Board of Appeal

DECISION OF THE BOARD OF APPEAL OF THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS [16 December 2015]

(Action for annulment – Opinion 09/2015 – Concept of 'challengeable act' – Inadmissibility)

Case number	A-001-2015
Language of the case	English
Appellant	Energie-Control Austria (E-Control) Represented by: DLA Piper Weiss-Tessbach Rechtsanwälte GmbH
Defendant	Agency for the Cooperation of Energy Regulators Represented by: Alberto Pototschnig, Director of the Agency
Application for	Annulment of the Opinion No 09/2015 of 23 September 2015 on the compliance of National Regulatory Authorities' (NRAs) decisions approving the methods of allocation of cross-border transmission capacity in the Central-East Europe (CEE) region, adopted by the Agency for the cooperation of Energy Regulators (hereinafter the 'Agency') having regard to Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ L 211, 14.08.2009, p. 1) (hereinafter the 'ACER Regulation') and, in particular, Articles 7(4) and 17(3) thereof.

THE BOARD OF APPEAL

Composed of Herbert Ungerer (Chairman), Mariano Bacigalupo Saggese (Rapporteur), Jacques de Jong, Peter Kaderjak, Pippo Ranci Ortigosa, Ignacio Pérez-Arriaga (Members).

Registrar: Alessandra Fratini (Registrar) and Mariacristina Bottino (Deputy Registrar).

Gives the following

DECISION

Facts giving rise to the dispute

1. On 2 December 2014, the Agency received from Urząd Regulacji Energetyki ('URE'), the Polish National Regulatory Authority ('NRA') for the energy market, a request for an Opinion on the compliance of some NRAs' decisions[1] with the provisions of the Guidelines annexed to Regulation (EC) No 714/2009 ('Regulation 714/2009')[2] and with the provisions of Regulation 714/2009 itself.

2. More specifically, the request aimed at answering the question of whether the absence of a capacity allocation procedure on the German-Austrian border is compliant with the provisions referred to above.

3. On 23 September 2015, the Agency adopted the Opinion No. 09/2015 on the compliance of National Regulatory Authorities' decisions approving the methods of allocation of cross-border transmission capacity in the Central-East Europe region with Regulation 714/2009 and the Guidelines on the management and allocation of available transfer capacity of interconnections between national systems contained in Annex I thereto ('Opinion'). The Agency concluded that there is currently structural congestion on the DE-PL, DE-CZ and CZ-AT interconnectors as well as on network elements within Germany, that the cross-border exchanges between Austria and Germany are physically realised partly through those structurally congested interconnectors and internal network elements, and that they have a significant impact on those structural congestions. Therefore, the German-Austrian interconnector should be considered to be usually and structurally congested according to Article 2(2)(c) of Regulation 714/2009 on conditions for access to the network for cross-border exchanges in electricity. It therefore requires the implementation of a capacity allocation method, in accordance with the Guidelines.

4. Therefore, the Agency invited the CEE NRAs and Transmission System Operators ('TSOs') to commit, within the following four months, to the implementation of a coordinated capacity allocation procedure on the German-Austrian border, according to a realistic but ambitious calendar with concrete steps. The German and the Austrian NRAs and TSOs were also invited to evaluate whether interim measures that have already been implemented are sufficient to ensure network security, or whether additional interim measures coordinated at regional level are needed until a coordinated capacity allocation procedure on the German-Austrian border is implemented.

Procedure

5. On 23 November 2015, the Appellant filed an appeal at the Registry of the Board of Appeal against the Opinion.

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[1] Decisions of AGEN-RS (No 141-4/2013-09/203 of 23/10/2013); E-Control (No V AUK 02/13 of 11/10/2013); MEKH (No 2538/2014 of 12/08/2014 and No 2890/2014 of 4/11/2014); ÚRSO (No 0027/2014/E-PP of 22/08/2014).

[2] Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ L 211, 14.8.2009, p. 15-35.

6. An application for leave to intervene and statement in intervention was filed in support of the Appellant by Österreichs E-Wirtschaft on 30 November 2015,[3] by Wirtschaftskammer Österreich on 2 December 2015,[4] by Vereinigung der Österreichischen Industrie (the Federation of Austrian Industries) on 3 December 2015,[5] by VERBUND AG, the European Federation of Energy Traders, Mondi AG on 4 December 2015, by EXAA Abwicklungsstelle für Energieprodukte AG on 7 December 2015.

7. An application for leave to intervene was filed in support of the Agency by the Regulatory Office for Network Industries of Slovakia on 8 December 2015, Polski Komitet Energii Elektrycznej (Polish Electricity Association - 'PKEE'), Polskie Sieci Elektroenergetyczne Spółka Akcyjna ('PSE SA'); Towarzystwo Obrotu Energią ('TOE') and the President of the Polish Energy Regulatory Office - 'ERO' (Urzad Regulacji Energetyki - 'URE') on 9 December 2015.

8. Both the Agency and the Appellant have lodged their observations on the applications for leave to intervene.

9. Following a request of the Board of Appeal pursuant to Article 19(3)(c) of Decision BoA No 1-2011 laying down the rules of organisation and procedure of the Board of Appeal of the Agency (hereinafter the 'Rules of procedure'), on 9 December 2015 the Agency lodged its comments on the admissibility of the appeal.

Main arguments and forms of order sought by the Parties

10. In support of the appeal, the Appellant claims that the Opinion qualifies as a decision against which right of action must exist under European law, as it has direct and immediate legal effect on E-Control and E-Control is an addressee of the Opinion. E-Control thus has the right to appeal the Opinion to the Board of Appeal.

11. The grounds of appeal concern: (i) the violation of procedural requirements, particularly infringement of the right to access to the file, infringement of the right to be heard and lack of proper justification; (ii) the lack of legal basis for the measures proposed (*ultra*

[3] Statements in support of the intervention submitted by Österreichs E-Wirtschaft were lodged by: EBNER STROM; Elektrizitätswerke Reutte AG; Energie AG Oberösterreich Trading GmbH; Energie Burgenland AG; Energie Steiermark Business GmbH; ENERGIEALLIANZ; ENV AG; Innsbrucker Kommunalbetriebe AG; KELAG; Linz Strom GmbH; Salzburg AG für Energie, Verkehr und Telekommunikation; Sappi Europe; Stadtwerke Kapfenberg GmbH; TIWAG; VERBUND; Voralberger Kraftwerke AG; WIEN ENERGIE.

[4] Statements in support of the intervention submitted by Wirtschaftskammer Österreich were lodged by: AMAG Austria Metall AG; Banner GMbH; Binderholz GmbH; delfortgroup AG; BORBET Austria GmbH; Energie AG Oberösterreich; Energie AG Oberösterreich Power Solutions GmbH; FunderMax GmbH; Hinteregger & Söhne Baugesellschaft m.b.H.; Ganahl Aktiengesellschaft; Geislinger GmbH; HASSLACHER Drauland Holzindustrie GmbH; Infineon Technologies Austria AG; JELD-WEN Türen GmbH; Kirchdorfer Zementwerk Hofmann Gesellschaft m.b.H; Laakirchen Papier AG; Lenzing AG; Liebherr-Hausgeraete Lienz GmbH; M. Kaindl KG; Mayr-Melnhof Karton Gesellschaft m.b.H.; Mondi Frantschach GmbH; Norske Skog Bruck GmbH; Omya Gmbh; Poloplast GmbH &Co KG; Profibaustoffe Austria GmbH; RHI AG; Rübig GmbH & Co KG; Schweighofer Fiber GmbH; Siemens Aktiengesellschaft Österreich; SIG Combibloc GmbH and Co KG; Sony DADC Austria AG; Sprecher Automation GmbH; SPZ Zementwerk Eiberg GmbH & CO KG; TANNPAPIER GmbH; TREIBACHER INDUSTRIE AG; TRUMPF; UPM-Kymmene Austria GmbH; VERBUND AG; VISHAY Semiconductor (Austria) Ges.m.b.H.; Wacker Neuson Linz GmbH; WIEN ENERGIE Vertrieb GmbH and Co KG; Wienerberger Ziegelindustrie GmbH; Wirtschaftskammer Niederösterreich, the economic Chamber of Lower Austria (WKNOE); Wirtschaftskammer Salzburg – Salzburg Economic Chamber; Wirtschaftskammer Vorarlberg; Wirtschaftskammer Wien; WKO Steiermark; WKOÖ Oberösterreich - Upper Austria Economic Chamber; Wolfram Bergbau- und Hütten AG; Zellstoff Pöls AG; Zementwerk LEUBE GmbH; Zumtobel Lighting GmbH.

[5] A statement in support of intervention has been submitted by voestalpine Stahl GmbH.

vires); (iii) infringement of Regulation 714/2009; (iv) infringement of Commission Regulation (EU) 1222/2015 (CACM Guideline)[6]; (v) infringement of Articles 101 and 102 TFEU, by ordering the NRAs and the TSOs to artificially split the integrated electricity market between Austria and Germany; (vi) infringement of Articles 34 and 35 TFEU, by requiring the respective NRAs to limit cross-border flows of electricity between Austria and Germany.

12. The Appellant requests that the Board of Appeal:

    - Annul the Opinion of the Agency;
    - Suspend the application of the Opinion.

13. In its reply to the request for comments on the admissibility of the appeal, the Agency maintains that it is apparent from its nature, as well as from its wording, its content, its context and the underlying intention of the Agency, that the Opinion does not produce legal effects. As such, the Opinion is not a decision within the meaning of Article 19(1) of the ACER Regulation and cannot be appealed pursuant to this provision.

14. The Agency requests that the Board of Appeal:

    - Dismiss the appeal as inadmissible;
    - Reject the Appellant's request for the suspension of the application of the Opinion.

Law

Legal Framework: admissibility of the appeal

15. Under Article 15(2) of the Rules of procedure, in order to avoid any unnecessary proceedings, the Chairman of the Board of Appeal assisted by the Registrar shall examine whether the appeal is admissible without undue delay of the appeal being filed in accordance with Article 19 of the ACER Regulation. In the negative, he shall submit a proposal for decision of inadmissibility of the Board of Appeal.

16. Under Article 15(1)(c) of the Rules of procedure, "[t]*he grounds on which an appeal shall be ruled inadmissible shall include the following:* […] *(c) the appeal is not brought against a decision referred to in Article 19(1)"* of the ACER Regulation.

17. Under Article 19(1) of the ACER Regulation, "[a]*ny 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*".

18. Pursuant to Recital 11 of the ACER Regulation, "[s]*ince the Agency has an overview of the national regulatory authorities, it should have an advisory role towards the Commission, other Community institutions and national regulatory authorities as regards the issues relating to the purpose for which it was established. It should also be required to inform the Commission where it finds that the cooperation between transmission system operators does not produce the results which are needed or that a*

[6] Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, OJ L 197, 25.7.2015, p. 24-72.

national regulatory authority whose decision is not in compliance with the Guidelines does not implement the opinion, recommendation or decision of the Agency appropriately".

19. According to Article 7(4) and (5) of the ACER Regulation, "*4. The Agency shall provide an opinion, based on matters of fact, at the request of a regulatory authority or of the Commission, on whether a decision taken by a regulatory authority complies with the Guidelines referred to in Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 or Regulation (EC) No 715/2009 or with other relevant provisions of those Directives or Regulations. 5. Where a national regulatory authority does not comply with the opinion of the Agency as referred to in paragraph 4 within four months from the day of receipt, the Agency shall inform the Commission and the Member State concerned accordingly".*

Assessment by the Board of Appeal

20. 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. Given that the appealed measure is an opinion issued pursuant to Article 7(4) of the ACER Regulation, the Board of Appeal must first establish if the Opinion is challengeable before the Board of Appeal.

21. It is settled case-law that in order to ascertain whether a measure is a challengeable act it is necessary to look at its substance.

22. An action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (see, *inter alia*, Case 60/81, IBM v Commission, EU:C:1981:264, par. 9, and C-362/08 P, Internationaler Hilfsfonds v Commission, EU:C:2010:40, par. 51).

23. Only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment (Case C-362/08, Internationaler Hilfsfonds v Commission, par. 51, Case C-131/03 P, Reynolds Tobacco and Others v Commission, ECLI:EU:C:2006:541, par. 54, and the case-law cited). By contrast, a written expression of opinion or a simple statement of intention cannot constitute a decision challengeable by an action for annulment, since it cannot produce legal effects or is not intended to produce such effects (Case T‑456/07, Commission v CdT, ECLI:EU:T:2010:39, par. 55).

24. The above applies, *mutatis mutandis,* to measures brought before the Board of Appeal. Therefore, it is appropriate to ascertain, at the outset, whether the contested act, by its substance, is capable of producing legal effects because of its author's powers.

25. The Appellant submits that the Opinion in fact "*has a direct legal effect*" as "*it entails specific duties for E-Control setting a time limit and ordering E-Control to invest resources*". The Opinion would "*require E-Control to act in a specific way to comply with*". This would became particularly apparent, when taking into account that the Opinion (would) "*specifically order E-Control to take actions before the end of the four month period, thereby leaving E-Control without any suitable remedy*".

26. The Appellant also maintains that"[t]*he fact that, pursuant to Art. 7(5) Regulation No. 713/2014 no direct legal consequences follow from the decision does not* […] *remove the legal obligations of E-Control*" and provides as "*evidence*" the joint TSOs proposal, stating that "[t]*he wording of the proposal makes it clear that TSOs obviously consider themselves bound by the opinion*".

27. It must be observed that the intention to conform to the Opinion is not an evidence of its binding nature and is not a proper argument to substantiate its binding nature (in this respect, Case T-113/89, Nefarma v Commission, ECLI:EU:T:1990:82, par. 76).

28. Also, it appears that the wording used by the Appellant is not correct. The Opinion does not entail "*specific duties*" and is not "*ordering*" the addressees to implement its provision as it only "*invites*" the addressees to follow the Agency's indications.

29. By issuing the contested Opinion, the Agency did not use a decision-making power, it exercised its "*advisory role*" towards the requesting NRA, pursuant to Recital 11. Accordingly, the Opinion at stake states in fact that "*the Agency invites*" to act as indicated.

30. Even assuming that the Agency had not only adopted an opinion on the compliance of NRAs' decisions with the Guidelines referred to in Regulation 714/2009, but also "*invited*" the concerned NRAs to adopt very concrete and specific measures to comply with those Guidelines, that fact would not be sufficient to transform an "*invitation to act*" in a genuine and formally binding "*obligation to act*". In other words, that would not change an opinion into a formally binding decision with direct and immediate legal consequences within the meaning of Article 19(1) of the ACER Regulation.

31. In addition, in case of lack of compliance with an opinion, the only consequence provided for in the ACER Regulation is that the Agency will inform the European Commission ('Commission') and the Member State concerned. The Agency will make the Commission and the Member State aware of the circumstance. A final decision is to be taken by the Commission or the Member State. The Commission may open an infringement proceeding against the Member State. The Commission holds a discretionary power in this respect.

32. Having no powers of enforcement or sanction, the Agency cannot impose remedies for non-compliance with the Opinion.

33. It follows that the contested Opinion can be considered as a preparatory step in the context of a (possible) future infringement procedure.

34. In this respect, it is appropriate to recall that the CJEU has repeatedly held that any irregularity in the preparatory act may be raised in challenging the final act. In fact, the annulment of a preparatory act might be inadmissible as it would anticipate the arguments on the substance of the case.

35. In addition, intermediate measures whose aim is to prepare the final decision do not, in principle, constitute acts, which may form the subject-matter of an action for annulment (Case 60/81, IBM v Commission, par. 10; Case C‑521/06 P, Athinaïki Techniki v Commission, ECLI:EU:C:2008:422, par. 42; Internationaler Hilfsfonds v Commission, par. 52). More specifically, in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal

procedure, an act is, in principle, open to review only if it is a measure definitively laying down the position of the institution at the end of that procedure, and not a provisional measure intended to pave the way for the final decision (Joined Cases T-391/03 and T-70/04, Yves Franchet and Daniel Byk v Commission, ECLI:EU:T:2006:190, par. 46).

36. This applies also when the act in the preparatory phase affects an institution other than the one against which the action for annulment is brought. In this respect, the CJEU has already made it clear that "*the circumstances affecting the legality of a contested measure may be relied upon in support of such an action even if they relate to the conduct of an institution other than the defendant institution*" (Case C-445/00, Austria v Council, ECLI:EU:C:2003:445, par. 33).

37. Based on the above, should the Commission decide to open an infringement procedure and refer the concerned Member State before the CJEU, the applicant will have the chance to defend himself and his interests before the CJEU.

38. The fact that the contested Opinion specifically invites the addressees to take actions before the end of the four-month period is not indicative of the binding nature of the Opinion. The CJEU held that a reasoned opinion, which gives national governments two months (or less) to comply, is not a measure capable of forming the subject-matter of an action for annulment, as it has the effect only of showing that the addressee is incurring a real risk of seeing the matter brought before the CJEU. In fact, "[t]*he Commission does not deliver a reasoned opinion unless it considers that the Member State in question has failed to fulfil one of its obligations. Moreover, if that State does not comply with the opinion within the period laid down, the Commission may* […] *bring the matter before the Court of Justice in order to obtain a declaration that the Member State has failed to fulfil its obligations.*" However, "*only the Court of Justice has jurisdiction to find that a Member State has failed to fulfil its obligations under* [EU] *law*", the reasoned opinion "*cannot therefore be regarded as an act which could form the subject-matter of proceedings for annulment*" (Case T‑182/97, Smanor and Others v Commission ECLI:EU:T:1998:32, par. 27-28). The same reasoning applies, *mutatis mutandis*, to the Agency's opinions.

39. It follows from all the foregoing that the Opinion, based on matters of fact, is not binding. Indeed no legal effects derive from non-compliance with it, the only consequence being the duty for the Agency to communicate this circumstance to the Commission and the Member State concerned. The Opinion therefore does not fall under the power of review of the Board of Appeal.

40. The application must therefore be dismissed as inadmissible for review before the Board of Appeal.

41. It follows that it is not necessary nor appropriate for the Board of Appeal to give a ruling on the substantial claims of the present case nor on the applications for leave to intervene and statements in intervention lodged in the case.

On those grounds,

THE BOARD OF APPEAL

Hereby:

Dismisses the application as inadmissible.

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.

Ljubljana, 16.12.2015

Herbert Ungerer
Chairman of the Board of Appeal

Alessandra Fratini and Mariacristina Bottino
Registrar of the Board of Appeal