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

22 May 2020

(Application for annulment – ACER Decision No. 06/2016 – BoA Decision A-001-2017 (consolidated) – General Court's Judgment T-332/17 and T-333/17 - Relaunched procedure)

Case number	A-001-2017_R (consolidated)
Language of the case	English
Appellants	Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft ('E-Control' or 'Appellant I.') Verbund AG ('Appellant II.') Austrian Power Grid AG ('Appellant III.') Vorarlberger Übertragungsnetz GmbH ('Appellant IV'.)
Defendant	European Union Agency for the Cooperation of Energy Regulators ('the Agency' or 'ACER') Represented by: Christian Zinglersen, Director
Interveners	E-Control for Appellant III. and IV. Chairperson of Energy Regulatory Office (Czech Republic), President of Energy Regulatory Office (Poland), MAVIR Hungarian Independent TSO, Hungarian Energy and Public Utility Regulatory Authority, POLSKIE SIECI ELEKTROENERGETYCZNE SPOŁKA AKCYJNA For the Defendant

Application for	Annulment of Decision n° 06/2016 ('the Contested Decision') of 17 November 2016 adopted by the Agency for the Cooperation of Energy Regulators pursuant to Article 19 of Regulation (EC) n° 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.
Relaunched procedure upon	Judgments T-332/17 (E-Control v ACER) and T-333/17 (Austrian Power Grid ('APG') and Vorarlberger Übertragungsnetz ('VUEN') v ACER) of 24 October 2019 – annulment of Board of Appeal Decision No. A-001-2017 (consolidated) of 17 March 2017 dismissing the appeals against ACER Decision No. 06/2016 regarding the determination of capacity calculation regions in so far as it dismisses the appeals brought by E-Control, APG and VUEN

THE BOARD OF APPEAL

composed of Andris Piebalgs (Chairperson), Yvonne Fredriksson, Jean-Yves Ollier (Rapporteur), Erik Rakhou, Mariusz Swora, Michael Thomadakis (Members).

Registrar: Andras Szalay

gives the following

Decision

I. Background

Procedure

1. On 17 March 2017, in its Decision A-001-2017 (consolidated), the Board of Appeal dismissed the appeals brought by Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control), by Verbund AG, by Austrian Power Grid AG and by Vorarlberger Übertragungsnetz GmbH against the Contested Decision.

2. In its judgements of 24 October 2019 in cases T-332/17 and T-333/17, the General Court annulled Decision A-001-2017 (consolidated) in so far as it dismisses the appeals respectively brought by E-Control (case T-332-17) and by Austrian Power Grid AG and by Vorarlberger Übertragungsnetz GmbH (T-333/17). The General Court ruled that the Board of Appeal of ACER made an error in law by finding that the Agency was competent, under Article 9(11) of Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management ('the CACM Regulation'), to adopt a decision on the TSOs' common proposal, namely the Contested Decision, even though the Agency had, since 18 May 2016, been aware that E-Control had submitted an amendment request.

3. The General Court dismissed the actions as to the remainder. In particular, in its judgement in case T-333/17, the General Court dismissed the appeal against the Contested Decision as inadmissible.

4. Further to these judgements, which have not been appealed, the Board of Appeal invited Appellants I-IV. to indicate whether they wished to continue the appeal proceedings, and to lodge a written submission indicating which consequences should be drawn from the cited judgments. They were also invited to indicate whether any parts of their initial notice of appeal or further submissions, in their entirety or in part, had become redundant or should be modified as a consequence of the above-mentioned judgments, and if they requested an oral hearing in the new (relaunched) case.

5. Appellant I. filed its statement via post on 27 January 2020, Appellant II. did via e-mail on 7 February 2020 and Appellant III. and IV., also via e-mail, on 6 February 2020.

6. The Defendant submitted its observations on the Appellants' statements on 2 March 2020.

7. The Board of Appeal also invited the admitted interveners to make an additional statement in the reopened proceedings. No interveners decided to take up this opportunity.

Main arguments and forms of order sought by the Parties and by other participants in their new submissions

8. Appellant I. states that it holds up its original application and expands it for the ground of lack of competence of the Agency for the reasons stated in judgments T-332/17 and T-333/17 of the General Court.

9. Appellant II. states that it upholds its appeal against the Contested Decision in its entirety. With respect to the admissibility of the appeal, Appellant II. refers to the judgments where the General Court held that it has established its direct and individual interest in the ruling on the form of order sought.

10. Appellant III. and IV. state that they uphold their original legal and factual arguments, in particular those referring to the lack of competency of the Agency.

11. The Defendant states that the appeal submitted by Appellant II. was found inadmissible in the original Board of Appeal proceeding, against which Appellant II. did not bring an action, therefore the previous decision in the appeal case A-001-2017 (consolidated) became final in its direction. Appellant II. should be found inadmissible in the present proceeding as well. As for the substance, the Defendant considered it critical for the sake of legal certainty that the Contested Decision is not removed with immediate effect but remains in place until a new decision has been adopted on the proposal for the determination of capacity calculation regions in accordance with Article 15(1) of the CACM Regulation.

Legal background of the resumption of the procedure before the Board of Appeal

12. Article 266 TFEU provides that '*The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgement of the CJEU*'.

13. Article 29 of 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 provides that "*(…) ACER shall take the necessary measures to comply with the judgments of the Court of Justice*."

14. Article 28 (5) of Regulation 2019/942, which sets out the powers of the Board of Appeal, provides that it "*may confirm the decision, or it may remit the case to the competent body of ACER. The latter shall be bound by the decision of the Board of Appeal*." It does not vest the Board of Appeal with the power to cancel the decision which is appealed against.

15. The provisions cited in the two previous paragraphs, as rules of procedure, apply to procedures pending when they came into force, hence to the resumption of the current procedure.

16. Based on these provisions, the Board of Appeal shall take the necessary measures to comply with the judgements of the General Court. It may confirm the decision or remit the case to the competent body of the Agency.

17. By contrast, the provisions in force when the Contested Decision was issued continue to apply to the situation brought before the Board of Appeal.

II. *Admissibility*

18. In its Decision A-001-2017 (consolidated), the Board of Appeal dismissed the appeal submitted by Appellant II. as inadmissible.

19. In its judgements T-332/17 (§ 29) and T-333/17 (§ 41), the General Court ruled Appellant II's claim seeking annulment of the contested decision in so far as the Board of Appeal took a decision on its administrative appeal should be declared inadmissible. It annuled the Contested Decision only in so far as it dismisses the appeals respectively brought by Appellant I (case T-332-17) and by by Appellants III. and IV. (T-333/17).

20. Hence, Decision A-001-2017 (consolidated) is final as regards the inadmissibility of the appeal submitted by Appellant II.

III. Merits

On the second plea - Lack of competence of the Defendant to disregard E-control's request for amendment

21. Appellant I. submits that it requested a change in the Transmission System Operators' ('TSOs') Proposal in respect to the proposed bidding zone border between Austria and Germany. The Agency disregarded the request for amendment relying on the argument that only all national regularity authorities ('NRAs') could request such a change.

22. Appellant I. states that the Defendant ignored the wording of Article 9(11) of the CACM Regulation[1], which covers the situation where even one NRA can request an amendment and, subsequently, all NRAs have to decide on this proposal. Appellant I. takes the further view that Article 9(11) of the CACM Regulation presupposes a situation where the NRAs do not agree with the proposal which would leave it without effect.

23. According to Appellant I.'s conclusion concerning that plea, the Defendant lacked the competence to decide on the proposal because it disregarded the valid amendment request taken by Appellant I.

24. Appellants III. and IV. added that the Defendant evidently wrongly interpreted the intent as well as the wording of Article 9 (12) of the CACM Regulation. According to the correct interpretation of these provision, there is no indication that amendments of terms and conditions or methodologies may only be requested by all NRAs jointly, and one NRA is competent to request an amendment of the TSOs proposal.

25. The Defendant in its initial defence stated that the above interpretation does not follow unambiguously from the wording of Article 9(12) of CACM Regulation. In a situation where all NRAs have to approve a joint TSOs' proposal, a unilateral

[1] Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management

amendment request by a single NRA will never lead to the resubmission of a TSOs' proposal: those regulators that disagreed with the requested amendment will naturally disagree with the amendment in a newly submitted TSOs' proposal.

26. The Defendant added that the above interpretation ignores the fact that an NRA has authority over the TSOs in its own territory. Where the NRAs disagree on an amendment request, it will not be possible that TSOs jointly develop a common proposal as required by Article 15(1) of CACM Regulation.

27. For these reasons, the Defendant claimed that Appellant I.'s amendment request was not valid pursuant to Article 9(12) of CACM regulation and, consequently, the Defendant was competent to decide and it did not commit a procedural error.

28. Article 15(1) of the CACM Regulation provides that, by 3 months after the entry into force of that regulation, all TSOs are to jointly develop a common proposal regarding the determination of capacity calculation regions.

29. According to Article 9(6)(b) of the same Regulation, the proposals concerning the determination of the capacity calculation regions are subject to approval by all the national regulatory authorities.

30. Article 9(10) of the CACM Regulation states that, for the purposes of the approval of a proposal concerning '*terms and conditions or methodologies'*, which include the determination of capacity calculation regions, the competent national regulatory authorities are to consult and closely cooperate and coordinate in order to reach an agreement. The national regulatory authorities are to take decisions concerning the TSOs' common proposal within 6 months following the receipt of that proposal.

31. Pursuant to Article 9(11) of the CACM Regulation: '*Where the regulatory authorities have not been able to reach agreement within the period referred to in paragraph 10, or upon their joint request, the Agency shall adopt a decision concerning the submitted proposals for terms and conditions or methodologies*

within six months, in accordance with Article 8(1) of Regulation (EC) No 713/2009.'

32. Article 9(12) of the same Regulation provides that: '*In the event that one or several regulatory authorities request an amendment to approve the terms and conditions or methodologies submitted in accordance with paragraphs 6, 7 and 8, the relevant TSOs or NEMOs shall submit a proposal for amended terms and conditions or methodologies for approval within two months following the requirement from the regulatory authorities. The competent regulatory authorities shall decide on the amended terms and conditions or methodologies within two months following their submission. Where the competent regulatory authorities have not been able to reach an agreement on terms and conditions or methodologies pursuant to paragraphs (6) and (7) within the two-month deadline, or upon their joint request, the Agency shall adopt a decision concerning the amended terms and conditions or methodologies within six months, in accordance with Article 8(1) of Regulation (EC) No 713/2009.* (…).'.

33. Article 9(4) of the CACM Regulation provides that, if the TSOs fail to submit to the national regulatory authorities an amended common proposal for '*terms and conditions or methodologies'* within the deadlines defined, they are to provide the competent national regulatory authorities and ACER with the relevant drafts of the amended proposal, and explain what has prevented agreement. ACER is to inform the European Commission and, in cooperation with the competent national regulatory authorities, at the Commission's request, is to investigate the reasons for the failure and inform the Commission thereof. Within 4 months from the receipt of ACER's information, the Commission is to take the appropriate steps to make the adoption of the required 'terms and conditions or methodologies' possible.

34. The General Court, in the judgements mentioned above, ruled that the Board of Appeal made an error in law by finding, in the Contested Decision, that the Agency had correctly adopted Decision No 6/2016 on the basis of Article 9(11) of Regulation 2015/1222.

35. The General Court considered that it follows from the provisions of the first sentence of Article 9(12) that, if an amendment request is submitted to the TSOs, those TSOs, in turn, are to submit an amended common proposal to the national regulatory authorities for approval within 2 months following the request. It ruled that : *'It is clear from a combined reading of Article 9(10) of Regulation 2015/1222 and Article 9(12) of the same regulation that, given that the power to approve a common proposal from the TSOs is conferred on ACER after the expiry of the six-month period during which the national regulatory authorities may approve the proposal, any such amendment request must necessarily be submitted during the six-month period referred to in Article 9(10) of Regulation 2015/1222, unless a joint request from the regulatory authorities, such as that referred to in Article 9(12) of Regulation 2015/1222, has already been made to ACER before the expiry of that deadline. / In addition, it follows by necessary implication from Article 9(12) of Regulation 2015/1222 that, as soon as an amendment request has been submitted, in principle, ACER cannot approve an initial common proposal from the TSOs on the basis of Article 9(11) of that regulation. The mere fact that a national regulatory authority submits an amendment request to the TSOs has the result that ACER does not acquire the decision-making power referred to in Article 9(11) of Regulation 2015/1222. / By contrast, ACER is competent to decide on a common proposal from the TSOs where, despite the existence of an amendment request, the national regulatory authorities confer on that agency, under Article 9(11) of Regulation 2015/1222, by means of a joint request, the task of approving the common proposal initially submitted by the TSOs or where, if no such amendment request has been submitted, those national authorities unanimously choose to shorten the period of 6 months referred to in Article 9(10) of that regulation. / If the TSOs concerned do not submit an amended proposal, the procedure provided for in Article 9(4) of Regulation 2015/1222 applies* (…)'.

36. As regards the facts, the General Court noted that '*In the present case, it is common ground that, on 17 November 2015 the TSOs submitted their common proposal of 13 November 2015 regarding the determination of capacity calculation regions in accordance with Article 15(1) of Regulation 2015/1222 and that the national*

regulatory authorities did not reach agreement regarding that proposal. Thus, when, on 17 May 2016, the Chair of the Energy Regulators' Forum informed ACER of the failure to reach agreement, the latter seemed to have become competent to adopt a decision on that proposal under Article 9(11) of Regulation 2015/1222. / However, a request for amendment drawn up by E-Control had existed since 13 May 2016, seeking, in essence, first, removal of the German-Austrian bidding zone border and, second, the merging of the two regions into a single capacity calculation region. It is common ground that that amendment request was submitted to the TSOs by E-Control on 13 May 2016 and, therefore, before expiry of the six-month period referred to in Article 9(10) of Regulation 2015/1222, namely, in the present case, 17 May 2016. Lastly, it is common ground that as at 13 May 2016 no joint request from the national regulatory authorities had been made asking ACER to adopt a decision in accordance with Article 9(11) of that regulation. The amendment request of 13 May 2016 was brought to the attention of ACER on 18 May 2016.'

37. In those circumstances, and in the view of what is mentioned in paragraph 35, the General Court found that, because of E-Control's submission to the TSOs of the amendment request of 13 May 2016, ACER did not have the power to adopt a decision on the TSOs' common proposal of 13 November 2015 in the context of the procedure set out in Article 9(11) of Regulation 2015/1222.

38. In the relaunched procedure, in its observations on the Appellants' statements, the Defendant adjusted its position in the view of the changes in the legislation occurred in the meantime. The Agency stated that Article 5 of Regulation (EU) 2019/942, which entered into force on 4 July 2019, introduced a new procedural regime for the approval of terms and conditions or methodologies for the implementation of network codes and guidelines, such as those adopted before 4 July 2019, which require the approval of all regulatory authorities. According to the procedural rules of Article 5(2) of Regulation (EU) 2019/942, the proposal shall no longer be approved by the regulatory authorities, but by the Agency.

39. Appellants III. and IV. on the contrary, stated that the entry into force of these provisions has no impact in the current procedure, since the CACM Regulation was

neither replaced nor repealed. The CACM Regulation 2015/1222 therefore continues to provide the procedural rules regarding the determination of the capacity calculation regions.

40. As noted above in paragraph 17 the provisions in force when the Contested Decision was issued continue to apply to the substance of the case brought before the Board of Appeal.

41. It follows from the General Court's judgements that the Agency was not competent to issue the Contested Decision, and that the second plea must be accepted.

42. Therefore, pursuant to Article 28(5) of Regulation 2019/942, the Board of Appeal remits the case to the Director of the Agency.

On the consequences of the Board of Appeal's decision

43. The Agency states that, if the Board of Appeal decides to annul the Contested Decision or to remit the case to the competent body of the Agency without annulling the Contested Decision, it is critical for the sake of legal certainty that such decision is not removed with immediate effect but remains in place until a new decision has been adopted on the proposal for the determination of capacity calculation regions in accordance with Article 15(1) of Regulation (EU) 2015/1222. The Agency stresses '*the risk of creating a significant legal gap, which may endanger the implementation of the network codes and guidelines and as such, the continuity of the market integration processes*.' It states that it could be useful for the parties concerned that the Board of Appeal indicate the appropriate measures to be taken following its decision, in particular as regards the applicable procedures.

44. The Appellants did not submit such a request. Appellants III. and IV. state that, as the rules of procedure do not seem to confer on the Board of Appeal the power to

repeal the Contested Decision, the Agency should repeal it in order to fulfil its obligation to comply with the judgements of the General Court.

45. The Board of Appeal may only rule on appeals against decisions issued by the Agency. If relevant, it may provide indications on the measures which necessarily follow from the motives of its decision on an appeal.

46. The Board of Appeal's decision is based solely on the Agency's incompetence when it issued the Contested Decision.

47. Regulation 2019/942 does not vest any body of the Agency with the power to annul the Contested Decision with a retroactive effect.

48. Neither Article 266 TFEU nor Article 29 of Regulation 2019/942 impose that the competent party or parties should immediately repeal the Contested Decision, which the Agency issued incompetently.

49. The Board of Appeal finds that the competent party or parties – based on the rules of competence provided for by regulations currently in force – should review the Contested Decision and amend it, replace it or confirm it, as they see relevant, and based on current circumstances. Hence the Agency should refer the decision to such party or parties. The Contested Decision will remain in force until such amendment, replacement or confirmation, if any.

D E C I S I O N

On those grounds,

THE BOARD OF APPEAL

Remits the case to the Director of the Agency.

This decision may be challenged pursuant to Article 263 of the Treaty on the Functioning of the European Union and Article 29 of Regulation (EU) 2019/942 within two months of its publication on the Agency website or of its notification to the Appellant as the case may be.

Andris Piebalgs

Chairperson of the Board of Appeal

Andras Szalay

Registrar of the Board of Appeal