and rejected HEA's interpretation, as shown in the emails quoted above. Thus, notwithstanding HEA's arguments, the Board of Regulators decided to move ahead with this vote, and a more than two thirds majority of its members wished the second vote to take place and used the opportunity to approve the Agency's draft decision. Only a small minority of Board of Regulators members agreed with HEA's view on the unlawfulness of the Board of Regulators' voting procedure in the HUAT case, as was further demonstrated by the intervention before the Board of Appeal, in the present proceedings, of only two NRAs in support of this plea by HEA.

183. Finally, although not temporally applicable to the facts underlying the present proceedings, the Board of Appeal notes that the final paragraph of Article 24(2) of the new ACER Regulation (Regulation (EU) 2019/942) explicitly mentions the possibility of submitting and amended decision following a failure to obtain a favourable opinion by the Board of Regulators, which implies the holding of a second vote on the amended decision: *"If the Board of Regulators does not give a favourable opinion on the resubmitted text of the draft opinion, recommendation or decision because its comments and amendments were not adequately reflected in the resubmitted text, the Director may revise the text of the draft opinion, recommendation or decision further in accordance with the amendments and comments proposed by the Board of Regulators in order to obtain its favourable opinion, without having to consult the relevant working group again or having to provide additional written reasons"*.

2.2. Unlawful influencing of Board of Regulators members by the Agency's Director

184. HEA argues that it is illegal for the Agency's Director to influence Board of Regulators members in order to alter their voting or to interfere in the adoption of a favourable

opinion by the Board of Regulators,[86] and that it is only for the Chair to seek to facilitate agreement and this power cannot be delegated on the Director.[87] HEA also argues that the Director's exchanges with Board of Regulators members in this case violated the right to good administration, "*because not all the concerned parties (namely the Appellant) knew which BoR members were in favour or against the Decision, or abstained during the first round of vote, thus violating the principle of equality of arms*", which HEA describes as a *"fundamental principle of fair trial guarantee"*.[88] HEA adds: *"This procedure could create the dangerous precedent that if the result of a valid vote* (…) *is not favourable for the Agency, it is possible without considerations to initiate a new vote while lobbying with certain members in a manner that only the Director knows how the votes were cast. This is similar to if a judge would try to influence the members of a jury to gain approval on a preferred judgment. The Agency has lost its impartiality, neutrality and objectivity in the case"*.[89]

185. FGSZ seemingly shares this view. It argues that the draft decision was unlawfully subject to repeated voting *"following a non-transparent process involving influencing select undisclosed members of the Board of Regulators"*, constituting a "misuse" or "abuse" of the process by the Agency's Director and an infringement of the principle of good administration.[90]

186. As a preliminary point, it should be clarified that, as noted above in para 176, the Chair of the Board of Regulators is not under a legal obligation to disclose the results of a Board of Regulators vote with the detailed information of which members voted in which way.

187. The Appellants' positions are unfounded with a view to the nature of the procedure in question, and of the role and obligations of the Agency's Director and of the Board of Regulators. A vote before the Board of Regulators, and the adoption of the HUAT

[86] See paras 50(j) and 59-60 of Appellant I.'s Appeal. Seemingly supported by ERO's Intervention, paras 16-17.
[87] See para 24 of Appellant I.'s Reply.
[88] See paras 61-62 of Appellant I.'s Appeal.
[89] See para 64 of Appellant I.'s Appeal.
[90] See paras 200-201 of FGSZ's Appeal; and para 146 of FGSZ's Reply.

decision by the Agency, is not a "trial", and the principle of equality of arms does not apply thereto in the way HEA claims. In this procedure, the Agency's Director is neither judge nor prosecutor, the Board of Regulators is neither judge nor jury, and the NRAs are not defendants.

188. As discussed above, the Agency has been entrusted and required by EU Law to adopt a decision on a given matter, and to do so within a given deadline. As bodies of the Agency with competences in this regard, it is just as much the Director's as the Board of Regulators' (and its members') obligation to do all in their power to see that this obligation is complied with, i.e. that a decision is adopted within the deadline. The relationship between the Agency's Board of Regulators and its Director, or between the Board of Regulators' members and the Agency's Director, in the context of Board of Regulators meetings, is not an adversarial one, as the Appellants' positions assume, but one based on the fundamental principle and requirement of sincere cooperation.

189. EU Law, in its current state, has struck a balance at the institutional level, in its quest to ensure the effectiveness of the EU's internal energy market. The transfer of sovereignty from the MS to the Agency has been carried out to a degree which is mitigated by the fact that the body which is equivalent to the Board of a regulator can generally not adopt decisions on its own, without the favourable vote of two-thirds of Member States represented in the Board of Regulators. The compromise reached implies that, when voting on matters within the Board of Regulators, its members are bound by, and must act in accordance with, EU Law (or, at least, their interpretation of it). It also implies that these two bodies of the Agency work together in the pursuit of the Agency's goals and in the discharge of its responsibilities, and that the independence of these bodies, as a whole, is guaranteed. As required by EU Law, Board of Regulators members come from bodies which must be independent, and they must act independently as members of the Board of Regulators.

190. In that regard, it should be stressed that Article 14(5) of Regulation (EC) 713/2009 states: *"When carrying out the tasks conferred upon it by this Regulation and without*

prejudice to its members acting on behalf of their respective regulatory authority, the Board of Regulators shall act independently and shall not seek or follow instructions from any government of a Member State, from the Commission, or from another public or private entity".[91] The same duty is imposed on the Agency's Director by Article 16(1) of Regulation (EC) 713/2009. But when the Director's independence is mentioned, this provision clarifies that this is "[w]*ithout prejudice to the respective roles of the Administrative Board and the Board of Regulators in relation to the tasks of the Director"*.

191. The Board of Regulators and its members, on the other hand, cannot seek or accept instructions even from the Agency's Director. This is so even though the Director is, in effect, just another body of the same Agency and pursues no market interests, but simply defends the interests of EU integration and of the effective functioning of the EU internal energy market – precisely the same interests which the Board of Regulators must also defend. However, this is also true for the European Commission, and yet EU Law requires the Board of Regulators to be independent from the Commission.

192. That being said, this could never mean the Board of Regulators and its members cannot discuss a draft project with the Agency's Director. Such an interpretation would make it impossible for the Board of Regulators to carry out its tasks, by eliminating any possibility of cooperation between the Agency's Director (and therefore also its staff, subordinate to the Director) and the Board of Regulators. The very nature and characteristics of the Board of Regulators' voting procedure, which includes the possibility of comments and disagreements being put forward by members and debated (be it following an orientation discussion, be it during the first round of a double-round electronic voting, be it following a failed attempt to reach a two-thirds majority),

[91] See further Recital 18 of Regulation (EC) 713/2009 and recitals of the Board of Regulators' RoP (*"Considering that the independence of sectoral regulatory authorities is not only a key principle of good governance but also a fundamental condition to ensure market confidence". "Considering that, reflecting the situation on a national level, the Board of Regulators shall according to article 14 (5) of the Regulation (EC) No 713/2009* (…) *act independently of market interests and shall not seek or take instructions from any government or other public or private entity or from the Commission". "Considering the importance of guaranteeing the independence of the Agency, its technical and regulatory capacities and its transparency and efficiency, national regulatory authorities within the Agency must act independently in fulfilling their role"*).

requires that the Agency's Director be able (and indeed required) to reply to those comments and contribute to this debate. Otherwise, if, for example, the Board of Regulators had doubts about the implications or meaning of a draft decision subject to a vote, it would not be able to discuss it with the Agency's Director and staff for fear or violating the principle of independence. In support of this interpretation, it may also be observed that the same law which explicitly requires the Board of Regulators to be independent from the European Commission also foresees that the Commission sits on Board of Regulators meetings, without a right to vote, meaning it can take part in discussions without this implying an infringement of the Board of Regulators' independence. Furthermore, the Agency is, as its very name indicates, a platform "for the Cooperation of Energy Regulators". Accordingly, the first goal of the Agency, including of its Director, is to foster cooperation NRAs. It is expectable, therefore, that the Director will, to the extent possible, act as an arbitrator and a promotor of cooperation between NRAs, before acting as a decision maker.

193. In the present case, there was no infringement of the requirement of independence. No proof has been put forward that the Agency's Director instructed or unduly influenced (or tried to instruct or unduly influence) any member of the Board of Regulators.[92] HEA and FGSZ merely make unfounded claims, or claims founded in documents which do not support them,[93] or they argue that the Director made calls and exchanged emails with Board of Regulators members, and that the Director was not allowed to do so, regardless of the content of these contacts. In its Reply, FGSZ went further and accused the Agency's Director and the Chair of the Board of Regulators of using bilateral contacts *"to mislead members of the Board of Regulators"*.[94]

194. The Appellants have provided no evidence of the facts they claim, which in part relate to the disagreement between the Appellants and the Agency concerning the content and legal effects of the Contested Decision. Furthermore, the Appellant's interpretation of the law in this regard cannot be retained. The emails mentioned above show that, after

[92] As noted in para 292 of ACER's Defence.
[93] See para 32 of Appellant I.'s Reply and Annex 1 to Appellant I.'s Reply.
[94] See paras 150 *et seq* of FGSZ's Reply.

the Board of Regulators failed to reach a decision, the Chair invited the Director to discuss with the individual members so as to find a way to achieve a two-thirds majority, and invited Board of Regulators members to engage in proactive discussions to achieve such a majority. The Director acted in accordance with the Chair's invitation and sought to engage with members in discussions which would allow identifying the issues in the draft decision which, if changed, could lead to a two-thirds majority in favour of the draft. This is exactly what the Chair of the Board of Regulators and the Agency's Director are required to do by EU Law.

195. The rules applicable to the Board of Regulators show that there is, by no means, an autonomous functioning of the Board of Regulators, without any role of the Agency's Director (or its staff, subject to its Director). Thus, for example, it is for the Agency to provide the *"secretarial services"* to the Board of Regulators, as provided in Article 14(6) of Regulation (EC) 713/2009. Article 4(2) of Board of Regulators' RoP specifies that the Board of Regulators may decide that the Secretariat be present for certain items on the agenda, and Article 5(3) adds that the Secretariat prepares the minutes and may *"assist the BoR in their functions"*.[95] This highlights the fact that the Agency's staff (including its Director) may be present in Board of Regulators meetings and is fully expected to assist the Board of Regulators in the discharge of its duties, providing any assistance deemed useful, in the spirit of cooperation mentioned above.

196. Furthermore, and for the sake of completeness, in this specific case, even if the principle of equality of arms were to apply, there is clearly no basis for HEA to argue that it was at a disadvantage in the procedure vis-à-vis the Agency's Director (with FGSZ having no right to participate in Board of Regulators deliberations). This disadvantage, HEA claims, would result from not knowing exactly who voted how in the first round of votes, whereas the Agency's Director did. But, firstly, it is by no means clear that HEA was unaware of which members voted how, even without this having been explicitly communicated to it by the Chair of the Board of Regulators. Secondly, HEA did not need to know who voted how to contact and "lobby" all the other members of the Board

[95] See also Article 5(4) of the Board of Regulators' RoP.

of Regulators in favour of its position. Indeed, a diligent defence of its position would necessarily require it to contact and discuss with all other members. HEA's objective would be to get 15 to switch their vote to no, 5 to keep their no vote, 5 to switch from abstention to no, and 2 to participate in the next vote and vote no. Thirdly, HEA could, and indeed did, make its position known, and argued in favour of it, to all other Board of Regulators members, at least in collective emails, as is a matter of record in the present proceedings (see email exchanges mentioned above). In an email of 1 April 2019 to all Board of Regulators members, for example, HEA's representative pointed out that [redacted]

[redacted].[96] These email exchanges also show that HEA had all the contacts and information it needed to contact each member individually, should it choose to do so. HEA also had the chance to discuss in person with other Board of Regulators members and to defend its position in the meeting of the Agency's Gas Working Group, which was held in Milan between the first and the second vote.

197. Finally, it must be stressed that, following the failure to reach a two-thirds majority, the Chair of the Board of Regulators and the Agency's Director conducted themselves in accordance with their duties, and promoted a transparent, open and impartial discussion on the subject, as the emails mentioned above demonstrate. Ample opportunity was provided for discussion between all members and with the Agency's Director. In a spirit of full collaboration and transparency, the Director invited the Vice-Chair of the Agency´s Gas Working Group to put the draft decision on the agenda of the meeting of the Gas Working Group in Milan, on 3 April 2019. The Gas Working Group is composed of representatives of the Agency, of the NRAs and of the European Commission. At this meeting, HEA was given an opportunity to discuss the draft decision face to face with other Board of Regulators members.[97]

[96] See Annex XXIII of Appellant I.'s Appeal.
[97] See paras 294 and 298-300 of ACER's Defence.

198. To conclude, even if this Plea weren't inadmissible, it would have to be dismissed in its entirety as manifestly unfounded.

Third Plea: Violation of the right to good administration

199. FGSZ claims that the Defendant violated its right to good administration[98].

3.1. Premature acceptance of the case

200. The Board of Appeal refers to the First Plea above on the Agency´s competence[99].

3.2. Failure to establish all relevant facts

201. FGSZ claims that the Defendant: (i) should have conducted a Cost-Benefit Analysis (´CBA´), should have requested the NRAs to produce a CBA, or should have analysed the results of the CBA commissioned by FGSZ; (ii) should have taken account of Hungarian law; (iii) should have assessed the detrimental effects of the HUAT project on competition and the internal market and (iv) should have examined the consequences of its Decision on the HUSKAT project.[100]

202. The Board of Appeal refers to (i) the Fifth Plea below setting out in detail that the applicable regulation does not require a CBA prior to the adoption of the Contested Decision; (ii) the First Plea above clarifying that the Agency is not bound by Hungarian law; (iii) the Fifth Plea below explaining how the Contested Decision is in line with Article 28(2) CAM NC and (iv) the Fifth Plea below expounding on the Agency´s analysis of the HUSKAT project.

203. The Board of Appeal refers to: (i) the Fifth Plea below setting out in detail that the applicable regulation does not require a CBA prior to the adoption of the Contested Decision; (ii) the First Plea above clarifying that the Agency is not bound by Hungarian

[98] See paras 187-201.6 of FGSZ´s Appeal.
[99] See paras 190-198 of FGSZ´s Appeal.
[100] See para 199 of FGSZ´s Appeal.

law; (iii) the Fifth Plea below explaining how the Contested Decision is in line with Article 28(2) CAM NC; and (iv) the Fifth Plea below expounding on the Agency´s analysis of the HUSKAT project.

3.3. Gaming the voting procedure

204. The Board of Appeal refers to section (c) of the part on admissibility *ratione materiae* above, and to the Second Plea above, as regards the Board of Regulators´ voting procedure[101].

3.4. Failure to grant timely and complete access to the file

205. FGSZ argues[102] that, upon its request of 10 May 2019 for access to the file following the Contested Decision, it was granted access to the Defendant´s file in various stages: a first batch of documents was made accessible by ACER on 15 May 2019, whilst a second batch of documents was only made accessible by ACER on 29 May 2019.[103]

206. The Board of Appeal observes in this regard that there is no formal deadline for the Defendant to provide access to the file, even though the principle of good administration imposes a duty upon the Defendant to provide access in a reasonable term. The Board of Appeal finds that both the first batch and the second batch of documents were made accessible in a reasonable timeframe of 15 working days following the request for access. The Board of Appeal notes, additionally, that, in the event that this delayed access to the file were to amount to a violation of the Appellant´s right to good administration, or of the Appellant's rights of defence, such procedural flaw would only be capable of invalidating the Board of Appeal´s Decision, partially or totally, if the Appellant had demonstrated that the delayed access to the file had affected its rights of defence. However, the Appellant did not demonstrate this, and the Board of Appeal finds no indication that the Appellant´s rights of defence were affected by the delayed access

[101] See paras 200-201 of FGSZ´s Appeal.
[102] See paras 201.1-201.6 of FGSZ´s Appeal.
[103] A list of the documents is provided in Annex A22 to FGSZ's Appeal.

to the file. Indeed, FGSZ first filed its Appeal and then an Amendment to its Appeal within the two-months deadline, according to Article 25(7) of the Board of Appeal´s Rules of Procedure, and was allowed to provide additional submissions (excluding new pleas), with a formal invitation of the Board of Appeal, e.g. the submission of FGSZ´s reply to ACER´s Defence of 12 July 2019 (having expressly been granted an extension of the deadline for the said submission by the Chairman of the Board of Appeal[104]), or without a formal invitation of the Board of Appeal, in a flexible, non-formalistic approach, e.g. the submission on 25 July 2019 of presentation materials for the oral hearing of the same day, which were duly analysed and taken into account by the Board of Appeal in its decision-making process.

207. To conclude, the Third Plea must be dismissed in its entirety as manifestly unfounded.

Fourth Plea: Intelligibility and executability of Contested Decision

208. HEA and the Interveners argue that the Contested Decision is not intelligible and does not contain enough information to carry out the economic test of the incremental capacity process provided for by the CAM NC, and is thus non-executable. They argue that the Contested Decision is non-executable because it lacks a well-defined methodology, contains undisclosed assumptions and because data are missing.

209. Article 22 CAM NC requires the competent TSOs or NRA (as decided by the NRA) to carry out an economic test 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. The parameters for this economic test are: (a) the present value of binding commitments of network users for contracting capacity, (b) the present value of the estimated increase in the TSO´s allowed or target revenue associated with the incremental capacity included in the respective offer level (as approved by the NRA) and (c) the f-factor.

[104] Annex 1 to FGSZ´s Reply.

210. The Contested Decision specifies the terms and conditions applicable to the economic test of the HUAT project in its Article 3 *"Economic test parameters"*.

211. Before turning to each of the individual arguments, the Board of Appeal observes, as a general remark, that the terms and conditions set out in Article 3 of the Contested Decision are extremely detailed and cannot be said to be vague, unclear or imprecise. The Board of Appeal also reiterates its settled decision-making practice,[105] according to which, in the limited timeframe it is given to decide on the appeal of the Contested Decision, considering the principle of procedural economy, and with regard to the complex economic and technical issues involved, it is not able to, and should not, carry out its own complete assessment of each of the complex issues raised. Instead, it must limit itself to decide whether the Defendant made a manifest error of assessment.

212. Firstly, HEA claims that it ignores which reference/reserve price it has to use to carry out the economic test of the HUAT project.

213. The Board of Appeal finds that the Contested Decision is very clear in this respect. It expressly states, in Article 3(1), that the *"reserve/reference price shall be 0.77 EUR/kWh/h/a in Austria and 631.25 HUF/kWh/h/a in Hungary"*. This is the reference or reserve price that has been used by the Defendant throughout the procedure that led to the Contested Decision, e.g. at the Hearing of 13 February 2019.[106] Furthermore, it coincides with the floating exit tariff indicated in FGSZ´s project proposal to HEA of 3 April 2018.[107] The Contested Decision adds that this reference price is the same as the reference price approved by HEA and applied by FGSZ in the comparable ROHU incremental capacity project.[108] Regarding its floating or fixed nature, the Contested

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[105] Case A-001-2017 (consolidated), para 108; Case A-001-2018, para 52; and Case A-002-2018, para 63.
[106] See pp. 7 and 22-25 of ACER´s slides entitled *"Proposal regarding the Incremental Capacity Project on the Cross-Border Point at Mosonmagyaróvár of the transmission line (HUAT case)"* at the Hearing of ACER with the NRAs and Project Promoters of 13 February 2019 (Annex 17 to ACER´s Defence).
[107] FGSZ´s project proposal to Appellant I. of 3 April 2018, Annex A4 to FGSZ´s Appeal.
[108] Para 94 of the Contested Decision.

Decision is equally clear: *"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. On the Hungarian side, the reference price is described as ´floating´"*.[109]

214. Secondly, HEA argues that the Contested Decision neither reveals the exact level of CAPEX nor a transparent depreciation scheme, thus impeding it from implementing the Contested Decision regarding the Hungarian section of the HUAT project. The Contested Decision should, in its opinion, be completed with an accepted level of CAPEX and a depreciation scheme.

215. The Board of Appeal observes that HEA is able to calculate the accepted level of CAPEX on the basis of the available data on the base CAPEX and the CAPEX contingency margin. HEA is aware that the proposed parameters for the economic test of the TSOs´ original proposal are the starting point of the Contested Decision, and that the Contested Decision expressly highlights when the Defendant deviates from the original proposal. Indeed, at para 39(e) of the Contested Decision, the Defendant summarises the parameters of the TSOs´ original proposal in Table 1: *"Overview of proposed parameters and inputs for the economic test of Article 22 of the CAM NC"*.[110] Having taken account of third-party observations, it then goes on to assess the project proposal in Section 6, by first assessing the legal framework (Section 6.1) and then setting out *"The Agency´s assessment of the project proposal according to the legal framework"* in Section 6.2. In addition, HEA´s rejection decision demonstrates that HEA analysed FGSZ´s original proposal in detail on the CAPEX and depreciation issues.[111]

216. For the Hungarian section of the HUAT project, FGSZ´s original proposal contained a base CAPEX plus a 25% contingency margin - as the Contested Decision clearly sets out in paras 110 and 112 –, which the Contested Decision required be amended to a 10%

[109] Para 88 of the Contested Decision.
[110] Para 39 of the Contested Decision.
[111] Annex A6 to FGSZ´s Appeal. Appellant I.´s rejection decision.

contingency margin in paras 110, 111 and 116 of the Contested Decision. Consequently, HEA is aware that it has to calculate the accepted CAPEX level by applying the contingency margin of 10%, as amended by the Contested Decision, to the base CAPEX of FGSZ´s original proposal. The Board of Appeal observes that FGSZ correctly carries out this calculation in its confidential annex entitled *"FGSZ on HUSKAT and CAPEX/Economic Test related Problems and Unclear Issues"*: *"CAPEX figures calculated according to FGSZ' interpretation are:*

- HUF ██████ for offer level I;
- HUF ██████ for offer level II";[112]

217. Regarding the depreciation scheme, the Board of Appeal observes that the depreciation principles are the same as those used by HEA in its calculation methodology: linearly for the period of paid use of capacity by successful bidders for 15 years, as set out in Article 2(3) of the Contested Decision.

218. Thirdly, HEA claims that it ignores whether the parameters in Article 3.1(c) and (d) and 3.1(2)(ii) of the Contested Decision are cumulative or not.

219. The Board of Appeal observes that the economic test parameters of Article 3.1 of the Contested Decision are unquestionably cumulative. All parameters are enumerated one after the other and a letter from (a) to (i) is assigned to each of them. None of the parameters are separated by the word *"or"*. Consequently, all parameters have to be applied to carry out the economic test in order to determine the viability of the incremental capacity process.

220. Finally, HEA claims that it ignores the calculation methodology that needs to be followed to execute the Contested Decision, in particular as regards the mandatory minimum premium and the minimum capacity level commitments.

[112] Confidential Annex A15 to FGSZ´s Appeal, p. 2.

221. The Board of Appeal observes that the Defendant clearly explained that it relied on the NRAs´ Standard Practices in its Contested Decision. At para 61 of the Contested Decision the Defendant states expressly, as a preliminary remark, prior to its assessment of the project proposal, that *"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."* When dealing with the parameters of the economic test, the Defendant reiterates throughout the Contested Decision that it relies on the NRAs´ calculation methodologies. For example, at para 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 for the current regulatory period in Austria[57] and in Hungary[58], respectively, and as discussed with the Agency by ECA and HEA. 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 T$Os 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 HEA, respectively".*[113]

222. Or at para 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*

[113] Footnote 57 and 58 of the Contested Decision refer respectively to ECA´s methodology (*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/methodenbeschreibungand) and to MEKH´s methodology (*A Magyar Energetikai és Közmü-szabályozási Hivatal mödszertani ütmutatója a fóldgáz rendszerhasználati dIjak évenkénti megállapitásának rendszeréröl a 2017-2020. közötti árszabályozási cikiusban*, http://rnekh.hu/download/a/la/20000/modszertani_utrnutato_foldgaz ii.pdf).

against the merits of other incremental capacity project proposals, the Agency finds that the usual ECA and HEA practices for setting the WACC for a given regulatory period without taking inflation into account for the period shall be applied".

223. At the Hearing of 13 February 2019, the Defendant stressed, in a similar manner, *"its intention to follow as much as possible the NRA´s practice when setting the parameters"*.[114]

224. The Board of Appeal also notes that, upon the Defendant´s request, HEA provided the Defendant, as early as November 2018, with a set of documents relating to the HUAT project, including an Excel file containing HEA´s calculation methodology.[115] HEA has been aware throughout the process leading-up to the Contested Decision that the Defendant used its calculation methodology to calculate the parameters of the economic test (which is logical, given that the Defendant substitutes the NRAs in the incremental capacity process). The Board of Appeal reiterates in this context that, as set out above, the Contested Decision refers to the parameters of the TSO´s original proposal, except where the Defendant expressly stresses that these parameters need to be amended. As expressly set out by the Defendant in its Defence, its amendments only concerned the input values and there was no change in the algorithm/model or in the calculation methodology as designed by HEA[116].

225. The Board of Appeal consequently finds that it is evident that, to execute the Contested Decision, HEA has to apply the parameters of the TSO´s original proposal as input values in its calculation methodology, except where the Contested Decision expressly deviates from these parameters. The Board of Appeal observes that this is illustrated in detail in ACER´s Defence,[117] and that the Defendant additionally sent its calculation file to HEA on 13 June 2019.

[114] Annex 13 to ACER´s Defence. Minutes of the Hearing of 13 February 2019, p. 4.
[115] Annexes 4 and 5 to ACER´s Defence.
[116] See para 163 of ACER´s Defence.
[117] See paras 152-183 of ACER´s Defence.

226. To conclude, the Fourth Plea must be dismissed as unfounded.

Fifth Plea: Reasoning of the Contested Decision, manifest errors of assessment and infringement of EU Law

227. The Appellants and Interveners argue that the Defendant infringed several provisions of EU Law in its approach and failed to consider or wrongly concluded on the assessment of the impact on competition and the internal market, including failing to carry out sufficiently detailed analysis, not preparing a CBA analysis and using a flawed model, and also improperly assessing the parameters related to the present value of the estimated decrease in allowed or target revenue of FGSZ[118].

5.1. Manifest error of assessment relating to Article 40(a) and (d) of the Gas Directive

228. Firstly, HEA asserts that the Agency made a manifest error of assessment because it omitted to take due account of Article 40(a) and (d) of the Gas Directive.

The Board of Appeal wishes to stress that Article 40(a) and (d) of the Gas Directive is directed at NRAs and precisely aims at avoiding that these authorities fend for themselves, omit the European internal market context in which they are operating and fail to collaborate with ACER and the European Commission.

229. Furthermore, HEA does not explain to which extent the Agency failed to create appropriate conditions for an effective and reliable operation of gas networks, taking into account long-term objectives, or failed to contribute, in the most cost-effective way, to the development of secure, reliable, efficient, non-discriminatory and consumer-oriented systems or to promote system adequacy, energy efficiency or the integration of

[118] Paras 13-35 of MEKH´s Appeal; Paras 111-180 of FGSZ´s Appeal.

large- and small-scale production of gas from renewable energy sources and distributed production in both transmission and distribution networks.

230. The Contested Decision sets the economic test to determine the economic viability of an incremental capacity process, i.e. a streamlined and harmonised Union-wide process for the offer of incremental capacity in order to react to possible market demand for such capacity, ensuring that network users demanding capacity assume the corresponding risks associated with their demand and avoiding captive customers from being exposed to the risk of such investments.[119]

5.2. Infringement of Article 28(2) CAM NC

231. Secondly, both Appellants adduce that the Contested Decision is contrary to Article 28(2) CAM NC because the Contested Decision does not take account of the detrimental effects on competition and on the effective functioning of the internal gas market.

232. Article 28(2) of CAM NC reads as follows: *"When preparing the national regulatory authority's decision, each national regulatory authority shall consider the views of the other national regulatory authorities involved. In any case national regulatory authorities shall take into account any detrimental effects on competition or the effective functioning of the internal gas market associated with the incremental capacity projects concerned"*.

233. Before turning to each of the individual reasons that lead the Appellants to consider that the Contested Decision infringes Article 28(2) CAM NC, the Board of Appeal has a preliminary, overall observation with respect to this argument. The Appellants´ arguments seem to misunderstand the analysis that Article 28(2) CAM NC imposes: it does not require that existing infrastructures or projects are protected from competition, but it requires that, in line with EU competition law and the internal gas market, a level playing field is created to ensure effective competition on the internal gas market. In the

[119] Recital 11 CAM NC.

present case, ensuring competition needs to be considered in the context of an incremental capacity process, which is a bottom-up process led by the market whereby regulatory authorities do not approve projects, as opposed to a top-down process steered by regulatory authorities. In other words, Article 28(2) CAM NC requires the Contested Decision to create a level-playing field of proposed incremental projects in order to allow the network users on the market to make binding commitments for incremental capacity.

234. The Board of Appeal finds that the Contested Decision contains, in its Section 6.2.6, paras 137-141, an assessment of the detrimental effects on competition or the effective functioning of the internal gas market under article 28(2) CAM NC, in which the Agency evidences that it carried out a feasible pattern flow analysis under various scenarios and analysed all observations of third parties on the HUAT project following its public notice of 2018,[120] as well as the results of the TSOs´ joint public consultation under Article 27(3) of the CAM NC in 2017. The Board of Appeal notes that FGSZ´s claim that the Defendant´s analysis of the results of the public consultation was biased[121] is unsubstantiated. The Agency took account of all third-party observations, including those by EUSTREAM, RONI and MFGK. With respect to EUSTREAM´s observations, adhered to by the Slovak NRA RONI, that the HUAT project could negatively affect the competing HUSKAT route,[122] the Board of Appeal emphasizes that the Defendant´s role in incremental capacity processes is not to assess the projects upon their technical or economic merits, but to set out an economic test to determine their viability. In case of a positive outcome of the economic test, it will be for the market to choose the economically or technically superior route (as correctly stated by RWE´s observation[123]). The Board of Appeal also notes that the observations by MFGK mirrors the Appellants´ concerns voiced throughout the procedure (pricing and taxation,

[120] Paras 40-49 of the Contested Decision. 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_Mosonmagyar%C3%B3v%C3%A1r_of_.aspx

[121] Para 109 of FGSZ´s reply.

[122] Para 48 of the Contested Decision.

[123] Paras 44 and 49 of the Contested Decision.

increased Hungarian transmission tariffs, etc,)[124] and has, consequently, sufficiently been taken into account.

235. The Board of Appeal proceeds to answer the individual arguments that led the Appellants to consider that the Contested Decision infringes Article 28(2) CAM NC.

236. HEA stresses that the Defendant should have examined the negative effects of its decision on the internal gas market that HEA highlighted in its decision rejecting the HUAT project.[125]

237. When detailing this claim, HEA merely invokes that its rejection decision examined *"the impact of the project on the entire domestic and regional gas infrastructure"*.[126] The Board of Appeal finds, however, that the feasible flow pattern analysis of the Defendant, referred to in para 138 of the Contested Decision, adequately examines the impact of the project on the existing Hungarian and regional gas infrastructure, given that it takes account of potentially competing and potentially complementary projects in a wide variety of plausible scenarios.[127] The details of the examination of all plausible scenarios were clearly set out at the Hearing of ACER with the NRAs and Project Promoters on 13 February 2019.[128]

238. HEA argues that, in line with its rejection decision, the Defendant should have examined FGSZ´s opinion, set out in its 10-year Development Plan.[129]

239. The Board of Appeal observes that the Defendant sufficiently took account of FGSZ´s opinion during the decision-making procedure via its requests for information to FGSZ

[124] Para 45 of the Contested Decision.
[125] MEKH´s resolution 10490/2018 of 5 October 2018, Annex IV to Appellant I.´s Appeal.
[126] See para 19 of MEKH´s Appeal.
[127] See Annex 15 to ACER´s Defence. Internal/Confidential Note to the file No. 2.
[128] Pp.14-18 and 31-35 of ACER´s slides entitled *"Proposal regarding the Incremental Capacity Project on the Cross-Border Point at Mosonmagyaróvár of the transmission line (HUAT case)"* at the Hearing of ACER with the NRAs and Project Promoters of 13 February 2019, see Annex 17 to ACER´s Defence.
[129] See para 19 of Appellant I.´s Appeal and Annex V to Appellant I.´s Appeal.

of 16 and 30 November 2018 and of 7 and 18 January 2019, and at the hearings of 10 December 2018, 17 January 2019 and 13 February 2019, at which FGSZ was heard.

240. HEA also claims that, in line with its rejection decision, the Defendant should have analysed the demand test for the HUSKAT project,[130] carried out a few months after the demand test for HUAT.

241. The Board of Appeal finds that the demand test for HUAT concluded that there was sufficient non-binding interest from network users to initiate an incremental capacity project with respect to the HUAT project.[131] Furthermore, the HUAT project does not impede the implementation of the HUSKAT project and both projects can operate in parallel, even though they are competing projects. This is not contrary to, but in accordance with, the very purpose of Article 28(2) CAM NC, which is precisely to foster competition on the gas market. As mentioned in the preliminary observation above, there is a misconception by the Appellants as to the purpose of Article 28(2) CAM NC: it does not require existing infrastructures or projects to be protected from competition,[132] but it requires the Contested Decision to create a level-playing field for proposed incremental projects, in order to allow network users on the market to make binding commitments for incremental capacity.

242. Finally, HEA also argues that the Defendant should have analysed the study made by the Regional Centre for Energy Research (´REKK´) that was referred to in its rejection decision.[133]

243. The Board of Appeal observes, in this respect, that the Defendant was provided with paper documentation on REKK´s analysis at a very late point of time, namely on 22

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[130] See para 20 of Appellant I.´s Appeal.

[131] Para 5 and footnote 9 of the Contested Decision; https://www.gasconnect.at/fileadmin/Fachabteilungen/ST/DE/MDAR-HU-AT-27Jul2017.pdf

[132] *"FGSZ stated that ACER´s Decision should not interfere with the currently ongoing ROHU and HUSKAT processes, where binding commitments are already placed by the shippers"* – Annex 13 to ACER´s Defence. Minutes of the Meeting of 13 February 2019, p. 8.

[133] See para 21 of Appellant I.´s Appeal.

March 2019, i.e. two days before the first meeting of the Defendant´s Board of Regulators. The Board of Appeal observes that the Defendant´s HUAT case team nevertheless carried out a point-by-point analysis of REKK´s Modelling based assessment of the HUAT and HUSKAT projects.[134]

244. FGSZ does not deny that the Defendant carried out an analysis of the detrimental effects of the HUAT project on competition and the effective functioning of the internal gas market in paras 137-141 of the Contested Decision, but claims that this analysis is merely *"cursory"*.[135]

245. The Board of Appeal observes in this regard that the Defendant´s nodal model analysis and third-party consultation[136] are far from being a "cursory" analysis, as claimed by FGSZ.

246. FGSZ states that the HUAT project has a *"completely different economic backdrop, potential gas flow, political and security considerations"* and that, hence, the analysis carried out for the ROHUAT project is not valid for the HUAT project.[137]

247. The Board of Appeal observes in this regard that the Contested Decision does not rely upon an analysis of the ROHUAT project to extrapolate its results by analogy to the parameters to be used for the HUAT project´s economic test.[138]

248. On one hand, the Contested Decision invokes the ROHUAT project when describing the context of the HUAT project in paras 2 and 3 of its Introduction, which is appropriate given that the HUAT project is a legacy of a more ambitious ROHUAT/BRUA corridor aimed at phased interconnection capacity increases in Bulgaria, Romania, Hungary and

[134] Annex 20 to ACER´s Defence.
[135] See para 137 of FGSZ´s Appeal.
[136] See paras 40-49 of the Contested Decision.
[137] See paras 138 and 139 of FGSZ´s Appeal.
[138] ACER merely refers to the ROHUAT project once, at para 130 of the Contested Decision, when comparing the discount rate used by Appellant I. in projects that are comparable to the HUAT project, namely the ROHU project (8.9%), the HUSKAT project (8.7%) and previously the ROHUAT project (8.69%).

Austria. This more ambitious ROHUAT project was precisely cancelled by the Appellant, FGSZ, in 2017. ROHUAT was subsequently split into two separate projects, namely the ROHU project, as regards the Romanian-Hungarian interconnection, and the HUAT project as regards the Hungarian-Austrian interconnection and subject of the Contested Decision.

249. On the other hand, the Agency took the legacy ROHU project of the original ROHUAT project into account in its decision-making process, together with many other projects which were brought into the equation when analysing the effects of the Contested Decision on competition and the internal gas market, as set out in para 137(b) of the Contested Decision (*"the sequencing of the implementation of various infrastructure projects in Austria, Hungary and in the wider region"*) and para 138 of the Contested Decision (*"it took into consideration potentially complementary and potentially competing projects (...)"*). Indeed, the scenarios of the Defendant´s nodal model analysis do not only take account of HUAT, but also of ROHU, HUSKAT, Nord Stream 2, Turk Stream 2, Trans Adriatic Pipeline (´TAP´) and KRK LNG, as illustrated in Annexes 15 and 17 to ACER´s Defence.[139] The Contested Decision clearly states that the Defendant *"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"*.[140] Similarly, the Defendant´s draft Decision clearly demonstrates that its analysis takes account of competing and complementary projects[141].

[139] Annex 17 to of ACER with the NRAs and Project Promoters of 13 February 2019. See also Annex 15 to ACER´s Defence.

[140] See para 18 of the Contested Decision.

[141] Annex 12 to ACER´s Defence. Confidential Draft Decision, Annex II "Competing and Complementary projects", p. 27: ***Annex II - Competing and complementary projects*** *(105) For other interconnection points which may have a bearing on the HUAT project, the Agency notes that: • For the interconnection point between Hungary and Slovakia (operated on the Hungarian side by Magyar Gáz Tranzit ZRt. and on the Slovakia side by Eustream a.s. – "Eustream"), PCI 6.25.1, the Agency received information from HEA following the Agency's request dated 16 November 2018; • For the interconnection point between Hungary and Ukraine (operated by FGSZ in Hungary and by the Public Joint Stock Company Ukrtransgaz in Ukraine – "Ukrtransgaz"), capacity demand assessment has not been carried out as the interconnection point is out of scope of Article 26 of the CAM NC; • For the interconnection point between Hungary and Croatia (operated by FGSZ in Hungary and Plinacro Ltd. in Croatia – "Plinacro"), PCI 6.5, an assessment is available to the public from Plinacro (published on 27 July 2017); • For the interconnection point between Hungary and Slovenia (to be operated by FGSZ in Hungary and by*

250. Finally, when analysing REKK´s Modelling based assessment of the HUAT and HUSKAT Projects, the Defendant´s HUAT case team took note that a CBA (not public) had already been carried out for the ROHUAT Project of Common Interest Cluster 6.24 (which contains ROHU and HUAT) and that the project promoters claimed that benefits of ROHUAT outweigh its costs. The confidential conclusions of the CBA as submitted by FGSZ and Transgaz (TSO in Romania) read: "[redacted]".[142]

251. Furthermore, FGSZ and HEA claim that the Contested Decision violates Article 28(2) of CAM NC in several respects.

Plinovodi d.o.o. in Slovenia – "Plinovodi"), PCI 6.23, an assessment is available and published by Plinovodi on 22 October 2018. (106) The Agency takes note of the available capacity demand assessments for the above mentioned interconnection points, as well as of the fact that no capacity demand assessment is available for the interconnection point between Hungary and Ukraine on the terms of Article 26 of the CAM NC. (107) FGSZ and Societatea Naţională de Transport Gaze Naturale "TRANSGAZ" S.A. ("Transgaz"), TSO in Romania, carried out a joint procedure known as binding Open Season regarding firm natural gas transmission services on the interconnection point Csanádpalota from Romania to Hungary and from Hungary to Romania. The procedure was opened on 16 October 2017 and ended with the publication of the results on 29 December 2017. (108) On 24 October 2018, Magyar Gáz Tranzit ZRt., Eustream and GCA published the result of the bid submission window II of the HUSKAT alternative allocation procedure. The economic test defined in the Rulebook was found to have a positive result for both Magyar Gáz Tranzit ZRt and Eustream and therefore capacities were allocated as bundled. (109) The Agency takes note of the fact that during hearings held by the Agency, the concerned parties requested the Agency to also consider the broader context of the HUAT project, by taking into view potential future changes in major patterns of gas inflows to the European Union's gas transmission system, such as the possible cessation of gas flows from Ukraine to Slovakia, the impact of Turk Stream project (in particular in Bulgaria, Serbia, and Hungary), the Nord Stream 2 project (in particular flows to Central Europe), the Krk Island LNG terminal project, the development of offshore gas fields in Romania and possible links to other Southern Gas Corridor projects, and others. The Agency has taken these requests in due consideration, in particular by assessing the types and the potential impacts of risks to which such future changes may expose the Austrian and the Hungarian stakeholders. (110) The Agency notes that the parallel running of several procedures for complementary interconnection points, such as, for example, ROHU and HUAT (both part of PCI 6.24), and potentially competing projects, such as, for example, HUAT and HUSKAT (one part of PCI 6.24, the other one PCI 6.25.1), may lead to uncertainties for shippers, project promoters, and NRAs who have to decide on the proposals".

[142] Annex 15 to ACER´s Defence. Internal/Confidential Note to the file No. 2, (7).

(i) Nodal Model Analysis

252. HEA[143] and FGSZ[144] claim that the Defendant should not have used a nodal model analysis.

253. Before turning to each of the arguments of the Appellants, the Board of Appeal underlines that the CAM NC does not prescribe the use of modelling of any kind in order to analyse the detrimental effects on competition or the effective functioning of the internal gas market. CAM NC does not require that a CBA be conducted (see below, (ii)) and, what is more, does not require any alternative modelling analysis. The Defendant therefore conducted its nodal model analysis on a voluntary basis. Additionally, as highlighted at the Hearing of 13 February 2019, *"the Agency reflected on market effects and noted that it would take into account several elements when analysing the potential market effects of the HUAT project, including but not limited to the use of modelling"*.[145]

254. The Board of Appeal observes the Appellants´ erroneous interpretation of the nature of the Defendant´s role in incremental capacity processes governed by CAM NC. The Defendant´s role is not to approve or reject the HUAT project upon its technical or economic merits, but to set the parameters for the economic test. The nodal model analysis has to be placed in this context: the model analyses if the HUAT project could be used under some plausible scenarios; however, whether such use will actually occur depends on market demand for incremental capacity and not on the results of the nodal model analysis.

HEA and FGSZ argue that the nodal model analysis neglects important supply sources (e.g. DE-AT and IT-AT entry capacities and abundant storages in Austria). In addition, REKK´s expert-witnesses stated at the oral hearing that the Defendant´s nodal model is

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[143] See paras 27-31 of Appellant I.´s Appeal.
[144] See paras 142-146 of FGSZ´s Appeal.
[145] Annex 13 to ACER´s Defence. Minutes of the Hearing of 13 February 2019, p. 3.

only based on a limited number of nodes and does not provide a full picture of the flows in the region.[146]

255. First, the Board of Appeal considers that its review is limited to assess whether the Defendant committed a manifest error of assessment and that it does, therefore, not repeat the Defendant´s analysis of complex economic and technical questions, for which the Agency should be granted a certain margin of appreciation of methodological nature.

Second, the Board of Appeal observes that the nodal model treats the core region (i.e. the countries that are most relevant for the HUAT project in terms of competing or complementary infrastructure developments: Austria, Bulgaria, Croatia, Hungary, Romania, Serbia, Slovakia, Slovenia and Ukraine) endogenously, and that it treats the peripheral countries exogenously, meaning import or export flows are not variables.[147] The Board of Appeal finds that, given that the purpose of the nodal model analysis is a high-level assessment of possible network configurations and not to propose, evaluate, select, approve or reject an infrastructure investment, its regional coverage is sufficient to identify whether under some scenarios the HUAT project will be in demand or not. It also notes that the assumptions of the Defendant´s analysis clearly tackle the issue of capacities entering from Germany to Austria and exiting from Austria to Italy, Germany and Slovenia.[148] Furthermore, according to the Internal/Confidential Note to the File No. 2, FGSZ made this comment in the Hearing of 13 February 2019 and the Defendant accordingly tested this comment: the Defendant relaxed the constraint on how much gas is available in Germany to flow to Austria and found that less dummy gas would be required, but that still both HUAT and HUSKAT would be used, indicating that both could play a role in ensuring feasible flow patterns and thus not changing the preliminary conclusion the Agency had arrived at.[149]

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[146] Expert-witness statement by [redacted], 25 July 2019.
[147] Annex 15 to ACER´s Defence. Internal/Confidential Note to the File No. 2, (12).
[148] P.15 of ACER´s slides entitled *"Proposal regarding the Incremental Capacity Project on the Cross-Border Point at Mosonmagyaróvár of the transmission line (HUAT case)"* at the Hearing of ACER with the NRAs and Project Promoters of 13 February 2019. Annex 17 to ACER´s Defence. See also Annex 15 to ACER´s Defence. Internal/Confidential Note to the File No. 2, pp. 9-22.
[149] Annex 15 to ACER´s Defence. Internal/Confidential Note to the File No. 2, (28) and (29).

256. The Board of Appeal also observes that the Defendant´s HUAT case team has clarified that its nodal model analysis considers storage as a supply source of gas.[150]

257. Responding to REKK´s comments, the Board of Appeal reiterates that its review is limited to assess whether the Defendant committed a manifest error of assessment and that it does, therefore, not repeat the Defendant´s analysis of complex economic and technical questions such as the design of the nodal model in respect of the number of nodes to add, the probabilities to allocate and the future availabilities of the capacities, for which the Agency should be granted a certain margin of appreciation of methodological nature.[151]

258. HEA asserts that the results of the nodal model analysis are erroneous when establishing that Austria faces significant security of supply risks, whereas Hungary remains well supplied in case of a disruption in Ukrainian gas transit, and are contrary to security of supply simulations of ENTSOG and the Ukrainian Risk Group. HEA adds that the results of the nodal model analysis contradict the fact that Austria was granted a permanent exemption for bidirectional flows on AT-HU, referring to the fact that they already meet the stringiest security of supply criteria and there is no business interest.

259. The Board of Appeal considers that the Defendant´s nodal model analysis is not an analysis of the security of supply of gas, but a high-level assessment of plausible scenarios of network configurations. It is not aimed at determining the optimal gas transmission system configuration in the region (as opposed to market models, it does not consider e.g. commodity costs, demand elasticity or long-term contracts).

260. HEA argues that the scenarios of the nodal model analysis are not appropriate to decide on the question of whether the observed shipping demand can be delivered on the HUSKAT project, because all scenarios contain HUAT and HUSKAT in parallel.

[150] Annex 20 to ACER´s Defence. Internal HUAT Case Team analysis, sections 1 and 2.
[151] See also para 14 of ACER´s Rejoinder.

261. The Board of Appeal observes, in this regard, that the Defendant´s analysis does not aim at assessing projects upon their technical or economic merits. It is aimed at identifying feasible flow patterns taking account of potentially complementary and potentially competing projects. As stressed several times by the Defendant at the Hearing of 13 February 2019, *“the main purpose of the modelling is to identify if there are plausible situations where HUAT and HUSKAT projects would be used to balance demand and supply in Austria and Hungary and if so, where the issues would be”*.[152]

262. FGSZ claims that the Defendant´s nodal model analysis departs from the analysis used by ENTSOG to perform gas network assessments, but does not explain in which way it departs from ENTSOG assessments, and which consequences these deviations create. FGSZ argues that the Defendant only shared the results of the nodal model analysis at the Hearing of 19 January 2019, and not the actual analysis.

263. Firstly, the Board of Appeal reiterates that its review is constrained to manifest errors of assessment by the Defendant. Secondly, the Board of Appeal observes that the Defendant´s analysis uses publicly available data to feed into an LP solver that is freely available and that is the same as the one used by ENTSOG. The main sources of data are the TYNDP 2017 Report and the ENTSOG Capacity Map 2017 for data concerning the existing and future technical capacity.[153] For the network assessment in the year 2024, the supply numbers for 2024 have been adjusted on the basis of public information and the Aggregate Gas Storage Inventory (AGSI+) transparency platform of Gas Storage Europe.[154]

264. Thirdly, the Board of Appeal also observes that FGSZ was given the opportunity at the Hearing of 17 (not 19) January 2019, not only to comment on the results of the Defendant´s analysis, but also to comment on the methodology itself. As such, the Defendant took account of HEA´s and FGSZ´s comments at the Hearing of 17 January

[152] Annex 13 to ACER´s Defence. Minutes of the Hearing of 13 February 2019, p. 4.
[153] Annex 15 to ACER´s Defence. Internal/Confidential Note to the file No. 2, (16).
[154] Annex 15 to ACER´s Defence. Internal/Confidential Note to the file No. 2, (18).

2019, accordingly refined the scenarios of its analysis, and presented updated calculations at its Hearing of 13 February 2019.[155] The Minutes of the Hearing of 13 February 2019 clearly state that the *"Agency (..) shared the description, topology, scenarios, assumptions and possible interpretation of the results of a nodal model used to identify scenarios of possible gas flows, as a way of illustration"*.[156]

265. FGSZ claims that the nodal model analysis is not fit *"to cover the full range of issues relating to competition and the Internal Market raised by the construction of such a major new infrastructure project and its likely effect on competing current and future infrastructure"*.

266. Firstly, FGSZ does not provide specific reasons why the nodal model analysis is not appropriate to analyse the detrimental effects on competition and the internal market. Secondly, the Board of Appeal reiterates that CAM NC does not require any modelling for the analysis of the detrimental effects on competition and the internal market. The Board of Appeal adds that the Defendant´s analysis duly took account of potentially complementary and potentially competing projects, as well as possible future changes in gas flow patterns.

(ii) Failure to conduct a CBA and to take account of the preliminary result of a CBA commissioned by FGSZ

267. HEA[157] and FGSZ[158] claim that the Defendant should have conducted a CBA or should at least have taken account of the results of REKK´s Study.

268. HEA and FGSZ argue that, despite their specific requests, the Defendant refused to prepare a fully-fledged CBA analysis referring to the limited timeframe of the investigation. They argue that a CBA analysis is always required for Projects of

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[155] Annex 13 to ACER´s Defence. Minutes of the Hearing of 13 February 2019, p. 4.
[156] Annex 13 to ACER´s Defence. Minutes of the Hearing of 13 February 2019, p. 4.
[157] See paras 26 and 32-35 of Appellant I.´s Appeal.
[158] See paras 147-157 of FGSZ´s Appeal.

Common Interest pursuant to the TEN-E Regulation, and that the HUAT project, given the high levels of investment and important effects it brings about, also required a CBA analysis.

269. The Board of Appeal holds that CAM NC does not require that a CBA be conducted for incremental capacity processes, and does not even require any alternative modelling analysis. Incremental capacity processes are to be distinguished from Projects of Common Interest, which require the performance of a CBA according to the TEN-E Regulation. Irrespective of timeframe issues, the main reason for not performing a CBA, invoked by the Defendant in all communications with the Appellants, was that a CBA was not necessary and went beyond the analysis carried out by the Defendant.[159] The Defendant clarified the absence of a regulatory requirement to perform a CBA at the Hearing of 17 January 2019: *"The Agency underlined that the scope of the CBA goes beyond the market effects assessment required by the CAM NC".* The Defendant reiterated that a CBA was not required by the applicable regulation at the Hearing of 13 February 2019: *"The Agency (..) Noted that the CBA assessments go beyond the analysis carried out by the Agency, but the CAM NC does not require them"*.

270. Moreover, in case a CBA would have been required - *quod certissime non* – it would not have been for the Defendant to perform it but for the project promoters, i.e. FGSZ and GCA. The fact that FGSZ did not include a CBA when filing its project proposal to the NRAs shows that it was aware that this was not a regulatory requirement. The fact that HEA did not mention a CBA as a regulatory requirement in its rejection decision similarly demonstrates its awareness that this was not a regulatory requirement.

271. Both HEA and FGSZ argue that the Contested Decision should have taken account of the CBA analysis carried out by REKK, the results of which were sent to the Defendant. HEA adds that the Defendant should have explained in its Contested Decision why the results of REKK´s study were not used.

[159] Annex 13 to ACER´s Defence. Minutes of the Hearing of 13 February 2019, p. 5; Annex A11 to FGSZ´s Appeal. Minutes of the Hearing of 17 January 2019, p.3; Annex 15 to ACER´s Defence. Internal/Confidential Note to the File No. 2, (5); Annex 20 to ACER's Defence. Internal HUAT Case Team Analysis, section 2.

272. Firstly, the Board of Appeal reiterates that, given the absence of a regulatory need for a CBA, the Defendant was under no obligation to analyse REKK´s CBA. Secondly, the Board of Appeal observes that it was only at the Hearing of 13 February 2019 - which is relatively late, given that the Defendant had become competent to decide on the case on 9 October 2018 – that FGSZ shared the main findings of REKK´s CBA orally (i.e. without sharing text of REKK´s CBA). This is illustrated by Annex A18 to FGSZ´s Appeal,[160] and by the minutes of the Hearing of 13 February 2019: *"the CBA was not shared with neither the parties, nor the Agency"*.[161] The Board of Appeal observes that, subsequently, on 22 March 2019, HEA sent a presentation containing REKK´s assessment of the Defendant´s nodal model analysis and the results of REKK´s study.[162] This submission happened at a very late stage (two days before the first meeting of the Board of Regulators on the draft Contested Decision), especially since FGSZ and HEA had been invited on 16 November 2018 to submit all documents relevant to the case,[163] and since third parties such as REKK could have sent their observations on the HUAT project by 18 January 2019.[164] Nevertheless, even though the Defendant was under no obligation to analyse REKK´s submission, which, moreover, was not filed in a timely fashion, the Defendant´s HUAT case team carried out a detailed analysis of REKK´s Modelling based assessment of the HUAT and HUSKAT projects.[165]

273. Having had the benefit of carefully analysing REKK´s CBA Study[166], REKK´s Comments on ACER Defence of 10 July 2019,[167] as well as REKK´s slides/input for the oral hearing[168] and having heard REKK´s expert-witnesses (Mr. Toth and Mr. Kotek) with attention at the said oral hearing, the Board of Appeal fully agrees with REKK that

[160] Annex A18 to FGSZ´s Appeal, Presentation of REKK Results, 13 February 2019.
[161] Annex 13 to ACER´s Defence. Minutes of the Hearing of 13 February 2019, p. 5.
[162] See para 32 of Appellant I.´s Appeal.
[163] Annexes 18 and 19 to ACER´s Defence.
[164] See para 27 of the Contested Decision.
[165] Annex 20 to ACER´s Defence.
[166] Annex 19 to FGSZ´s Appeal.
[167] Annex 2 to FGSZ´s Reply.
[168] Expert-witness statement of [redacted], 25 July 2019.

the Defendant´s analysis is a nodal model and hence not a market model[169]. The Board of Appeal reiterates that a market analysis is not required by the applicable regulation. Additionally, the Board of Appeal observes, within the boundaries of its limited analysis as to whether the Defendant committed a manifest error of assessment, that the four results presented by the expert-witnesses at the oral hearing[170] (i) contradict other sources: in particular the statement that the current market does not support trade from Hungary to Austria contradicts the market demand assessment carried out by the TSOs for the HUAT project under Article 26 of CAM NC, which concluded that there was sufficient non-binding interest from network users in incremental capacity[171]; (ii) are not substantiated by REKK´s CBA itself: in particular the statement that the dominant market player in the regional markets is most likely to book the capacity, as this statement does not derive from any finding and is nowhere identified in REKK´s CBA Study; (iii) irrelevant: in particular the statement that the new interconnector may not bring new sources but only reroute existing flows, given that market demand which will decide whether and how new gas is routed or existing gas is rerouted; and (iv) erroneous: in particular the statement that rerouting of flows can foster market foreclosure, given that the mere fact that gas is rerouted does not foreclose the market; this statement seems to stem from a misconception that existing infrastructure should be prioritized over new infrastructure and that fostering competition on the gas market implies shielding existing projects from new entrants.

274. With respect to REKK´s comments on the Defendant´s nodal model analysis, the Board of Appeal observes, in line with ACER´s rejoinder[172], that the *sui generis* test carried out by the NRAs and the Agency when taking into account the effects on competition and on the effective functioning of the internal gas market under Article 28(2) CAM NC is totally different from the substantive test carried out by the NRAs, the Agency and the European Commission under Article 36 of the Gas Directive.

[169] Expert-witness statement of [redacted], 25 July 2019
[170] Expert-witness statement of [redacted], 25 July 2019
[171] Para 5 of the Contested Decision.
[172] Para 12 of ACER´s Rejoinder.

275. HEA argues that the Defendant did not carefully and impartially examine all relevant aspects of the individual case and refers by analogy to Case T-167/94 *Detlef Nölle*.[173] Irrespective of the fact that this case is not applicable, because it concerns infringement proceedings in an anti-dumping case - i.e. contentious proceedings, unlike the proceedings leading to the Contested Decision -, the Board of Appeal has not been presented with any evidence leading it to consider that the Defendant did not carry out a careful and impartial analysis in order to reach the Contested Decision. HEA adds that the Contested Decision does not provide any reasoning as to why certain evidence, in particular the study of REKK, was rejected and why certain legal provisions, in particular article 28(2) CAM NC, were not applied.[174]

276. The Board of Appeal reiterates in this respect that the Defendant was under no regulatory obligation to carry out a CBA or to analyse REKK´s CBA (even though the Defendant nevertheless carried out an analysis of REKK´s Modelling based assessment of the HUAT and HUSKAT projects[175]) and that the Contested Decision is in accordance with article 28(2) CAM NC.

(iii) Unsubstantiated conclusions

277. FGSZ argues that the conclusion of the Contested Decision in para 139 is generic (it applies to any potential pipeline), unsupported, cannot be fully justified on the basis of the nodal model analysis, and finds no further support in the case file.

278. Para 139 of the Contested Decision reads as follows: *"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*

[173] See para 24 of Appellant I.´s Appeal.
[174] See para 25 of Appellant I.´s Appeal.
[175] Annex 20 to ACER´s Defence.

significantly contribute to market integration and competition on the points of juncture between markets in Southeast and Central Europe".

279. Contrary to FGSZ´s contention, this statement, far from being generic, qualifies the HUAT project as a plausible solution to an identified failure of gas interconnection between Southeast and Central Europe in terms of volumes and capacity if the market decides to implement the project. The Defendant does not state out of the blue that the HUAT project – as would any additional pipeline - enables the supply of additional gas. The starting point of the Defendant´s Decision is an identified lack of interconnection between Southeast and Central Europe, preventing market integration. Furthermore, the nodal model analysis concludes that the HUAT project would add a feasible route in certain contemplated scenarios, to the extent that network users make binding commitments to implement it. The findings of the nodal model analysis are available in the Internal/Confidential Note to the File No. 2.[176] These findings were presented at the Hearing of 13 February 2019 ("Routes Comparison of 2024 scenarios"). The slides containing the results of ACER´s nodal model analysis stated as follows: *"Findings: there could be future scenarios (2, 3) where both HUAT and HUSKAT are useful and there could be future scenarios (1, 4, 5) where neither are useful"*.[177] On the basis of the nodal model analysis´ finding that HUAT would be useful in certain scenarios, the Agency can, therefore, correctly assert in its Contested Decision that the HUAT project could improve the ability of shippers to move gas from Southeast Europe to Central Europe.

(iv) Market position of the dominant firm in the region

280. FGSZ asserts that, in the absence of Black Sea gas, the HUAT project will not foster competition but, on the contrary, reinforce the position of the dominant player in the region, and that the Defendant did not examine this issue. At a later stage, in its Reply, FGSZ added that *"the most likely (and probably) sole company likely to use the pipeline*

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[176] Annex 15 to ACER´s Defence.

[177] See p. 16 of ACER´s slides entitled *"Proposal regarding the Incremental Capacity Project on the Cross-Border Point at Mosonmagyaróvár of the transmission line (HUAT case)"* at the Hearing of ACER with the NRAs and Project Promoters of 13 February 2019. Annex 17 to ACER´s Defence.

is the one with a very high market share in the region".[178] FGSZ justified this statement with a new plea arguing that the Defendant´s nodal modal analysis did not analyse the South Stream pipeline,[179] and attached in annex to its Reply REKK´s Comments of 10 July 2019, which mentioned that this dominant player would be Gazprom,[180] and contains a detailed analysis of the exemption of the Gastrans natural gas pipeline project by the Serbian NRA.[181]

281. Firstly, the Contested Decision states at para 141 that no compelling evidence has been provided supporting, with sufficient certainty, that the HUAT project could create a risk of occurrence of detrimental effects on competition. In line with this statement, the Board of Appeal does not find any evidence in the file which demonstrates that the position of a dominant player would be reinforced by the HUAT project. The Board of Appeal notes that the Defendant did not make any manifest error of assessment given that the data on the South Stream pipeline were not available on the file when the Defendant took its Contested Decision. Even more so, these data were not included in FGSZ´s initial Appeal of 9 June 2019 and Amended Plea of 11 June 2019 and consequently amount to a new plea, which the Board of Appeal needs to dismiss.

282. The Board of Appeal observes, nevertheless, *ad arguendum*, that FGSZ´s Reply and REKK´s Comments[182] merely bluntly state that the HUAT project will benefit a single actor, namely Gazprom, without substantiating this claim. The only piece of supporting evidence presented - i.e. Opinion 1/2019 of the Energy Community Secretariat on the exemption of the Gastrans natural pipeline project from certain requirements under Directive 2009/73/EC by the Energy Agency of the Republic of Serbia[183] - is irrelevant in the present case. In that case - which concerns an exemption of the regulated regime under the Gas Directive, different from an incremental capacity process - the infrastructure´s controlling shareholder was Gazprom.

[178] Para 103 of FGSZ´s Reply.
[179] Para 124 of FGSZ´s rReply.
[180] Annex 2 to FGSZ´s Reply.
[181] With detailed documentation in Annex 3 to FGSZ´s Reply.
[182] Annex 2 to FGSZ´s Reply.
[183] Annex 3 to FGSZ´s Reply.

283. Secondly, the Board of Appeal observes that the Appellant has not demonstrated that the HUAT project fully depends on Black Sea gas sources, nor is this suggested by the evidence on the file. The market demand assessment for the HUAT project under Article 26 of CAM NC concluded that there was sufficient non-binding interest from network users in incremental capacity and that, during the public consultation, third-parties invoked insufficient interconnection capacity and capacity bottlenecks between Southeast and Central Europe.[184]

284. Thirdly, the Board of Appeal observes that, in addition to the analysis of detrimental effects on competition and the effective functioning of the internal gas market during incremental capacity processes, EU competition law, applied by the national competition authorities and the European Commission, is there to prevent any abusive behaviour by dominant players on the market. Furthermore, a dominant position is not *per se* contrary to competition law, it is the abuse of such dominant position which infringes competition law.

(v) Failure to properly assess the HUSKAT route

285. FGSZ claims that the role of the HUSKAT route and its relation to the HUAT project was not thoroughly assessed by the Defendant, in particular as regards its stranded assets in Hungary and adverse effects on the use of the existing infrastructure by channelling flows to a redundant route.

286. The Board of Appeal observes that the Contested Decision adequately took account of the HUSKAT route and its relation to the HUAT project. However, the Board of Appeal draws, again, the attention to FGSZ´s misconception on the Defendant´s role in relation to an incremental capacity process: the Defendant´s role is not to assess incremental capacity projects upon their technical or economic merits but to set out an economic test

[184] E.g. Observations by OMV and CEGH.

to determine their viability. The Defendant clearly expressed this in its Contested Decision: *"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 test which determines whether the project is viable or not"*.[185]

287. The Board of Appeal further highlights that 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, as expressly indicated by the Defendant in the Contested Decision.[186] The findings of the Defendant´s nodal model analysis concluded that there were some scenarios, in which the use of both the HUAT and the HUSKAT projects were viable, whereas in all other scenarios, none of the projects were viable.[187] These findings imply that, if the HUAT project passes the economic test, the HUAT and HUSKAT routes will be in competition during the same timeframe, and it will be left to the market to decide on the most suitable project. Contrary to what FGSZ claims, this is not contrary to, but in accordance with, competition rules, as mandated by Article 28(2) CAM NC. As set out by the Defendant at the Hearing of 10 December 2018, all proposed incremental capacity projects need to be treated fairly, avoiding giving preference to the incumbents to the detriment of the new routes and sources of supply, if these are efficient and based on the results of a market test, i.e. if demand for such services exists:[188] *"it is therefore important to give a chance to the market to have a say in which incremental capacity proposal is in demand and which one is not, based on the results of open season procedure for all projects, and avoid pre-deciding on behalf of the market"*. At the said Hearing, the

[185] See para 17 of the Contested Decision.
[186] See para 16 of the Contested Decision.
[187] See p.16 of ACER´s slides entitled *"Proposal regarding the Incremental Capacity Project on the Cross-Border Point at Mosonmagyaróvár of the transmission line (HUAT case)"* at the Hearing of ACER with the NRAs and Project Promoters of 13 February 2019. Annex 17 to ACER´s Defence.
[188] Annex A10 to FGSZ´s Appeal, minutes of the Hearing of 10 December 2018, p. 5.

Defendant stressed two principles for developing the Contested Decision, namely: (i) *"recognizing the need for fair market competition and fair treatment of all sources of supply, whether incumbent or new, and of different system operators"*, and (ii) *"fair treatment of all investments included in a project cluster"*.[189]

288. Regarding the claim of stranded assets in Hungary and adverse effects on the use of the existing infrastructure by channelling flows to a redundant route, the Board of Appeal agrees with the Defendant, in that *"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"*.[190] The Contested Decision adds that *"the Agency strives to define the parameters of the economic test in such a way 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"*.[191] The Contested Decision has, consequently, set the parameters of the economic test in a risk-mitigating way, e.g. by setting the f-factor equal to 1 (*"which ensures, if the project is developed, that all costs will be borne by the users of the incremental capacity"*[192]) or by setting the mandatory minimum premium at a level that corresponds to a level of capacity bookings below 100% of the offered incremental capacity (*"the unit price of incremental capacity is such that the full project will be paid for even if there is unallocated capacity, limiting the risk of asset stranding"*[193]). The Agency clearly reiterates this statement at para 125 of the Contested Decision: *"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*

[189] Annex A10 to FGSZ´s Appeal, minutes of the Hearing of 10 December 2018, p. 6.
[190] See para 16 of the Contested Decision.
[191] See para 17 of the Contested Decision.
[192] See paras 13,14 and 125 of the Contested Decision.
[193] See para 15 of the Contested Decision.

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".

289. Finally, contrary to FGSZ´s claim,[194] ENGIE did not support the argument that *"the construction of the HUAT project will have profound potential negative effects on the HUSKAT pipeline".* The Board of Appeal notes that ENGIE merely stated that the HUAT project could not be analysed in isolation from the situation of the region.[195] Furthermore, the Board of Appeal observes that ENGIE adds that *"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".*[196] The Board of Appeal takes note of EUSTREAM´s observation that the HUAT project could negatively affect the competing HUSKAT route,[197] but observes, again, that the Defendant´s role in incremental capacity processes is not to assess the projects upon their technical or economic merits but to set out an economic test to determine their viability. In case of a positive outcome of the economic test, it will be for the market to choose the economically or technically superior route.

5.3. Infringement of Articles 22(1) and 28(1)(d) CAM NC and Article 22 of the Gas Directive and insufficient reasoning

290. FGSZ argues that the Contested Decision infringes Articles 22(1) and 28(1)(d) CAM NC, Article 22 of the Gas Directive and lack a sufficient reasoning.[198]

291. Article 22(1) CAM NC reads as follows:

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[194] See para 168 of FGSZ´s Appeal.
[195] See para 43 of the Contested Decision.
[196] See para 43 of the Contested Decision.
[197] See para 44 of the Contested Decision.
[198] See paras 111-117 of FGSZ´s Appeal.

“1. 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 and shall consist of the following parameters:

(a) the present value of binding commitments of network users for contracting capacity, which is calculated as the discounted sum of the following parameters:

(i) the sum of the respective estimated reference prices and a potential auction premium and a potential mandatory minimum premium multiplied by the amount of contracted incremental capacity;

(ii) the sum of a potential auction premium and a potential mandatory minimum premium multiplied by the amount of available capacity that was contracted in combination with the incremental capacity;

(b) 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, as approved by the relevant national regulatory authority in accordance with Article 28(2);

(c) the f-factor.”

292. Article 28(1)(d) CAM NC establishes that *“1. Following the consultation and finalisation of the design phase for an incremental capacity project in accordance with Article 27, the involved transmission system operators shall submit the project proposal for an incremental capacity project to the relevant national regulatory authorities for coordinated approvals. The project proposal shall also be published by the involved transmission system operators in one or more official languages of the Member State and to the extent possible in English and shall include at least the following information: (a) (..); (d) the parameters defined in Article 22(1); (...)”*.

293. Firstly, the Board of Appeal refers to the First Plea above, clarifying that the Agency is not bound by Hungarian law and the particularities of the Hungarian regulatory system.

Additionally, FGSZ generically opposes the nature of incremental capacity projects conditional upon successful economic tests, which inherently imply a risk if the projected demand does not materialize.[199] The Board of Appeal indicates, however, that the Defendant applies the applicable regulation, i.e. the CAM NC, in its Contested Decision, and that the fact that FGSZ does not agree with the said Regulation is not capable of invalidating the Contested Decision.

294. Secondly, with respect to the claim that the Defendant should have justified that it approved the HUAT project in a similar fashion as HEA justified that it rejected the HUAT project, the Board of Appeal observes FGSZ´s misconception of the Defendant´s role in an incremental capacity process: the Defendant does not approve or reject incremental capacity projects but sets the economic test to determine its economic viability. This implies that the effective implementation of the incremental capacity projects does not depend on the regulatory authorities but on the binding commitments that will be made by network users on the market. As regards FGSZ´s opinion set out in its 10-year Development Plan, the Board of Appeal observes that the Defendant sufficiently took account of FGSZ´s opinion during the decision-making procedure and via its requests for information to FGSZ of 16 and 30 November 2018 and 7 and 18 January 2019 and at the hearings of 10 December 2018, 17 January 2019 and 13 February 2019, at which FGSZ was heard. As regards the need for a full tariff comparison of the routes, the Board of Appeal refers to the Plea above with respect to the need for a CBA.

295. Thirdly, on the lack of a detailed calculation methodology and the inability for FGSZ to understand or reproduce the Defendant´s calculations, the Board of Appeal refers to the Fourth Plea above.

296. With respect to the lower CAPEX and WACC levels, the Board of Appeal reaffirms its settled decision-making practice referred to above in the Fourth Plea, according to which, in the limited timeframe it is given to decide on the appeal of the Contested

[199] Para 111 of FGSZ´s Appeal.

Decision, considering the principle of procedural economy, and with regard to the complex economic and technical issues involved, it is not able to, and should not, carry out its own complete assessment of each of the complex issues raised. Instead, it must limit itself to decide whether the Defendant made a manifest error of assessment.

297. The Board of Appeal finds, firstly, that the Defendant correctly recognised that the eventual implementation of the HUAT project had to be handled in a way that minimises FGSZ´s risk exposure, with risk mitigation strategies.[200] As acknowledged by the Defendant at the Hearing of 13 February 2019, the Contested Decision had to *"find a modality that (a) enables to the max flows from the East to AT, while (b) keeps the HU TSO safe from stranded assets"*.[201] Furthermore, the Board of Appeal finds that the Defendant did not make a manifest error of assessment when striking a balance between the positive effects of proportionate risk mitigation strategies on FGSZ´s risk exposure, on the one hand, and the negative effects of excessive risk mitigation strategies, on the other hand. Indeed, the Defendant found that the economic parameters of its Contested Decision included sufficient risk mitigation measures, and that applying overlapping risk mitigation strategies would create unrealistic hurdles in the conditions which a successful economic test must meet, thus essentially precluding a proper estimate of the feasibility of the project.[202] The Defendant pre-empted the possibility of overlapping risk mitigation strategies at the Hearing of 13 February 2019.[203] According to the Agency, *"the setting of f-factor at 1, combined with conservatively assessed level of CAPEX (including a 10% instead of 25% margin) and OPEX already covers most of FGSZ´s risks directly attributable to the project"*.[204] The Board of Appeal recalls, in this context, that the HUAT project will only be implemented if there are sufficient binding commitments from network users and that this minimizes the risk of the HUAT project becoming a stranded asset.

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[200] See paras 16 and 122 of the Contested Decision.
[201] See p. 18 of ACER´s slides entitled *"Proposal regarding the Incremental Capacity Project on the Cross-Border Point at Mosonmagyaróvár of the transmission line (HUAT case)"* at the Hearing of ACER with the NRAs and Project Promoters of 13 February 2019. Annex 17 to ACER´s Defence.
[202] See para 126 of the Contested Decision.
[203] Annex 13 to ACER´s Defence. Minutes of the Hearing of 13 February 2019, p. 9.
[204] See para 125 of the Contested Decision.

298. The Board of Appeal consequently finds that the Defendant did not make a manifest error of assessment when revising the CAPEX and WACC/discount rate downwards. The Defendant did not make a manifest error of assessment when it found that the CAPEX estimate - which exceeded ACER´s Unit Investment Costs Report values by 33% to 35% - had to be revised downwards in line with HEA´s Guidance that a 25% CAPEX contingency margin was too extreme and a 10% margin would be reasonable.[205] Similarly, the Defendant did not make a manifest error of assessment when it found that the discount factor had to be revised downwards because its value of 19,3% was an outlier compared to discount rates generally set by NRAs (including HEA) in the EU and because FGSZ did not provide justifications for the use of this particularly high discount rate.[206] The Contested Decision refers in this regard to HEA´s suggestion to use for the Hungarian part of the HUAT project a discount rate of 8.47% and to HEA´s Guidance Note, in which HEA informed about: (i) the discount rates for other comparable projects, e.g. the ROHU project (8.9%), the HUSKAT project (8.7%), and previously the ROHUAT project (8.69%); and (ii) its discount rate for the current regulatory period of 4.62%.[207] The Contested Decision clarifies, in addition, that FGSZ´s particularly high discount rate would undervalue or depreciate the present value of the project´s earnings in Hungary.[208]

299. Finally, FGSZ asserts that the Contested Decision infringes Article 22 of the Gas Directive *"which is the very foundation of the power of an NRA to oblige a TSO to construct infrastructure"*.[209] The Board of Appeal wishes to stress, again, that FGSZ´s Appeal is based upon a misconception. Article 22 of the Gas Directive concerns network development and powers to make investment decisions and, hence, does not apply to the incremental capacity processes contained in Chapter V of CAM NC. There is no obligation by an NRA – or by the Defendant, in the present case – to order the construction of infrastructure as regards incremental capacity processes. The role of the

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[205] See para 116 of the Contested Decision.
[206] See paras 122-124 of the Contested Decision.
[207] See para 130 of the Contested Decision. See also Annex 13 to ACER´s Defence, Minutes of the Hearing of 13 February 2019, p. 3: *"MEKH indicated that for guidance on its practice the numbers of other projects in the region (i.e. not the HU-AT proposal) are indicative"*.
[208] See para 128 of the Contested Decision.
[209] See paras 109-110 and 116 of FGSZ´s Appeal.

Defendant in the incremental capacity process is not to make an investment decision, but to set the economic test to determine the economic viability of an incremental capacity process. However, the effective implementation of the incremental capacity process depends on the market, i.e. on the binding commitments that will be made by network users.

5.4. Infringement of Article 22(1)(b) CAM NC

300. FGSZ claims that the Contested Decision infringes Articles 22(1)(b) CAM NC[210].

301. Article 22(1)(b) CAM NC reads as follows: *"1. 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 and shall consist of the following parameters: (a)(..); (b) 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, as approved by the relevant national regulatory authority in accordance with Article 28(2); (...)".*

302. Firstly, on the lack of a detailed calculation methodology and the inability for FGSZ to understand or reproduce the Defendant´s calculations, the Board of Appeal refers to the Fourth Plea above.

303. FGSZ opposes the Defendant´s comparison between its estimated costs of the HUAT project and the values available in the Agency´s Unit Investment Cost Report because it contends that these values are out-dated (2015). FGSZ adds that, even though the Defendant observed at the Hearing of 17 January 2019 that the CAPEX values set by

[210] See paras 118-134 of FGSZ´s Appeal.

FGSZ were within the range of maximum UIC values, the Contested Decision notes that these values are 33 to 35% higher than UIC values and should be revised by using a 10% CAPEX contingency margin.[211] FGSZ also adds that ACER should have taken account of the project-specific issues that it presented at the Hearing of 10 December 2018, i.e. that the enormous investment in the HUAT project might be needless if incoming flows to Hungary are stopped (e.g. Ukrainian flows) or not realised (e.g. Black Sea sources, Krk LNG terminal) and that this large investment may require FGSZ to increase tariffs across its system given that existing infrastructure would be underutilised. FGSZ adds more project-specific issues in its Appeal (some of which were raised at the Hearing of 13 February 2019[212]), namely Natura 2000 and other protected areas, archaeological sites, the fact that the pipeline needs to cross the Danube river twice and the need to dispose of war ammunition along the pipeline.[213]

304. The Board of Appeal reaffirms its settled decision-making practice already quoted in the present Decision, according to which it must limit itself to decide whether the Defendant made a manifest error of assessment. The Board of Appeal is, hence, not called upon to rule, *inter alia*, whether the Agency´s Unit Investment Cost Report is sufficiently updated, or to repeat the Defendant´s detailed analysis. The Board of Appeal also notes, with respect to the project-specific issues invoked by FGSZ to justify a contingency margin of 25%, that these issues have been invoked by FGSZ in a generic fashion, without any explanation on how these issues justified a contingency margin of 25%. FGSZ expressly recognised at the oral hearing that it had not explained why the project-specific issues it had invoked required a contingency margin of 25% and that it had limited experience in calculating the CAPEX of such projects,[214] but justified this by adducing that contingencies are inherently hard to predict. FGSZ´s closing statements contain a slide on CAPEX contingency in which FGSZ lists all project-specific issues but again, fails to explain why these issues justify a contingency margin of 25%. The

[211] See para 111 of the Contested Decision.
[212] Annex 13 to ACER´s Defence. Minutes of the Hearing of 13 February 2019, p. 4.
[213] See para 129 of FGSZ´s Appeal.
[214] FGSZ´s opening statement at the oral hearing, slide 6. See p. 15 of the Summary minutes of the oral hearing of 25 July 2019 (“It is true that FGSZ has not mathematically justified and proven the 25% contingency reserve to the last precise Euro, but this reflects the nature of the instrument, it is ‘contingency’ only”)

Board of Appeal notes, in addition, that FGSZ´s Appeal contains project-specific issues that have never been mentioned to the Defendant prior to the Contested Decision (e.g. the need to dispose of war ammunition along the pipeline) and that FGSZ´s closing statement at the oral hearing also adds project-specific issues that had not been brought up previously (e.g. environmental issues such as bird nesting places).

305. With respect to the contingency margin, REKK´s slides at the oral hearing added that *"we cannot argue for either 10% or 25% contingency"*[215] and REKK´s Comments to FGSZ´s reply stated that *"the level of CAPEX and risks can be assessed best by the TSO. We have no view on whether 25% or 10% of contingency is the correct number"*[216].

306. The Board of Appeal observes, in this respect, that the Defendant´s comparison based on the said Report is not the only reason that led it to revise the CAPEX and the WACC/discount rate downwards. The Board of Appeal finds that the Defendant´s decision was essentially motivated by an intention to strike a balance between the positive effects of proportionate risk mitigation strategies on FGSZ´s risk exposure, on the one hand, and the negative effects of excessive risk mitigation strategies, on the other hand. In so doing, the Defendant did not only take account of the Agency´s Unit Investment Cost Report, but also took account of HEA´s Guidance and NRAs´ standard practice, in particular in comparable projects. Consequently, the Board of Appeal finds that the Defendant did not make a manifest error of assessment when revising the CAPEX and WACC/discount rate downwards. At the oral hearing[217] and in its Reply,[218] FGSZ erroneously reversed the burden of proof when adducing that the Defendant had failed, in the present proceedings, to prove that a CAPEX contingency margin of 25% was inappropriate. A correct application of the burden of proof requires FGSZ to demonstrate that the Defendant made a manifest error of assessment when reducing the contingency margin from 25% to 10%, evidencing a minimally quantified link between

[215] REKK´s slides at the oral hearing, slide 3.
[216] Annex 2 to FGSZ´s Reply, p.3.
[217] FGSZ´s Opening Statement at the haring of 25 July 2019
[218] Para 17 of FGSZ´s Reply.

the cost overruns and the increase in the contingency margin, which FGZS did not demonstrate.

307. Finally, with respect to the particularities of the Hungarian regulatory system, the Board of Appeal refers to the First Plea above, clarifying that the Agency is not bound by Hungarian law and should make *ad hoc* exceptions to a harmonised, Union-wide incremental capacity process, in order to adapt to Hungarian Law. Doing so would be discriminatory and contrary to the primacy of EU Law and the goal of creating an internal gas market...

308. To conclude, the Fifth Plea must be dismissed as unfounded.

Sixth Plea: Violation of fundamental rights

309. The Appellants and Interveners argue that the Defendant violated fundamental rights.[219]

310. As set out above, HEA´s appeal on the violation of fundamental rights is not admissible.

311. As regards FGSZ´s appeal on the violation of fundamental rights, this Appellant invokes the Defendant´s obligation to abide by the Charter of Fundamental Rights (´the Charter´) according to its Article 51, and claims that the Contested Decision violates both Article 16 of the Charter, i.e. the freedom to conduct a business, and Article 17 of the Charter, i.e. the right to property. The Contested Decision does so, in FGSZ´s opinion, because it sets the conditional threshold for the HUAT project in such a manner that it compels FGSZ to implement the HUAT project - contrary to its freedom to conduct its business - and because it expropriates FGSZ´s company assets *de facto.*

312. The Board of Appeal observes that FGSZ is a TSO, as created and defined by Article 2(4) of the Gas Directive, i.e. *"a natural or legal person who carries out the function of transmission and is responsible for operating, ensuring the maintenance of and, if*

[219] See paras 181-186 of FGSZ´s Appeal.

necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transport of gas". In accordance with the Gas Directive and its ownership unbundling principle, TSOs are regulated, certified and independent entities whose main task is to operate, maintain and develop a transmission grid under the supervision of the NRAs and ACER and are members of the European Network of Transmission System Operators (´ENTSO-E´). In return for providing access to the transmission grid, TSOs receive network access tariffs from users.

313. Consequently, FGSZ´s right to conduct its business is constrained by EU Law, and bound to abide by it. As expressly provided for by its Article 52(1) of the Charter, the rights of the Charter may be subject to limitations. If the applicable sector regulation provides that NRAs shall decide on incremental capacity projects, and that ACER substitutes the NRAs in case they cannot reach an agreement within a period of six months, TSOs are, in their quality of regulated entities, bound by these regulatory requirements. While granting TSOs monopolistic rights to certain infrastructure, the gas regulatory framework is concerned with preventing these entities from exploiting those rights in an uncontrolled fashion, under the pretext of a right to conduct business. TSOs have a right to conduct their business, but within the boundaries of the regulated framework they operate in. The Board of Appeal opines in the same way in reply to FGSZ's invocation of its right to free competition under Article 119(1) and (3) TFEU.

314. As regards FGSZ´s right to property, FGSZ does not clarify which assets are being expropriated by the Contested Decision. In addition, a decision setting out the parameters to be applied by NRAs in their economic test to determine the viability of the HUAT project cannot prompt an expropriation of assets. Neither did FGSZ provide any evidence of assets being expropriated. As noted above, the characteristics of the economic test set out in the Contested Decision (including the setting of the f-factor at 1) are such that the risk of stranded assets or financial losses for FGSZ, if the economic test is successful, is virtually eliminated. Finally, FGSZ has not provided any specific arguments to show that, even if there were an expropriation of assets or risk thereof,

quod certissime non, this would not be accompanied by sufficient compensation or that the deficit in compensation would not be justified under the test of proportionality.

315. To conclude, the Sixth Plea must be dismissed as unfounded.

316. It follows from the above that the Appeals must be dismissed in their entirety.

ACER

Agency for the Cooperation of Energy Regulators

Board of Appeal

DECISION

On those grounds

THE BOARD OF APPEAL

hereby dismisses the Appeals against the Contested Decision as partly inadmissible and unfounded in their remaining parts. In particular:

(i) HEA's request that the Board of Appeal order the Agency to establish and publish rules of procedure for cases when the Agency is carrying out a contentious procedure in accordance with Art. 8(1) of Regulation (EC) 713/2009 is dismissed as inadmissible;

(ii) HEA´s and FGSZ´s request that the Board of Appeal assess the validity of preparatory acts adopted by the Board of Regulators is dismissed as inadmissible; and

(iii) HEA´s and FGSZ´s request for annulment of the Contested Decision is admissible but dismissed as manifestly unfounded.

This decision may be challenged pursuant to Article 263 of the Treaty on the Functioning of the European Union and Article 20 of Regulation (EC) No 713/2009 within two months of its publication on the Agency website or of its notification to the Appellant as the case may be.

- SIGNED -

Andris Piebalgs

- SIGNED -

Andras Szalay