

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

16 July 2020

*(Application for annulment – ACER Decision No. 02/2020 – Competence of ACER – proportionality – subsidiarity – Charter of Fundamental Rights of the EU – access to documents)*

<b>Case number</b>	A-001-2020 (consolidated)
<b>Language of the case</b>	English
<b>Appellants</b>	<p>Austrian Power Grid AG; ČEPS, a.s.; Independent Power Transmission Operator S.A.; Polskie Sieci Elektroenergetyczne; Red Eléctrica de España, S.A.; Réseau de Transport d'Électricité; Affärsverket svenska kraftnät ('Appellants I to VII')</p> <p>Represented by: Matthew Levitt (Baker Botts (Belgium) LLP), legal representative</p> <p>TenneT TSO GmbH; TenneT TSO B.V. ('Appellants VIII and IX')</p> <p>Represented by: Arjan Kleinhout and Koen Orbons (De Brauw Blackstone Westbroek N.V.), legal representatives</p>
<b>Defendant</b>	<p>European Union Agency for the Cooperation of Energy Regulators ('the Agency' or 'ACER')</p> <p>Represented by: Christian Zinglensen, Director / Pierre Goffinet, Emmanuel Van Nuffel and Laure Bersou (Daldewolf S.C.R.L).</p>
<b>Interveners</b>	<p>MAVIR Hungarian Independent Transmission Operator Company Ltd. ('MAVIR')</p> <p>Represented by: Zoltán Tihanyi, Deputy CEO for System Operation</p>

and Intersystem Cooperation

(On behalf of Appellants I to VII, granted)

**Application for** The revision or annulment of Decision No. 02/2020 of the European Union Agency for the Cooperation of Energy Regulators of 24 January 2020 on the Implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation (‘Decision No. 02/2020’ or ‘the Contested Decision’).

Access to certain documentation.

### THE BOARD OF APPEAL

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

**Acting Registrar:** Ronja Linßen

gives the following

### Decision

#### *I. Background*

##### *Legal background*

1. In a power system, demand should be equal to supply at all times or, in other terms, the system frequency must be maintained close to its nominal value. Each transmission system operator (‘TSO’) has to carry out a real-time balance to avoid any frequency deviation, capable of triggering a system collapse or blackout. Electricity balancing is needed because, after careful planning, producers, suppliers and traders may often find themselves out of balance and exposed to TSOs balancing and settlement regime.

2. Balancing energy (the real-time adjustment of balancing resources to maintain the system balance) is provided by Balancing Service Providers (BSPs) and can be provided either in real-time or secured in advance as balancing reserve products, i.e. available generation or demand capacity that can be activated to inject or withdraw balancing energy into or from the network and balance the system real-time. Three types of balancing reserve products are available, which are part of a sequential process based on successive layers of control. These are: (i) Frequency Containment Reserves (‘FCR’), Frequency Restoration Reserves (‘FRRs’) and Replacement Reserves (‘RR’). FRR are a type of balancing reserves allowing for a frequency restoration process. FRRs can be activated either manually (mFRR), e.g. by a phone call, or automatically by means of an automated system in which auctions are made using algorithms (aFRR). Frequency restoration processes are (jointly) operated by the TSO or TSOs operating in a Load-Frequency Control Area (‘LFC’ area).
3. The market players have a responsibility to balance the system through the balance responsibility of market participants, namely the Balance Responsible Parties (BRPs), who are financially responsible for keeping their own position (sum of injections, withdrawals and trades) balanced over a given timeframe (the imbalance settlement period or ‘ISP’). In case of remaining positive and negative imbalances (deviations between generation, consumption and commercial transactions), BRPs need to pay an imbalance charge to the TSOs.
4. In a single EU Internal Electricity Market, the wide variety of balancing market designs existing in Europe is generally perceived as an important barrier for their integration and the cause of unnecessary complexities for cross-border trade<sup>1</sup>.
5. Regulation (EU) 2017/2195<sup>2</sup> (‘EB NC’) establishes, therefore, an EU-wide standardised set of technical, operational and market rules to govern the functioning of electricity balancing markets<sup>3</sup> in order to ensure an optimal management and coordinated operation of the European electricity transmission system, while supporting the achievement of the Union’s targets for penetration of renewable generation, as well as providing benefits for customers. The EB NC, applicable to TSOs, Distribution System Operators (‘DSOs’), BRPs and BSPs, seeks to give full shape to the Third Energy Package<sup>4</sup>.

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<sup>1</sup> Commission Staff Working Document, Impact Assessment of 23 November 2017, SWD(2017)383 final, p. 17

<sup>2</sup> Commission Regulation (EU) No 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing.

<sup>3</sup> Recital 5 of the EB NC.

<sup>4</sup> EU regulatory package aimed at improving the functioning of the internal energy market and resolving certain structural problems, covering the areas of unbundling, independent regulators, ACER, cross-border cooperation

6. The EB NC sets out rules for the procurement of balancing capacity, the activation of balancing energy and the financial settlement of BRPs. It also requires the development of harmonised methodologies for the allocation of cross-zonal transmission capacity for balancing purposes. Such rules are aimed at increasing the liquidity of short-term markets by allowing for more cross-border trade and allowing for a more efficient use of the existing grid for the purposes of balancing energy. As balancing energy bids will compete on EU-wide balancing platforms, it will also have positive effects on competition<sup>5</sup>.
7. The EB NC lays down a detailed guideline on electricity balancing including the establishment of common principles for the procurement and the financial settlement of FCR, FRR and RR and a common methodology for the activation of FRR and RR<sup>6</sup>.
8. In addition, to facilitate the integration of electricity balancing markets, the EB NC foresees the creation of common European platforms to enable the exchange of balancing energy from FRR and RR and to operate the imbalance netting ('IN') process<sup>7</sup>. The EB NC requires that all TSOs develop implementation frameworks for these European platforms - the RR implementation framework ('RRIF'), the aFRR implementation framework ('aFRRIF'), the mFRR implementation framework ('mFRRIF') and the IN implementation framework ('INIF') - which are based on common governance principles and business processes<sup>8</sup>.
9. These common European Platform perform different functions: (i) the activation optimisation function ('AOF'), which takes, *inter alia*, demands, the common merit order lists and cross-zonal capacities as input and determines the amount of energy exchange between LFC areas, aiming to ensure the activation of the most cost-efficient bids through an optimisation algorithm; (ii) the TSO-TSO settlement function ('TTSF'), which calculates the settlement between TSOs of intended energy exchanges as a result of the cross-border processes; and (iii) the capacity management function ('CMF'), which continuously updates cross-zonal capacities available for balancing energy exchanges on

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and open and fair retail markets. Composed of: (i) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC; (ii) 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; (iii) 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; (iv) Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005; (v) 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.

<sup>5</sup> Recital (5) of the EB NC.

<sup>6</sup> Article 1(1) of the EB NC.

<sup>7</sup> Recital (10) of the EB NC.

<sup>8</sup> Articles 19(2), 20(2) and 21(2) and 22(2) of the EB NC.

bidding zone borders and can be implemented in a decentralised or centralised way. The cross-zonal capacity calculation function ('CCCF'), which calculates the capacity across zones, may be added if deemed efficient when implementing the methodology for cross-zonal capacity calculation within the balancing timeframe in accordance with Article 37(3) of the EB NC.

10. As highlighted in the Annual Report of ACER and the Council of European Energy Regulators ('CEER') on the Results of Monitoring the Internal Electricity and Gas Markets in 2016<sup>9</sup>, the core element of the EB NC is an efficient exchange of balancing services, which will provide the legal framework for integrating national balancing markets. In an earlier Annual Report, ACER and CEER highlighted the benefits of EU integration of balancing markets through increasing the cross-border exchanges of balancing energy (including imbalance netting), "*which are estimated at several hundred million euros per year and may even be higher in view of the ambitious decarbonisation objective of the EU energy market.*"<sup>10</sup>
11. The EB NC seeks to foster cross-border trade in balancing energy within the EU. This integration of balancing markets is aimed at enhancing the efficiency of the European balancing markets, whilst creating a level-playing field.
12. Recital 2 of the EB NC states: "*The Energy Union aims to provide final customers – household and business – with safe, secure, sustainable, competitive and affordable energy. Historically, the electricity system was dominated by vertically integrated, often publicly owned, monopolies with large centralised nuclear or fossil fuel power plants. The internal market for electricity, which has been progressively implemented since 1999, aims to deliver a real choice for all consumers in the Union new business opportunities and more cross-border trade, so as to achieve efficiency gains, competitive prices and higher standards of service, and to contribute to security of supply and sustainability. The internal market for electricity has increased competition, in particular at the wholesale level, and cross-zonal trade. It remains the foundation of an efficient energy market.*"
13. Recital 3 of the EB NC reads: "*The Union's energy system is in the middle of its most profound change in decades and the electricity market is at the heart of that change. The common goal of decarbonising the energy system creates new opportunities and*

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<sup>9</sup> Annual Report of ACER and the Council of European Energy Regulators ('CEER') on the Results of Monitoring the Internal Electricity and Gas Markets in 2016, 6 October 2017, p. 49.

<sup>10</sup> Annual Report of ACER and the Council of European Energy Regulators ('CEER') on the Results of Monitoring the Internal Electricity and Gas Markets in 2014, 30 November 2015, p. 16.

*challenges for market participants. At the same time, technological developments allow for new forms of consumer participation and cross-border cooperation.”*

14. The integration of balancing markets at EU-level foreseen by the EB NC is a gradual, bottom-up process, in which, at different points in time, various stakeholders – in essence the TSOs, the national regulatory authorities (‘NRAs’) and the Agency - are required to take formal steps to attain certain goals set by the EB NC.
15. In the step-based integration process of the EB NC, pursuant to Articles 4(1) and 5(2) of the EB NC, all TSOs were required, by one year after the entry into force of the EB NC - i.e. by 18 December 2018 -, to develop common proposals on (i) the methodology for pricing balancing energy and cross-zonal capacity used for the exchange of balancing energy or operating the IN process in accordance with Article 30(1) of the EB NC; (ii) the aFRRIF in accordance with Article 21 of the EB NC and (iii) the mFRRIF in accordance with Article 20 of the EB NC.
16. All TSOs’ proposals were submitted for approval to all NRAs, who were required by Article 5(6) of the EB NC to reach an agreement and take a decision on All TSOs’ Proposals within six months after the receipt of the proposals by the last relevant NRA.
17. According to Article 5(7) of the EB NC, when all NRAs fail to reach an agreement within the six months deadline, or upon the NRAs’ joint request, the Agency shall adopt a decision on All TSOs’ Proposals within six months from the end of previous six months period or from the date of referral by the NRAs, acting under Article 6(10)(b) of Regulation (EU) 2019/942<sup>11</sup> (‘ACER Regulation’). By virtue of Article 5(7) of the EB NC, all NRAs jointly requested the Agency to adopt a decision in their stead on the TSOs’ Proposals in accordance with Article 6(10)(b) of the ACER Regulation.
18. Consequently, the Agency adopted three decisions on All TSOs’ Proposals: (i) Decision No. 01/2020 on the methodology to determine prices for the balancing energy that results from the activation of balancing energy bids; (ii) Decision No. 02/2020 on the aFRRIF, which is the Contested Decision and (iii) Decision No. 03/2020 on the mFRRIF<sup>12</sup>.
19. The Agency adopted these decisions on the basis of Article 6(10)(b) of the ACER Regulation.
20. Article 6(10)(b) of the ACER Regulation states that the Agency shall be competent to adopt individual decisions as specified in the first subparagraph - ACER shall be competent to adopt individual decisions on regulatory issues having effects on cross-

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<sup>11</sup> 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.

<sup>12</sup> Annex 2 to the Appeal of Appellants VIII and IX.

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 certain legal acts - in the following situations: (..) “(b) on the basis of a joint request from the competent regulatory authorities”.

21. Article 6(11) of the ACER Regulation provides that, when preparing its decision pursuant to paragraph 10, the Agency shall consult the NRAs and TSOs concerned and shall be informed of the proposals and observations of all concerned TSOs.
22. Article 6(12)(a) of the ACER Regulation further states that “Where a case has been referred to ACER under paragraph 10, ACER: (a) shall issue a decision within six months of the date of referral, or within four months thereof in cases pursuant to Article 4(7) of this Regulation or point (c) of Article (59)(1) or point (f) of Article 62(1) of Directive (EU) 2019/944”.
23. The Contested Decision has to be in compliance with Article 21 of the EB NC entitled “European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation”.
24. Article 21(1), (2) and (3) of the EB NC reads as follows:
  - “1. By one year after entry into force of this Regulation, all TSOs shall develop a proposal for the implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation.
  2. The European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation, operated by TSOs or by means of an entity the TSOs would create themselves, shall be based on common governance principles and business processes and shall consist of at least the activation optimisation function and the TSO-TSO settlement function. This European platform shall apply a multilateral TSO-TSO model with common merit order lists to exchange all balancing energy bids from all standard products for frequency restoration reserves with automatic activation, except for unavailable bids pursuant to Article 29(14).
  3. The proposal in paragraph 1 shall include at least:
    - (a) the high level design of the European platform;
    - (b) the roadmap and timelines for the implementation of the European platform;
    - (c) the definition of the functions required to operate the European platform;
    - (d) the proposed rules concerning the governance and operation of the European platform, based on the principle of non-discrimination and ensuring equitable treatment of all member TSOs and that no TSO benefits from unjustified economic advantages through the participation in the functions of the European platform;

*(e) the proposed designation of the entity or entities that will perform the functions defined in the proposal. Where the TSOs propose to designate more than one entity, the proposal shall demonstrate and ensure:*

*(i) a coherent allocation of the functions to the entities operating the European platform. The proposal shall take full account of the need to coordinate the different functions allocated to the entities operating the European platform;*

*(ii) that the proposed setup of the European platform and allocation of functions ensures efficient and effective governance, operation and regulatory oversight of the European platform as well as supports the objectives of this Regulation;*

*(iii) an effective coordination and decision making process to resolve any conflicting positions between entities operating the European platform;*

*(f) the framework for harmonisation of the terms and conditions related to balancing set up pursuant to Article 18;*

*(g) the detailed principles for sharing the common costs, including the detailed categorisation of common costs, in accordance with Article 23;*

*(h) the balancing energy gate closure time for all standard products for frequency restoration reserves with automatic activation in accordance with Article 24;*

*(i) the definition of standard products for balancing energy from frequency restoration reserves with automatic activation in accordance with Article 25;*

*(j) the TSO energy bid submission gate closure time in accordance with Article 29( 13);*

*(k) the common merit order lists to be organised by the common activation optimisation function pursuant to Article 31;*

*(l) the description of the algorithm for the operation of the activation optimisation function for the balancing energy bids from all standard products for frequency restoration reserves with automatic activation in accordance with Article 58.”*

25. Articles 36 and 37 of the EB NC list the requirements for using and updating the cross-zonal capacity for the exchange of balancing energy. Specifically, Article 37(1) of the EB NC requires that, after the intraday-cross-zonal gate closure time, TSOs shall continuously update the availability of cross-zonal capacity for the exchange of balancing energy, and that cross-zonal capacity shall be updated every time a portion of cross-zonal capacity has been used or when cross-zonal capacity has been recalculated.

26. Additionally, Article 37(2) of the EB NC requires that TSOs use the cross-zonal capacities remaining after the intraday cross-zonal gate closure time until they have developed a methodology for cross-zonal capacity calculation pursuant to Article 37(3) of the EB NC.



*Facts giving rise to the dispute*

27. Following a public consultation organised by the TSOs from 26 April 2018 until 26 June 2018, all TSOs submitted their “*All TSO’s Proposal for the Implementation Framework for a European Platform for the Exchange of Balancing Energy from Frequency Restoration Reserves with Automatic Activation in accordance with Article 21 of the EB NC*” (All TSOs’ initial aFRRIF Proposal) on 18 December 2018<sup>13</sup> to the NRAs. The last relevant NRA received the Proposal on 11 February 2019.
28. By a letter dated 24 July 2019, the Chair of the Energy Regulators’ Forum, on behalf of All NRAs, informed the Agency that they had jointly agreed, within the 6 months timeframe, to request the Agency to adopt a decision on All TSOs’ initial aFRRIF Proposal pursuant to Article 5(7) of the EB NC<sup>14</sup>. The Agency received the aforementioned letter on that same day.
29. The letter was accompanied by a document entitled “*Non-Paper of All Regulatory Authorities agreed at the Energy Regulators’ Forum on All TSOs’ Proposal for the Implementation Framework for the Exchange of Balancing Energy from Frequency Restoration Reserves with Automatic Activation in accordance with Article 21 of the EB NC*” (All NRAs’ Non-Paper) dated 23 July 2019<sup>15</sup>.
30. The Agency submitted All TSOs’ initial aFRRIF Proposal to public consultation on 28 October 2019, which lasted until 18 November 2019. The results of the public consultation are attached as Annex II to the Contested Decision.
31. From July 2019 until December 2019, the Agency closely collaborated with all NRAs and TSOs and further consulted on All TSOs’ initial aFRRIF Proposal during teleconferences, meetings and written exchanges<sup>16</sup>.
32. Article 12 of the initial All TSOs’ aFRRIF Proposal submitted to the NRAs on 18 December 2018 stipulates that “*1. All TSOs shall appoint one entity entrusted to operate all the functions of the aFRR-Platform. 2. The entity shall be a consortium of TSOs or a company owned by TSOs.*”

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<sup>13</sup> Annex 4 to the Defence. See also Annex 4 of the Appeal of Appellants I to VII.

<sup>14</sup> Annex 5 to the Defence. See also Annex 5 of the Appeal of Appellants I to VII and Annex 8 of the Appeal of Appellants VIII and IX.

<sup>15</sup> Annex 6 to the Defence. See also Annex 5 of the Appeal of Appellants I to VII and Annex 8 of the Appeal of Appellants VIII and IX.

<sup>16</sup> Para 10 of the Contested Decision. See also Annexes 7-17 to the Defence.

33. The Agency viewed that the initial All TSOs' aFRRIF Proposal was not in accordance with the EB NC. A consortium of TSOs would be contrary to the EB NC because, given that it lacks legal personality, a consortium does not amount to a single entity but multiple entities, triggering the need for compliance with the additional requirements of the second sentence of Article 21(3)(e) of the EB NC, absent in the initial All TSOs' aFRRIF Proposal. In effect, the initial All TSOs' aFRRIF Proposal neither ensured nor demonstrated compliance with additional requirements imposed by Article 21(3)(e) of the EB NC on multiple entities.
34. The Agency therefore consulted with the TSOs and the TSOs clarified that their intention was to designate a single entity as opposed to multiple entities to operate all functions of the aFRR-Platform. Hence, there was no need for compliance with the additional requirements of the second sentence of Article 21(3)(e) of the EB NC.
35. Pursuant to the TSOs' clarification, the Agency provided its opinion on the TSOs' clarification to the TSOs, stating that the designation of a single entity that the TSOs would create themselves would be more efficient to operate cross-platform functions, carry out direct management control, to allow for an efficient separation, monitoring, audit and approval of costs and to ensure the maintenance of national responsibility for balancing with each TSO.
36. The TSOs submitted a second (revised) All TSOs' aFRRIF Proposal to the Agency on 28 November 2019<sup>17</sup>, designating a single TSO to perform the AOF and the TTSP. The second (revised) Proposal stipulated that *“All TSOs shall designate a single entity entrusted to perform all the functions of the aFRR-Platform. This entity shall not be allowed to delegate these functions to a TSO or third party. This entity shall be a company owned by TSOs.”* It was accompanied by an explanatory memo stating that *“(1) Each member TSO of the aFRR-Platform is accountable towards its national regulatory authority and its market participants for the execution of the cross-border aFRR activation process in accordance with this aFRRIF. (2) All TSOs shall designate one entity being one single TSO that will perform both the AOF function and the TSO-TSO settlement function. (3) The designation of the entity will be done in accordance with Article 21(4) of the EBGL. (4) The designated entity shall be acting on behalf of all member TSOs under the supervision of the steering committee of the aFRR-Platform, in accordance with Article 14(2)(a) of this aFRRIF and in accordance with the operational rules approved by the steering committee. (5) For the avoidance of doubt, the designated*

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<sup>17</sup> Annex 14 to the Defence, joined as annex to an email of 28 November 2019 from the TSOs to ACER.

*entity may contract third parties for executing supporting tasks, subject to the agreement of the steering committee.”*

37. The Agency evaluated this second (revised) All TSOs’ aFRRIF Proposal and held that it was not in accordance with the EB NC. This is because the designated entity would only perform the AOF and TTTF, whereas the EB NC requires the designated entity to perform all functions of the aFRR-Platform, including cross-platform functions, such as the CMF. The Agency also suggested that both the option of designating a single TSO and the option of designating an entity that the TSOs would create themselves be kept open in order to comply with Article 21(2) of the EB NC.
38. Pursuant to the Agency’s evaluation, the TSOs submitted a third (revised) All TSOs’ aFRRIF Proposal to the Agency on 13 December 2019<sup>18</sup>. This was after the deadline for consultations that the Agency had communicated to the TSOs. This third (revised) All TSOs’ aFRRIF Proposal designated a single TSO to perform the AOF and TTTF. It also stipulated that, each time TSOs would implement cross-platform functions, the TSOs would designate an entity to perform them and that this entity could be different from the single TSO performing the AOF and TTTFs. The third (revised) Proposal stipulated both for aFRRIF and mFRRIF (designated generically as [x]FRRIF that “1. Each member TSO of the [x]FRR-Platform is accountable towards its national regulatory authority and its market participants for the execution of the cross-border [x]FRR activation process in accordance with this [x]FRRIF. 2. All TSOs shall appoint one entity entrusted to operate the AOF and the settlement function of the [x]FRR-Platform. This entity shall be a single TSO or a company owned by TSOs. 3. The designation of the entity as set out in (2) will be done in accordance with Article 21(4) of the EB Regulation. 4. Whenever all TSOs implement a cross-platform function, all TSOs shall appoint one entity entrusted to operate such a cross-platform function which may be different from the entity in (2). 5. By six months after the approval of the proposal for the implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with [manual/automatic] activation, all TSOs shall designate the proposed entity entrusted with operating the CMF. 6. A designated entity as set out in (5) shall be acting in behalf of all member TSOs under the supervision of the steering committee of the [x]FRR-Platform, in accordance with Article 14(2)(a) of this [x]FRRIF and in accordance with the operational rules approved by the steering committee. 7. For the avoidance of

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<sup>18</sup> Annex 17 to the Defence, joined as annex to an email of 13 December 2019 from the TSOs to ACER.

*doubt, a designated entity may contract third parties for executing supporting tasks, subject to the agreement of the steering committee.”*

39. The Agency evaluated this third (revised) All TSOs’ aFRRIF Proposal and held that it was not in accordance with the EB NC. In the event that the designated TSO for the AOF and the TTSF did not coincide with the designated entity to perform cross-platform functions, there would be in effect multiple entities, triggering the need for compliance with the additional requirements of the second sentence of Article 21(3)(e) of the EB NC, absent in the Proposal. In effect, the third (revised) All TSOs’ aFRRIF Proposal neither ensured nor demonstrated compliance with additional requirements imposed by Article 21(3)(e) of the EB NC on multiple entities.
40. On 18 December 2019, the TSOs submitted complementary assertions to the third (revised) All TSOs’ aFRRIF Proposal of 13 December 2019<sup>19</sup>. These assertions stipulated that the cross-platform CMF is not required to operate the aFRR-Platform.
41. The Agency provided its opinion to the TSOs, clarifying that the CMF is essential to the operation of the aFRR-Platform and that the third (revised) All TSOs’ aFRRIF Proposal of 13 December 2019 did not comply with the second sentence of Article 21(3)(e) of the EB NC.
42. Due to the Agency’s six-month deadline to take a decision on the Proposal, expiring on 24 January 2020, the Agency could not request the TSOs to complement the All TSOs’ aFRRIF Proposal once again.
43. The Agency issued Decision 02/2020 on the Implementation Framework for the European Platform for the Exchange of Balancing Energy from Frequency Restoration Reserves with Automatic Activation (‘the Contested Decision’) on 24 January 2020. Annex I to the Contested Decision contains the aFRRIF, allowing for the designation of a single TSO or an entity that the TSOs would create themselves to perform the AOF and TTSF, whilst leaving the decision on the entity performing the CMF open but requiring the TSOs to develop a new Proposal on the issue and submit it for regulatory approval no later than 18 months before the deadline for the implementation of the CMF (this deadline being 2 years after the implementation of the aFRR-Platform) or earlier if an earlier implementation of the CMF is foreseen<sup>20</sup>.

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<sup>19</sup> Annex 7 to the Defence, joined as annex to an email of 18 December 2019 from the TSOs to ACER. See also Annex 10 to the Appeal of Appellants VIII and IX.

<sup>20</sup> In case the TSOs intend to implement the CMF at the time of the implementation of the aFRR-Platform, the TSOs should develop a proposal for the designated entity to operate this function sufficiently before the implementation of the aFRR-Platform.

44. The following table describes the difference between the third (revised) All TSO's aFRRIF Proposal and the final aFRRIF joined as Annex I to the Agency's Contested Decision:

**Table – Comparison of the Designation of the Entity/Entities to perform the functions of the aFRR Platform according to Article 21 of the EB NC.**

Third (revised) All TSOs' aFRRIF Proposal	Final aFRRIF annexed to the Contested Decision
<p><b>AOF and TTTSF:</b> Designation of a single TSO (AOF/TTTSF TSO) by 24 July 2020.</p> <p><b>CMF:</b> Designation <i>ad hoc</i>, each time the CMF is implemented, of an entity (CMF entity), which could be different from the AOF/TTTSF TSO.</p>	<p><b>AOF and TTTSF:</b> Designation of a single entity being a single TSO <u>or</u> a company owned by TSOs (AOF/TTTSF TSO <u>or</u> TSO-owned AOF/TTTSF entity) by 24 July 2020.</p> <p><b>CMF:</b> Development of a proposal for amendment of the aFRRIF to designate a CMF entity, <u>either</u> as (i) a single entity (the same entity as the AOF/TTTSF TSO <u>or</u> TSO-owned AOF/TTTSF entity) <u>or</u> (ii) multiple entities complying with the additional requirements of Art.21(3)(e) EB NC (different entity than the AOF/TTTSF TSO <u>or</u> TSO-owned AOF/TTTSF entity) by 24 January 2023 .</p>

Source: Agency's Board of Appeal

### *Procedure*

45. On 23 March 2020, Appellants I to VII submitted an appeal to the Registry of the Board of Appeal against the Contested Decision in case A-001-2020.
46. On 23 March 2020, Appellants VIII and IX submitted an appeal to the Registry of the Board of Appeal against the Contested Decision and against the Decision of the Agency for the Cooperation of Energy Regulators No. 03/2020 of 24 January 2020 on the mFRRIF ('ACER Decision No. 03/2020').
47. On 31 March 2020, the announcement of appeal was published on the website of the Agency.
48. Given that it related to two different ACER decisions, the Appeal submitted by Appellants VIII to IX against Decisions No. 02/2020 and 03/2020 was split into two cases for procedural reasons, namely case A-004-2020 relating to Decision No. 02/2020, on the one hand, which, as set out above, is the Contested Decision, and A-005-2020 relating to Decision No. 03/2020, on the other hand. In both cases, the same Appeal has been retained. On 24 April 2020, the Board of Appeal merged appeals no. A-001-2020 and A-004-2020, being similar in their contents, into Appeal A-001-2020 (consolidated).

49. On 22 April 2020, the Registrar communicated the composition of the Board of Appeal to the Parties.
50. On 9 April 2020, MAVIR filed its requests for intervention with the Registry in support of Appellants I to VII.
51. On 15 April 2020, VERENIGING ENERGIE-NEDERLAND filed its requests for intervention with the Registry in support of Appellants VIII and IX.
52. On 8 June 2020, MAVIR was granted the right to intervene on behalf of Appellants I to VII, whereas VERENIGING ENERGIE-NEDERLAND was refused the right to intervene on behalf of Appellants VIII and IX.
53. On 4 May 2020, ACER filed its Defence with the Registry requesting the BoA to dismiss the appeal.
54. Appellants I to VII requested the Board of Appeal, pursuant to Article 20(3)(d) of the Board of Appeal's Rules of Procedure, to disclose or to require ACER to disclose to the Appellants in unredacted form (i) a copy of any assessment conducted by ACER under Article 21(5) of the EB NC to determine whether and how the TSOs could perform the cost-benefit analysis necessary to support the amendment required by Article 12(2) of the aFRRIF and (ii) copies of any templates recording the views of the Board of Regulators and ACER on the Decision and aFRRIF prior to their adoption, and provide the Appellants with the right to make observations on the outcome of such disclosures. On 2 June 2020, the Chairperson acting on behalf of the Board of Appeal denied this disclosure request in a duly reasoned decision.
55. On 28 May 2020, Appellants I to VII and Appellants VIII and IX filed their respective Replies to the Defence with the Registry.
56. On 10 June 2020 the Agency submitted its Rejoinder to the Registry.
57. On 17 June 2020, the written part of the proceeding was closed.
58. The Board of Appeal held an oral hearing on 18 June 2020. Some questions posed by the Board of Appeal were not answered orally during the hearing but were answered in writing on 19 June 2020, as was duly authorised by the Board of Appeal's Registrar during the Oral Hearing.

#### *Main arguments of the Parties*

59. The claims by Appellants I to VII can be summarized as follows:

-First and Second Pleas: infringement by ACER of Article 6(10) of Regulation (EU) 2019/942 and of Article 5(7) of the EB NC, in acting outside of its competence by extending its decision-making powers to the revision of matters of All TSOs' aFRRIF Proposal on which the NRAs were in agreement, *inter alia* the designation of an entity in Article 12 of the aFRRIF;

-Third Plea: infringement by ACER of Articles 10 and 21(5) of the EB NC, by exceeding its competence in obliging the TSOs to submit a proposal for an amendment of the aFRRIF;

-Fourth Plea: infringement by ACER of Article 21 of the EB NC in its decision to impose a single entity structure on the TSOs;

-Fifth Plea: infringement by ACER of Article 16 of the Charter of Fundamental Rights of the EU (freedom to conduct a business), in its decision to impose a single entity structure on the TSOs;

-Sixth Plea: infringement by ACER of the principle of proportionality and of the right to pursue an economic activity, through the imposition of a single entity structure on the TSOs which is not justified by the scope and purpose of the EB NC;

-Seventh Plea: infringement by ACER of Articles 6(11) and 14(6) of Regulation (EU) 2019/942, and of Article 41 of the Charter of Fundamental Rights of the EU (right to good administration), in failing to consult on its interpretation of All TSOs' revised aFRRIF Proposals when choosing to evaluate them following the deadline for consultation provided to the TSOs.

60. Appellants I to VII request the Board of Appeal to:

- a) Annul Articles 3(3), 3(4)(b), 4(6), 6, 11(1)(c) and 12 of the aFRRIF (Annex I to the Contested Decision);
- b) Annul Article 1 of the Contested Decision;
- c) Remit the Contested Decision and aFRRIF to the competent body of ACER.

61. The claims by Appellants VIII and IX can be summarized as follows:

-First, Second and Fourth Pleas: infringement by ACER of Article 6(10) of Regulation (EU) 2019/942, Article 5(7) of the EB NC and the principle of subsidiarity, by exceeding its competence in its decision to impose a single entity structure on the TSOs, especially when the NRAs had reached an agreement on this issue and had not requested ACER to take a decision on this point.

-Third Plea: infringement by ACER of Article 21(2) of the EB NC by imposing a single entity structure.

62. Appellants VIII and IX request the Board of Appeal to annul the Contested Decision.

63. The Defendant requests the Board of Appeal to dismiss the Appeals in their entirety as unfounded.

## II. *Admissibility*

### *Admissibility of the appeal*

#### *Ratione temporis*

64. Article 28(2) of Regulation (EU) 2019/942 provides that “[t]he appeal shall include a statement of the grounds for appeal and shall be filed in writing at ACER within two months of the notification of the decision to the person concerned, or, in the absence thereof, within two months of the date on which ACER published its decision”.

65. The Appeals were submitted on 23 March 2020, challenging ACER Decision No. 02/2020, which was published on its website on 28 January 2020.

66. The Appeals were received by the Registry *by e-mail* on 23 March 2020 and it contained the statement of grounds.

67. Therefore, the Appeals are admissible *ratione temporis*.

#### *Ratione materiae*

68. Article 28(1) of Regulation (EU) 2019/942 provides that decisions referred to in Article 2(d) may be appealed before the Board of Appeal.



69. Decision No. 02/2020 was issued on the basis of Article 6(10)(b) of Regulation (EU) 2019/942, read in conjunction with Article 5(7) of Regulation (EU) 2017/2195, following a consultation with the concerned regulatory authorities (‘NRAs’) and transmission system operators (‘TSOs’).

70. Therefore, since the appeals fulfil the criterion of Article 28(1) of Regulation (EU) 2019/942, the Appeals are admissible *ratione materiae*.

#### *Ratione personae*

71. Article 28(1) of Regulation (EU) 2019/942 provides that “[a]ny natural or legal person, including the regulatory authorities, may appeal against a decision referred to in point (d) of Article 2 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.”

72. In accordance with Article 2 of the Contested Decision, the Appellants are addressees of the Contested Decision.

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

#### *Merits*

##### *Remedies sought by the Appellant*

74. Appellants I to VII request the Board of Appeal to (i) annul Article 1 of Decision No. 02/2020; (ii) annul Articles 3.3, 3(4)(b), 4(6), 6, 11(1)(c) and 12 of the aFRRIF joined as Annex I to Decision No. 02/2020 and remit the case to the competent Agency body to replace Decision No. 02/2020 by a new Decision.

75. Appellants VIII and IX request to Board of Appeal to annul Decision No. 02/2020.

##### *Pleas and arguments of the Parties*

76. The Board of Appeal observes, as a preliminary remark, that the facts contained in paras 4-20 and 67-77 of the Contested Decision are not challenged by the Appellants.

*First Consolidated Plea - Infringement by ACER of Article 6(10) of Regulation (EU) 2019/942, of Article 5(7) of the EB NC, and of the principle of subsidiarity, in acting outside of its competence by extending its decision-making powers to the revision of aspects of All TSOs' aFRRIF Proposal on which the NRAs were in agreement.*

77. By their First and Second Pleas, Appellants I to VII argue that the Contested Decision infringes Article 6(10) of Regulation (EU) 2019/942 and Article 5(7) of the EB NC, because ACER had acted outside of its competence by extending its decision-making powers to the revision of aspects of All TSOs' aFRRIF Proposal on which the NRAs were in agreement and/or which had not been referred to ACER by the NRAs, including the imposition of a single entity structure. They further argue that ACER does not have the competence to exercise a general power of revision under Article 6(10) of Regulation (EU) 2019/942<sup>21</sup>.

78. By their First, Second and Fourth Pleas, Appellants VIII and IX argue that the Contested Decision infringes Article 6(10) of Regulation (EU) 2019/942, Article 5(7) of the EB NC, and the principle of subsidiarity, because ACER exceeded its competence in obliging the TSOs to submit a revised All TSOs' aFRRIF Proposal, including the imposition of a single entity structure, when the NRAs were in agreement on this issue and had not requested that ACER revise All TSOs' Proposal on this point. These Appellants also argue that Article 6(10) of Regulation (EU) 2019/942 does not grant the Agency the power to revise All TSOs' Proposals, in contrast with the powers granted by Article 5(2) of the same Regulation<sup>22</sup>.

79. The Agency disagrees with the Appellants' interpretation of the scope of the Agency's competence in this case, arguing that, in the case of a referral such as the one at hand, the Agency became competent to adopt the Contested Decision without this competence being limited to matters on which there was disagreement between the NRAs, and noting that this does not lead to an "unlimited" power of the Agency. It also rejects the view of the Agency's role as being limited to "regulatory oversight", notes that the Recast ACER

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<sup>21</sup> Paras 35-69 of the Appeal of Appellants I to VII.

<sup>22</sup> Paras 17-32 and 37-39 of the Appeal of Appellants VIII and IX.

Regulation has not reduced the Agency’s relevant competences and argues that there is no meaningful difference between the powers of “revision and approval” and to “adopt individual decisions”. It further argues that the Agency’s competence is confirmed, not just by a literal interpretation, but also by a systemic and teleological approach to applicable EU Law<sup>23</sup>. It added, in its Rejoinder, that Article 6(10) of the EB NC does not distinguish between the two trigger events, namely the absence of agreement and the joint request by the NRAs<sup>24</sup>.

80. Article 6(10)(b) of Regulation (EU) 2019/942 states that the Agency shall be competent to adopt individual decisions as specified in the first subparagraph - 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 certain legal acts - *“(b) on the basis of a joint request from the competent regulatory authorities”*.
81. Article 6(11) of the ACER Regulation provides that, when preparing its decision pursuant to paragraph 10, the Agency shall consult the NRAs and TSOs concerned and shall be informed of the proposals and observations of all concerned TSOs.
82. Article 6(12)(a) of Regulation (EU) 2019/942 further states that *“Where a case has been referred to ACER under paragraph 10, ACER: (a) shall issue a decision within six months of the date of referral, or within four months thereof in cases pursuant to Article 4(7) of this Regulation or point (c) of Article (59)(1) or point (f) of Article 62(1) of Directive (EU) 2019/944”*.
83. Article 5(7) of the EB NC states that, *“where the relevant regulatory authorities have not been able to reach an agreement within the period referred to in paragraph 6, or upon their joint request, the Agency shall adopt a decision concerning the submitted proposals for terms and conditions or methodologies within six months from the day of referral, in accordance with Article 8(1) of Regulation (EC) No 713/2009”*. Article 5(7) of the EB NC refers to Article 8(1) of Regulation (EC) 713/2009 (the former ACER Regulation), which has been replaced by Article 6(10) of Regulation (EU) 2019/942, referred to above.
84. Article 21(1) of the EB NC mandates all TSOs to develop a proposal for an aFRRIF. Article 21(3)(e) of the EB NC provides that the TSOs’ proposal shall include the designation of *“an entity or entities that will perform the functions defined in the*

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<sup>23</sup> Paras 54-100 and 103-124 of the Defence.

<sup>24</sup> Paras 2 and 43-45 of the Rejoinder.

*proposal*”. It adds that, “*where the TSOs propose to designate more than one entity*”, the guarantee of additional conditions has to be demonstrated in the proposal: “*(i) a coherent allocation of the functions to the entities operating the European platform. The proposal shall take full account of the need to coordinate the different functions allocated to the entities operating the European platform; (ii) that the proposed setup of the European platform and allocation of functions ensures efficient and effective governance, operation and regulatory oversight of the European platform as well as supports the objectives of this Regulation; (iii) an effective coordination and decision making process to resolve any conflicting positions between entities operating the European platform.*”

85. The Board of Appeal observes that, in the case at hand, the Appellants and the Agency agree on the following: all NRAs jointly requested the Agency to adopt a decision on All TSOs’ initial aFRRIF Proposal by virtue of Article 5(7) of the EB NC within the six-month deadline of the TSOs’ referral of their Proposal and, pursuant to this request, the Agency had a six-month deadline to take its decision<sup>25</sup>.

86. The Board of Appeal also observes that the Appellants and the Agency agree on the fact that the approval of All TSOs’ aFRRIF Proposal qualifies as a regulatory matter within the competences of the NRAs that can jointly be referred by the NRAs to the Agency<sup>26</sup>. The Appellants do not dispute that the designation of an entity under Article 12 of the aFRRIF joined as Annex I to the Contested Decision falls within the scope of the decision which could have been adopted by the NRAs but was jointly referred by the latter to the Agency.

87. The Appellants, however, dispute that Article 6(10) of Regulation (EU) 2019/942 and Article 5(7) of the EB NC grant the Agency the competence to modify All TSOs’ initial aFRRIF Proposal on a regulatory matter on which the NRAs had not previously disagreed, in particular on the designation of an entity to perform the Platform functions.

88. In other words, the Appellants do not dispute that the NRAs are competent to decide on the designation of an entity to perform the Platform functions. They dispute that the Agency is competent to decide on the designation of such entity in the absence of an express disagreement on this issue by all NRAs in their joint referral to the Agency.

89. Article 12 of the Contested Decision’s aFRRIF<sup>27</sup> reads:

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<sup>25</sup> Contested Decision, paras 3, 7, 11-13 and 15-17. Letter of the Chair of All Energy Regulators’ Forum dated 24 July 2019, see Annex 5 of the Defence, Annex 5 of the Appeal of Appellants I to VII and Annex 8 of the Appeal of Appellants VIII and IX.

<sup>26</sup> *Ibidem*.

<sup>27</sup> Contested Decision, paras 67-84 and Annex I.

“1. Each member TSO of the aFRR-Platform is accountable towards its national regulatory authority and its market participants for the execution of the cross-border aFRR activation process in accordance with this aFRRIF.

2. All TSOs shall appoint one entity being a single TSO or a company owned by TSOs that shall be entrusted to operate the activation optimisation function and the TSO-TSO settlement function of the aFRR-Platform. No later than eighteen months before the deadline when the capacity management function shall be considered as a function required to operate the aFRR-Platform pursuant to Article 6(4), all TSOs shall develop a proposal for amendment of this aFRRIF, which shall designate the entity performing the capacity management function in accordance with Article 21(3)(e) of the EB Regulation and clarify whether the aFRR-Platform will be operated by a single entity or multiple entities.

3. The designation of the entity will be done in accordance with Article 21(4) of the EB Regulation.

4. The designated entity shall be acting on behalf of all member TSOs under the supervision of the steering committee of the aFRR-Platform, in accordance with Article 14(2)(a) and in accordance with the operational rules approved by the steering committee.

5. For the avoidance of doubt, the designated entity may contract third parties for executing supporting tasks, subject to the agreement of the steering committee.”

90. The Board of Appeal observes that both the Appellants and the Agency agree that the aFRRIF joined as Annex I to the Contested Decision mandates all TSOs to designate a single entity to operate the AOF and the TTSF of the aFRR-Platform, notably “one entity being a single TSO or a company owned by TSOs”.

91. The Board of Appeal reiterates the comparison between the third (revised) All TSOs’ aFRRIF Proposal<sup>28</sup> and the Contested Decision’s aFRRIF.

**Table – Comparison of the Designation of the Entity/Entities to perform the functions of the aFRR Platform according to Article 21 of the EB NC.**

<b>Third (revised) All TSOs’ aFRRIF Proposal</b>	<b>Final aFRRIF annexed to the Contested Decision</b>
<b>AOF and TTSF:</b> Designation of a single TSO (AOF/TTSF TSO) by 24 July 2020.	<b>AOF and TTSF:</b> Designation of a single entity being a single TSO <u>or</u> a company owned by TSOs (AOF/TTSF TSO <u>or</u> TSO-owned AOF/TTSF entity) by 24 July 2020.
<b>CMF:</b>	<b>CMF:</b>

<sup>28</sup> Annex 17 to the Defence, joined as annex to an email of 13 December 2019 from the TSOs to ACER.

Designation <i>ad hoc</i> , each time the CMF is implemented, of an entity (CMF entity), which could be different from the AOF/TTSF TSO.	Development of a proposal for amendment of the aFRRIF to designate a CMF entity, <u>either</u> as (i) a single entity (the same entity as the AOF/TTSF TSO <u>or</u> TSO-owned AOF/TTSF entity) <u>or</u> (ii) multiple entities complying with the additional requirements of Art.21(3)(e) EB NC (different entity than the AOF/TTSF TSO <u>or</u> TSO-owned AOF/TTSF entity) by 24 January 2023 .
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*Source: Agency's Board of Appeal*

92. The Board of Appeal infers that both the third (revised) All TSOs' aFRRIF Proposal and the Contested Decision's aFRRIF require the designation of a single TSO, enabling them to either designate a single TSO or a company owned by TSOs (AOF/TTSF TSO or TSO-owned AOF/TTSF entity). The Board of Appeal does not observe any contradiction between the third (revised) TSOs' aFRRIF Proposal and the Contested Decision's aFRRIF regarding the designation of an AOF/TTSF TSO or TSO-owned entity. Moreover, the second (revised) All TSOs' Proposal contained a similar wording: "*All TSOs shall designate one entity being one single TSO that will perform both the AOF function and the TSO-TSO settlement function.*"<sup>29</sup>
93. The Board of Appeal considers, in addition, that Article 12 of the aFRRIF may be altered by the future designation of a CMF entity, where the Agency leaves a margin to the TSOs to either designate the same entity as the AOF/TTSF TSO or TSO-owned entity – in which case, overall, a single entity will perform all functions of the aFRR-Platform - or a different entity than the AOF/TTSF TSO or TSO-owned entity meeting the additional requirements of Article 21(3)(e) of the EB NC – in which case multiple entities will perform the functions of the aFRR-Platform.
94. Moreover, the Contested Decision's aFRRIF duly took account of the contents of the third (revised) Proposal that all TSOs had submitted to the Agency after the NRAs had jointly referred the aFRRIF decision on the TSOs' initial Proposal of 18 December 2018<sup>30</sup> to the Agency. In other words, after the joint referral of the aFRRIF decision by the NRAs to the Agency on 24 July 2019<sup>31</sup>, the Agency launched a public consultation and duly entered into consultations with the TSOs and the NRAs as required by Article 6(11) of Regulation (EU) 2019/942. All TSOs provided the Agency with a second (revised) aFRRIF Proposal on 28 November 2019 and a third (revised) aFRRIF Proposal on 13

<sup>29</sup> Annex 14 to the Defence, joined as annex to an email of 28 November 2019 from the TSOs to ACER.

<sup>30</sup> Annex 4 to the Defence.

<sup>31</sup> Annex 5 to the Defence. Annex 5 to the Appeal of Appellant I to VII and Annex 8 of the Appeal of Appellants VIII and IX.

December 2019. In this context, it was the Agency's obligation under Article 6(11) of Regulation (EU), to take account of the ensuing amendments of November and December 2019, which the TSOs had tabled after the NRAs' referral of July 2019.

95. Given the above, the Board of Appeal fails to identify any imposition of a single entity structure. Indeed, the EB NC allows for the designation of a single entity or multiple entities complying with certain requirements to perform all Platform functions. Similarly, the aFRRIF allows for a single entity or multiple entities complying with certain requirements to perform all Platform functions.
96. The Board of Appeal finds, therefore, that the argument that ACER exceeds its powers when imposing a single entity structure is void because of the fact that ACER does not impose a single entity structure in the aFRRIF annexed to the Contested Decision.
97. Even though it is not necessary for the Board of Appeal to expand on this issue given that the Plea is void, the Board of Appeal considers, for fullness, that all Appellants and intervening party MAVIR<sup>32</sup> raise an additional issue, in the context of this Plea, namely whether the Agency had the competence to allegedly impose a single entity structure, notwithstanding the fact that the NRAs were in no disagreement on the issue<sup>33</sup>.
98. The Board of Appeal notes, in this respect, that the argument relies on the Appellants' erroneous view that the NRAs had agreed on the (non-)designation of a single entity, of which the Board of Appeal finds no confirmation.
99. According to All NRAs' letter of 24 July 2019<sup>34</sup> ACER was asked to "*adopt a decision concerning the aFRR IF, according to Article 5(7) of the Regulation 2017/2195*", given that "*all Regulatory Authorities were not able to reach an agreement on the TSO proposal*". The letter mentions "*two main points of disagreement among Regulatory authorities*", none of which was the issue of the designation of a single entity. The letter expressed the hope that the Agency would "*give utmost consideration to all Regulatory Authorities' views on the aFRR IF as provided in the related non-paper and the key topics listed above*", attached a Non-Paper<sup>35</sup> describing the positions of the NRAs and expressed the NRAs' willingness to assist the Agency in developing its decision.

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<sup>32</sup> Statement of Intervention of MAVIR, p. 4 "*MAVIR strongly supports the interpretation that the scope of ACER's decision-making power in any individual case under Article 5(7) of Electricity Balancing Guideline is defined by the subject-matter of the disagreement between the NRAs or by the terms of the NRAs' request*".

<sup>33</sup> Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 001-2020 (consolidated), p. 4. Appellants I to VII held that "*ACER has exceeded its legal powers. An agency set up to enhance co-operation does not need additional powers to overrule the very parties it is expected to support*".

<sup>34</sup> Ibidem.

<sup>35</sup> Annex 6 to the Defence. Annex 5 to the Appeal of Appellant I to VII and Annex 8 of the Appeal of Appellants VIII and IX.

100. Even though it is a relevant document in the context of sincere cooperation between EU actors, the NRAs' Non-Paper is, as its name indicates, non-binding. Hence, the Agency's competence under Article 6(10)(b) of Regulation (EU) 2019/942 can legally not be limited by the NRAs' Non-Paper (beyond the effect achieved by the letter of 24 July 2019 of remitting the adoption of the decision on the aFRRIF to the Agency).
101. The Non-Paper is meant to include a description of the positions of all NRAs with regard to All TSOs' initial aFRRIF Proposal. Section III, entitled "*topics of disagreement between Regulatory Authorities*", does not include the issue of the designation of a single entity. Section IV, entitled "*topics of agreement between Regulatory Authorities*", includes the single entity structure in clause (e) "*Entity (article 12 of the aFRRIF)*": the NRAs were in agreement to convey to All TSOs that their initial aFRRIF Proposal had to be "*rephrased*" in order to "*unambiguously specify*" whether it designated a single entity or multiple entities, in particular because of the fact that a consortium, without legal capacity, amounted to a multiple entity structure and that, if such were the case, the Proposal had to contain a "*sufficient amount of details as regards the operational rules*" to ensure compliance with the additional requirements of Article 21(3)(e) of the EB NC<sup>36</sup>. The Board of Appeal notes that there is a fine line between an agreement that a Proposal needs to be reshaped and a disagreement on the shape of the Proposal.
102. It is clear that the Non-Paper lists some issues on which there was already clear agreement or disagreement but does not intend these lists to be exhaustive. It would, in any case, be impossible to conclude that the Agency could not decide on the single entity issue because of the reason that the NRAs allegedly "had agreed" on it because the only agreement they reached was that All TSOs' initial Proposal was not clear enough and had to be clarified. Also, the Appellants fail to explain how the Agency could have complied with its legal obligation to adopt a decision on certain matters that the EB NC mandatorily requires to be dealt with in the aFRRIF, if they consider that the Agency is only allowed to address matters of disagreement by the NRAs and the NRAs did not opine on the said matters but merely indicated that they were unclear. In line with its earlier, similar decision-making<sup>37</sup>, the Board of Appeal observes that the procedure foreseen by Article 6(10) of Regulation (EU) 2019/942 is precisely meant to prevent or solve deadlocks in EU energy decision-making (which is, as will be set out in detail in the

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<sup>36</sup> The NRAs expressly noted that the operational handbook of the Platform could only be considered supplementary to the Proposal and could not replace it for the purpose of establishing whether the additional requirements of Article 21(3)(e) of the EB NC were met.

<sup>37</sup> Board of Appeal Decision A-004-2019, para 115.



Second and Third Consolidated Pleas, a bottom-up process involving a variety of stakeholders). Furthermore, Recital (12) of the EB NC states that “*ACER should also monitor the implementation of the tasks of other entities with regulated functions of Union-wide dimension, such as energy exchanges. ACER's involvement is essential in order to ensure that the cooperation between transmission system operators and the operation of other entities with Union-wide functions proceed in an efficient and transparent way for the benefit of the internal markets for electricity and natural gas*”.

103. At the Oral Hearing, Appellants VIII and IX qualified their statements in this regard and stated that “*regarding the absence of disagreement: the Agency puts forward that the NRAs took no decision regarding the designation of the entity. That in itself is true*”<sup>38</sup>.

104. The Board of Appeal considers, as a preliminary point, that, given the principle of sincere cooperation between the Agency and the NRAs deriving from Articles 4(3) and (13) TEU and highlighted in Recitals (10), (16), (22), (23), (30) and 45 and Article 1 of Regulation (EU) 2019/942, the Agency shall duly take account of the NRAs’ views when performing its tasks, in all independence from electricity and gas producers, TSOs and DSOs, whether public or private, and consumers in accordance with Recital 11 of the said Regulation. In so doing, the Board of Appeal observes that, in line with the aforementioned principle and good governance, the Agency shall, to a reasonable extent, reflect in its decision-making and duly justify the way in which it has taken into consideration the NRAs’ views in their referral.

105. In light of the above, the Board of Appeal finds that the Contested Decision duly took account of the NRAs’ Non-Paper and that it cannot be held that the Contested Decision ran counter to positions agreed upon by the NRAs. The Contested Decision, instead, accepted the part of All TSOs’ aFRR Proposal that was clear and granted the TSOs 2 years to clarify and “*unambiguously specify*” the part that was not clear, thus implementing the NRAs’ Non-Paper.

106. Subsidiarily, the Board of Appeal observes that the Agency’s role in the bottom-up, multipartite decision-making processes aimed at the integration of the internal energy market, characterised by sincere cooperation between the Agency and the NRAs, ensures a proper assessment by ACER of any comments attached by the NRAs to their referral.

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<sup>38</sup> Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 001-2020 (consolidated), p. 18. Appellants VIII and IX add: “*But it’s not the point: it’s about “whether the relevant regulatory authorities have not been able to reach agreement”. And this was clearly not the case: the NRAs were in full agreement on this point.*”

107. Firstly, the Board of Appeal notes that the referral to the Agency does not amount to a judicial appeal procedure whereby the Defendant would be assimilated to a judicial authority whose competences are limited by the principle of *ne ultra petita*. The Agency is an administrative authority whose powers are directly conferred upon by Regulation (EU) 2019/942.
108. Secondly, the Board of Appeal observes that the Agency's competence to adopt the Contested Decision derives directly and immediately from EU Law, specifically from Article 6(10) of Regulation (EU) 2019/942. 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 Regulation (EU) 2019/942, when the respective requisites are met. Appellants VIII and IX's arguments on the Agency's alleged "conferred powers"<sup>39</sup> is, hence, unfounded.
109. Thirdly, the Board of Appeal observes that the Agency, as a body of the European Union, is required to interpret EU Law in a systematic approach and to observe the principle of sincere cooperation with the Member States, including (in this context) the NRAs.
110. Fourthly, turning to the wording of Article 6(10)(b) of Regulation (EU) 2019/942, it provides that all NRAs can jointly request the Defendant 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 (...). ACER shall be competent to adopt individual decisions as specified in the first subparagraph in the following situations: (...) (b) on the basis of a joint request from the competent regulatory authorities.* Regulation (EU) 2019/942 does not contain a referral by all NRAs to adopt a decision on regulatory issues related to the EB NC on which they disagree, but a referral by all NRAs to adopt a decision on regulatory issues related to the EB NC within their competences. The same is true for Article 5(7) of the EB NC, which states that, upon the joint request of the NRAs, "*the Agency shall adopt a decision concerning the submitted proposals for terms and conditions or methodologies within six months from the day of referral, in accordance with Article 8(1) of Regulation (EC) No 713/2009.*" A textual approach demonstrates, therefore, that, by virtue of Regulation (EU) 2019/942 and the EB NC, pursuant to the referral, the Agency's decision was not constricted to regulatory issues of disagreement.

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<sup>39</sup> Appeal of Appellants VIII and IX, paras 22, 25 and 32. Reply of Appellants VIII and IX, para 21.

111. The only legal constraint imposed by Regulation (EU) 2019/942 on ACER's individual decisions is that they are adopted "*on issues that are strictly related to the purposes for which ACER was established*" (Recital 29). Recital 16 of the said Regulation states in the same line: "*As regards situations concerning more than one Member State, ACER has been granted the power to adopt individual decisions. That power should, under clearly specified conditions, cover technical and regulatory issues which require regional coordination, in particular those concerning the implementation of network codes and guidelines, (...)*". Nowhere are these powers restricted to areas of discord between NRAs. The Board of Appeal observes, in this regard, that the Agency adopted the Proposal on issues that were strictly related to the purposes for which it was established and covered technical and regulatory issues requiring regional coordination, in particular the implementation of the EB NC.
112. Fifthly, the Board of Appeal refers to its earlier decision-making<sup>40</sup> and observes that this interpretation is confirmed by a systemic or contextual, teleological and historic interpretation of Article 6(10)(b) of Regulation (EU) 2019/942 and the EB NC. Indeed, the grammatical interpretation (the wording of the law) needs to be interpreted, taking account of the systematic or contextual interpretation (the logical interpretation of different pieces of the law among themselves and with the overall legal system), historical interpretation (the legal situation and pertaining circumstances at the point in time when the law was enacted) and teleological interpretation (the underlying objective and rationale of the law), as supported by the consistent methodology applied by the Court of Justice of the European Union (CJEU)<sup>41</sup>.
113. Recital (45) of Regulation (EU) 2019/942 confirms that the objective of the Regulation is to grant competences to the Agency precisely because cooperation of NRAs at EU level and their participation in the exercise of EU-related functions cannot be sufficiently achieved by the Member States acting by themselves and confirms that, in so doing, the Regulation respects the principle of subsidiarity and proportionality.

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<sup>40</sup> Board of Appeal Decision A-004-2019 paras 106 and 158.

<sup>41</sup> H.G. Schermes, D.F. Waelbroeck, "*Judicial Protection in the European Union*" (2001); N. Fennelly, "*Legal Interpretation at the European Court of Justice*", Fordham International Law Journal Volume 20, Issue 3 1996; A. Albers Llorens, "*The European Court of Justice, More than a Teleological Court*", Cambridge University Press, 2017;; Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1; Case 6/64 *Costa v. ENEL* ECLI:EU:C:1964:66; Case 26/69 *Stauder v Ulm*, ECLI:EU:C:1969:57; Case 55/87 *Moksel v. BALM*, ECLI:EU:C:1988:377; Case C-89/81 *Hong Kong Trade*, ECLI:EU:C:1982:121; Case C-101/01 *Lindqvist* ECLI:EU:C:2003:596; Case C-409/06 *Winner Wette* ECLI:EU:C:2010:503; Case C-402/07 *Sturgeon and Others*, ECLI:EU:C:2009:716; Case C-439/08 *VEBIC* ECLI:EU:C:2010:739; Case C-41/09 *European Commission and Kingdom of the Netherlands*, ECLI:EU:C:2011:108; Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* ECLI:EU:C:2010:363; Case C-583/11 P *Inuit Tapiriit Kanatami and Others*, ECLI:EU:C:2013:625.

114. Regulation (EU) 2019/942 framed more precisely the Agency’s competences with regard to the implementation of network codes and guidelines, such as EB NC, as expressly provided for in Recital (19): “(...) ACER’s role with regards to monitoring and contributing to the implementation of the network codes and guidelines has increased”. Recital (19) adds that “the effective monitoring of network codes and guidelines is a key function of ACER and is crucial to the implementation of internal market rules”.
115. In so doing, ACER has the competence to “fill the regulatory gap at Union level and to contribute towards the effective functioning of the internal markets for electricity and natural gas” (Recital 10) and, what is more, to coordinate and, where necessary, complete the NRAs’ regulatory functions (Recital 11)<sup>42</sup>. The Board of Appeal notes that these competences are in line with the Agency’s competences in the development and revision of network codes and guidelines<sup>43</sup>, as well as its advisory role with respect to NRAs on issues relating to the purpose for which the Agency was created<sup>44</sup>, and that Regulation (EU) 2019/942 foresees the increase of the Agency’s regulatory powers in the future as regards network codes and guidelines<sup>45</sup>.
116. Contrary to the Appellants’ arguments on the comparison of Article 6(10) with Article 5(2)(b) of Regulation (EU) 2019/942 - which grants the Agency competences to review and approve network codes and guidelines adopted before 4 July 2019 and their subsequent revisions – these provisions refer to two different processes that are not mutually exclusive. Furthermore, the Board of Appeal considers quite the opposite to the Appellants’ claim: it should be inferred from the fact that the EU legislator grants the Agency, under Article 5 Regulation (EU) 2019/942, powers to review and amend network codes and guidelines that it intended to grant the Agency, under Article 6(10) Regulation (EU) 2019/942, similar powers to review and amend TSOs’ proposals implementing the EB NC submitted to the NRAs and jointly referred by the latter to the Agency.

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<sup>42</sup> Recital 11 of Regulation (EU) 2019/942 stipulates that “ACER should ensure that regulatory functions performed by the regulatory authorities in accordance with Directive (EU) 2019/944 of the European Parliament and of the Council ( 10) and Directive 2009/73/EC of the European Parliament and of the Council ( 11) are properly coordinated and, where necessary, completed at Union level.”

<sup>43</sup> Recitals 17 and 19 and Article 5 of Regulation (EU) 2019/942. See also Articles 59 and 61 of Regulation (EU) 2019/943 and Article 6 of Regulation (EC) 715/2009.

<sup>44</sup> Recital 22 and Article 6(2) of Regulation (EU) 2019/942.

<sup>45</sup> Recital 20 of Regulation (EU) 2019/942 stipulates that “During the implementation of network codes and guidelines, it has emerged that it would be useful to streamline the procedures for the regulatory approval of regional or Union-wide terms and conditions or methodologies that are developed under the network codes and guidelines by submitting them directly to ACER to allow regulatory authorities represented in the Board of Regulators to decide on such terms and conditions or methodologies.”

117. Contrary to the arguments of Appellants VIII and IX<sup>46</sup>, this interpretation is not contradicted by Article 6(4) of Regulation (EU) 2019/942, which mandates ACER “to provide a framework within which the regulatory authorities can cooperate in order to ensure efficient decision-making on issues with cross-border relevance” and “to promote cooperation between the regulatory authorities and between the regulatory authorities at regional and Union level and take into account the outcome of such cooperation when formulating its opinions, recommendations and decisions”. The Agency did not only take account of the outcome of the cooperation between the NRAs when formulating the Contested Decision, but continued to promote this cooperation and discussion in the procedure leading up to the adoption of the Contested Decision, whilst also launching a public consultation and closely cooperating with the TSOs. The Board of Appeal observes that the Agency and the NRAs are expected to collaborate in a spirit of sincere cooperation. Likewise, under Article 5(6) of the EB NC, when there is no joint referral, the Agency can issue opinions to the NRAs that the latter need to take into account<sup>47</sup>.
118. The duty to take account of the outcome of cooperation between the NRAs has various procedural implications, but does not, in itself, limit the competence of the Agency to adopt the decision in question, addressing all the issues which EU Law requires be addressed in that decision. Moreover, as will be set out in detail below, the Board of Appeal notes that the Director of the Agency could not have taken the Contested Decision without a favourable opinion of two thirds of the Agency’s Board of Regulators, which is composed of all NRAs.
119. In this context, the Board of Appeal underlines that all NRAs are represented in the Agency’s Board of Regulators. Hence, NRAs play a key role in the Agency’s decision-making process, which functions as a platform for continued cooperation between the NRAs to arrive at the necessary decision, under the auspices of the Agency<sup>48</sup>. Indeed, the Agency’s Director would not have been able to take the Contested Decision without first obtaining a favourable opinion of the Board of Regulators<sup>49</sup>.
120. Moreover, appropriate discussions took place within the Board of Regulators, allowing for amendments and comments to the Director’s Proposal, which ACER’s Director duly had to take into account in accordance with Article 24 of Regulation (EU)

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<sup>46</sup> Para 31 of the Appeal of Appellants VIII and IX.

<sup>47</sup> Article 5(6) of the EB NC: “(..) Where the Agency issues an opinion, the relevant regulatory authorities shall take that opinion into account. (..)”.

<sup>48</sup> Article 21 of Regulation (EU) 2019/942.

<sup>49</sup> Recital 36 and Article 24 of Regulation (EU) 2019/942.

2019/942. These discussions ended with a favourable opinion by the Board of Regulators to the Proposal of the Agency's Director.

121. As to the historical interpretation of Regulation (EU) 2019/942, the Board of Appeal notes that it did not reduce but probably framed the Agency's competences compared to the former ACER Regulation (Regulation (EC) 713/2009). The Board of Appeal refers to the Proposal for Regulation (EU) 2019/942, which reads: *"The present legislative proposal still largely preserves this distribution of roles. The current structure strikes a fine-tuned balance of powers between the different actors, having regard to the special features of the developing internal energy market."*<sup>50</sup>

122. The Board of Appeal refers, in this respect, to its earlier decision-making, in which it noted that: *"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) 2019/94233 (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: (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 (...)" and "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"*<sup>51</sup>.

123. The EB NC also grants competences to the Agency on the approval of the technical and regulatory issues of the TSOs' common proposals, such as the aFRRIF pursuant to Article 21(1). Indeed, even in the scenario that the NRAs would not have jointly requested the Agency to adopt the Contested Decision on All TSOs' aFRRIF Proposal pursuant to Article 5(7) of the EB NC and would have, instead, opted to take a

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<sup>50</sup> Proposal for a Regulation of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators, COM/2016/0863 final – 2016/0378 (COD), 30 November 2016, p. 23.

<sup>51</sup> Board of Appeal Decision A-004-2019 paras 108-109.

coordinated decision pursuant to Article 5(6) of the EB NC, the Agency could have issued an opinion to the NRAs and the NRAs should have taken that opinion into account, as expressly provided for in Article 5(6) of the EB NC.

124. Furthermore, The Contested Decision fits within the objectives of the EB NC, listed in its Article 3, aimed at enhancing efficiency and EU-wide integration in the balancing markets in the long term, as will be set out in detail below in the Third Consolidated Plea. Far from frustrating the objectives of Regulation (EU) 2019/942 and EB NC, as suggested by Appellants I to VII, the procedure followed by the Agency in the adoption of the Contested Decision promoted extensive dialogue and cooperation between all interested parties - including TSOs and NRAs - arriving at a solution which, as will be discussed in the subsequent Pleas, the Appellants have not shown to lead to anything other than the optimal management and coordinated operation of a balancing energy decision.

125. Furthermore, this interpretation is in accordance with the Board of Appeal's earlier decision-making on the boundaries of the Agency's competence, in which it stated that the absence of provisions explicitly allowing for the possibility of changing a proposal or requesting an amendment to a proposal submitted by TSOs did not *per se* exclude the possibility of such changes or amendments, whilst acknowledging that the Agency's discretionary powers in such circumstances were not unlimited but circumscribed by the competences set out in Article 8(1) of former Regulation (EC) 713/2009 (which presently corresponds with Article 6(10) of Regulation (EU) 2019/942). An interpretation which would prevent the Agency from amending All TSOs' aFRRIF Proposal would easily lead to a deadlock and deprive the relevant EU law provisions of their effectiveness, by allowing lack of cooperation by TSOs to make it impossible to achieve the objectives of the proper functioning of the internal market<sup>52</sup>.

126. In light of the above, Appellants I to VII's arguments concerning implied powers<sup>53</sup> are out of place, as EU Law explicitly grants the Agency the competence to adopt the Contested Decision in the circumstances of the present case.

127. The Board of Appeal considers that the Appellants<sup>54</sup> wrongly invoke the General Court of the European Union's judgment in case T-332/17 E-Control/ACER<sup>55</sup> to argue that the Agency does not have competence to take a decision on a matter on which NRAs

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<sup>52</sup> Board of Appeal Decisions A-001-2017 para 57 *et seq.*, A-001-2019 paras 53 *et seq.*, A-003-2019 para 142 *et seq.* and A-004-2019 para 113 *et seq.*

<sup>53</sup> Para 48 *et seq.* of the Appeal of Appellants I to VII.

<sup>54</sup> Para 49 of the Appeal of Appellants I to VII; paras 24-27 of the Appeal of Appellants VIII and IX.

<sup>55</sup> Case T-332/17 Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control) v ACER of 24 October 2019, ECLI:EU:T:2019:761.

did not disagree, because that judgment highlights precisely that when there is a joint request by the NRAs – as in the present case – there is no doubt about the conferral of powers by the NRAs to the Agency. The Board of Appeal quotes the General Court of the European Union: “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”.<sup>56</sup>

128. Appellants VIII and IX further argue that the adoption of the Contested Decision, in particular in what concerns the designation of the single entity, infringes the principle of subsidiarity<sup>57</sup>. At the Oral Hearing, they held that “It’s not that the Agency is entitled to exercise powers, unless there is a good reason to allocate these to the NRAs, it’s the other way around”<sup>58</sup>.

129. In line with its earlier decision-making practice<sup>59</sup>, the Board of Appeal considers that the principle of subsidiarity has no relevance for the present plea. As is clearly set out in Article 5(3) TEU, the principle of subsidiarity governs the attribution of competence to the EU or to the Member States in areas of shared competence. The Agency took the Contested Decision on the basis of its exclusive competence set out in Article 6(10) of Regulation (EU) 2019/942. Appellants I to VII confirm in their Appeal and their Reply that the Agency’s competence is solely based on 6(10) of Regulation (EU) 2019/942<sup>60</sup>. Given that Appellants VIII and IX did not challenge the validity of Article 6(10) of Regulation (EU) 2019/942 on the basis of which the Contested Decision was taken, its argument on the principle of subsidiarity is immaterial.

130. In addition, even if Appellants VIII and IX would have challenged the validity of Article 6(10) of Regulation (EU) 2019/942, *quod non*, it must be reminded that the Agency was jointly requested by the NRAs, pursuant to Article 5(7) of the EB NC, to adopt the Contested Decision by virtue of Article 6(10) of Regulation (EU) 2019/942.

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<sup>56</sup> Ibidem, para 46.

<sup>57</sup> Para 28 of the Appeal of Appellants VIII and IX.

<sup>58</sup> Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 001-2020 (consolidated), p. 20.

<sup>59</sup> Board of Appeal Decision A-001-2019 para 51.

<sup>60</sup> Appeal of Appellants I to VI, para 68: “Moreover, ACER cannot obtain any separate competence to act under Article 5(7), Electricity Balancing Guidelines, that it does not obtain under Article 6(10), ACER Regulation.” Reply of Appellants I to VII, para 17: “(.) ACER does not have any separate competence under that provision [Article 5(7) of the EB NC] that it does not have under Article 6(10) of the ACER Regulation.”



131. Appellants VIII and IX seem to argue that the Contested Decision should have been silent on the issues of the designation of a single entity in order to allow the NRAs to decide on the issue. However, the Contested Decision's silence on the issue would not have allowed for a NRAs' decision on the issue, given that the NRAs jointly referred the entirety of the aFRRIF to the Agency. The Contested Decision's silence on the issue would rather have resulted in there being no decision at all, implicitly leaving it up to the TSOs to decide on the issue, which would be contrary to the EB NC and could not possibly be the purpose of the principle of subsidiarity in the EU legal order.
132. It follows that the First and Second Pleas of Appellants I to VII and the First, Second and Fourth Pleas of Appellants VIII and IX must be dismissed as unfounded.

*Second Consolidated Plea - Infringement by ACER of Articles 21(5) and 10 of the EB NC by exceeding its competence in obliging the TSOs to submit a proposal for an amendment of the aFRRIF.*

133. According to the Third Plea of the Appeal of Appellants I to VII<sup>61</sup>, the Contested Decision infringes Articles 21(5) and 10 of the EB NC “*by exceeding its competence in obliging the TSOs to submit a proposal for amendment of the aFRR IF, a decision which it had no competence to take pursuant to Article 6(10) ACER Regulation or Article 5(7) of the EB NC*”<sup>62</sup>. The Appellants argue that the TSOs are free to submit or not to submit a proposal for modification supported by a cost-benefit analysis (‘CBA’), at their own discretion, by virtue of Article 21(5) of the EB NC. They claim that the Agency neither has a competence to convert this right of the TSOs into a specific obligation nor to impose a mandatory process of modification, even more so without a CBA. They also argue that the Agency infringed Article 10 of the EB NC and exceeded its competences by seeking to initiate a consultation procedure on the amendment of Article 12 aFRRIF. They claim that the Agency has no right to mandate the initiation of a consultation process but that this is a prerogative of TSOs.
134. The Agency argues that the third (revised) All TSOs' aFRRIF Proposal effectively designated multiple entities, given that one TSO would operate the AOF and TTTFs and there was a possibility that another TSO would operate the CMF. It therefore argues that third (revised) All TSO's Proposal did not comply with the additional requirements of Article 21(3)(e) of the EB NC, applicable when multiple entities are designated to operate

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<sup>61</sup> Paras 70-79 of the Appeal of Appellants I to VII.

<sup>62</sup> Para 70 the Appeal of Appellants I to VII.

the aFRR-Platform. It claims that it was, therefore, necessary to require the TSOs to submit an amendment of the aFRRIF to ensure compliance with those additional requirements. The Agency further notes that the designation of an entity to operate all functions of the aFRR-Platform, including the CMF, does not fall within the scope of Article 21(5) of the EB NC but within the scope of Article 6(3) of the EB NC<sup>63</sup>.

135. Article 21(5) of the EB NC reads as follows: *“By eighteen months after the approval of the proposal for the implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation, all TSOs may develop a proposal for modification of the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation pursuant to paragraph 1 and of the principles set in paragraph 2. Proposed modifications shall be supported by a cost-benefit analysis performed by the all TSOs pursuant to Article 61. The proposal shall be notified to the Commission.”*

136. Article 10 of the EB NC reads as follows:

*“1. TSOs responsible for submitting proposals for terms and conditions or methodologies or their amendments in accordance with this Regulation shall consult stakeholders, including the relevant authorities of each Member State, on the draft proposals for terms and conditions or methodologies and other implementing measures for a period of not less than one month.*

*2. The consultation shall last for a period of not less than one month, except for the draft proposals pursuant to points (a), (b), (c), (d), (e), (f), (g), (h) and (j) of Article 5(2) that shall be consulted for a period of not less than two months.*

*3. At least the proposals pursuant to points (a), (b), (c), (d), (e), (f), (g), (h) and (j) of Article 5(2) shall be subject to public consultation at European level.*

*4. At least the proposals pursuant to points (a), (b), (c), (d), (e), (f), (g), (h), (i), (n), and (o) of Article 5(3) shall be subject to public consultation at the concerned regional level.*

*5. At least the proposals pursuant to points (a), (b), (c), (d), (e), (f), (g) and (i) of Article 5(4) shall be subject to public consultation in each concerned Member State.*

*6. TSOs responsible for the proposal for terms and conditions or methodologies shall duly consider the views of stakeholders resulting from the consultations undertaken in accordance with paragraphs 2 to 5, prior to its submission for regulatory approval. In all cases, a sound justification for including or not including the views resulting from the consultation shall be provided together with the submission and published in a timely*

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<sup>63</sup> Paras 127- of the Defence.

*manner before or simultaneously with the publication of the proposal for terms and conditions or methodologies.”*

137. The Board of Appeal notes that Article 12(2) and (3) of the Contested Decision’s aFRRIF reads as follows:

*“2. All TSOs shall appoint one entity being a single TSO or a company owned by TSOs that shall be entrusted to operate the activation optimisation function and the TSO-TSO settlement function of the aFRR-Platform. No later than eighteen months before the deadline when the capacity management function shall be considered as a function required to operate the aFRR-Platform pursuant to Article 6(4), all TSOs shall develop a proposal for amendment of this aFRRIF, which shall designate the entity performing the capacity management function in accordance with Article 21(3)(e) of the EB Regulation and clarify whether the aFRR-Platform will be operated by a single entity or multiple entities.*

*3. The designation of the entity will be done in accordance with Article 21(4) of the EB Regulation.”*

138. As a preliminary, but important point, the Board of Appeal observes that both Appellants and intervening party MAVIR voice a recurrent claim throughout their Appeals according to which the Agency would have “imposed” the single entity structure or “imposed” the CMF. In so doing, the Appellants fail to acknowledge that electricity balancing integration processes do not amount to processes whereby NRAs take binary decisions to approve or reject electricity balancing framework proposals; they are bottom-up processes based on a close cooperation between all stakeholders, public consultations, coordinated proposal designs by all TSOs, coordinated regulatory approval by all NRAs or the ACER in their stead - having the benefit of NRA debates with the Agency’s Board of Regulators - , taking stock of the experience gained in the voluntary, dynamic and evolving balancing pilot projects and EU initiatives (e.g with respect to aFRR, the PICASSO project<sup>64</sup> and its predecessor the EXPLORE project, which was actively taken into account by ENTSO-E when drafting its initial all TSOs’ aFRRIF Proposal of 18 December 2018<sup>65</sup>, it being noteworthy that all TSOs designated PICASSO to be converted into the aFRR-Platform<sup>66</sup>).

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<sup>64</sup> Platform for International Coordination of aFRR Stable System Operation (composed of member TSOs and observers). At the Oral Hearing, the Agency and all Appellants confirmed that PICASSO does not yet constitute an operational Platform. See, Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 001-2020 (consolidated), p. 26-27.

<sup>65</sup> ENTSO-E’s Explanatory Document to All TSOs’ Proposal for the Implementation Framework for a European Platform for the Exchange of Balancing Energy from Frequency Restoration Reserves with Automatic

139. The Appellants' view whereby one entity (the Agency) would "impose" the terms and conditions of the electricity balancing integration processes fails to acknowledge the complexities of the EU's market-driven energy regulation ensuring multipart balances between a variety of national and EU stakeholders. If the process were reduced to an "imposition" by ACER, its carefully programmed sequence of steps foreseen by the EB NC would not have any *raison d'être*. Hence, within the regulatory bottom-up processes characterising decision-making on integration in the field of electricity, the Board of Appeal fails to understand how the Agency could be seen as unilaterally imposing the Contested Decision's aFRRIF.
140. The Board of Appeal proceeds with the analysis in the view of the circumstances of the case.
141. First, the Board of Appeal considers that it follows from Article 12(2) and (3) of the Contested Decision's aFRRIF, read in conjunction with Article 5 of the Contested Decision's aFRRIF that, no later than 24 January 2023 (eighteen months before the deadline when the CMF becomes a mandatory function pursuant to Article 6(4) of the aFRRIF - which the Appellants did not appeal -), the TSOs should make a proposal relating to the designation of the entity in charge of operating the CMF. In other words, TSOs are asked to submit a proposal for aFRRIF amendment on the CMF.
142. Second, the Board of Appeal refers to the First Consolidated Plea above on the Agency's ability to amend All TSOs' aFRRIF Proposal within the boundaries of its competence.
143. Third, with respect to Article 21(5) of the EB NC, the Board of Appeal notes that this article provides the possibility for TSOs to develop a proposal to amend the aFRRIF following a CBA in a timeframe of 18 months after the aFRRIF's regulatory approval, i.e. by 24 July 2021. The Board of Appeal observes that Article 21(5) of the EB NC is not applicable to the requirement set out in Article 12(2) of the Contested Decision's aFRRIF. Indeed, Article 21(5) of the EB NC allows TSOs to table modifications to the aFRRIF 18 months after its approval by the regulatory authorities, backing it up with a CBA to persuade the regulators of the positive impact of such modifications. This possibility

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Activation in accordance with Article 21 of Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a Guideline on Electricity Balancing, 20 April 2018 ('ENTSO-E's Explanatory Memorandum'), available at: [https://consultations.entsoe.eu/markets/afrr\\_implementation\\_framework/supporting\\_documents/20180426\\_aFRRIF\\_Explanatory\\_document.pdf](https://consultations.entsoe.eu/markets/afrr_implementation_framework/supporting_documents/20180426_aFRRIF_Explanatory_document.pdf), p. 3 and 7. Analysis and discussions within the PICASSO project as well as stakeholders' input gathered by the project have served as input to ENTSO-E. Coordination with other implementation projects such as TERRE (RR), MARI (mFRR) and IGCC (IN) is done in working groups within ENTSO-E.

<sup>66</sup> ENTSO-E's Explanatory Document, p. 6.

occurs, in a different moment in time, 18 months after the approval of the aFRRIF. The Contested Decision, including its aFRRIF in Annex 1 (and, therefore, Article 12 of the aFRRIF) is, however, the “*regulatory approval*” used as a starting point to calculate the timeframe of 18 months in Article 21(5) of the EB NC. This means that, in a timeframe of 18 months as of the Contested Decision of 24 January 2020, the TSOs are allowed to submit aFRRIF amendment proposals backed-up by a CBA to the NRAs for their approval and notify them to the European Commission.

144. The Board of Appeal considers, in this regard, that the structure of Article 21 of the EB NC is very clear: Articles 1, 2 and 3 contain the obligation upon TSOs to develop an aFRRIF proposal, setting out the mandatory requirements, for the aFRRIF’s regulatory approval ; Article 4 contains an obligation upon TSOs to designate the proposed entity or entities to operate the aFRR-Platform within 6 months after the aFRRIF’s regulatory approval; Article 5 contains a possibility for TSOs to propose amendments to the aFRRIF, backed-up by a CBA, within 18 months after the aFRRIF’s regulatory approval; Article 6 contains an obligation upon TSOs to designate the proposed entity or entities to operate the aFRR-Platform within 30 months after the aFRRIF’s regulatory approval. The timeframe of Article 21 of the EB NC is clear and Article 21(5) of the EB NC cannot and should not be read in isolation of this timeframe.

145. Fourth, the Board of Appeal considers furthermore that the objective of the Agency, when asking the TSOs in Article 12(2) of the Contested Decision’s aFRRIF to submit a Proposal to amend the Contested Decision’s aFRRIF in order to designate a CMF entity is precisely to limit the exercise of its discretionary margin within the scope of its competences to what was strictly necessary, in accordance with the principle of proportionality, and to provide the necessary leeway to the TSOs when designating the CMF entity. In effect, given the lack of compliance of the third (revised) All TSOs’ aFRRIF Proposal with the requirement to either clearly state whether it designated, on the one hand, the same entity as the AOF/TTSF entity for the CMF or, on the other hand, a different CMF entity, ensuring and demonstrating compliance with the additional requirements of Article 21(3)(e) of the EB NC, the Agency inserted the obligation upon the TSOs to designate a CMF entity within a reasonable period of 2 years, leaving it up to the TSOs to decide whether this entity would be identical to the AOF/TTSF entity or different from the AOF/TTSF entity, as long as compliance with the additional requirements of Article 21(3)(e) of the EB NC was ensured and demonstrated if multiple entities were designated. In so doing, the Agency deliberately refrained from either setting additional conditions to bring the third (revised) All TSOs’ Proposal, which

foresaw the designation *ad hoc* of an entity each time TSOs would implement a cross-platform CMF, in line with Article 21(3)(e) of the EB NC as regards the CMF or from designating the CMF entity itself. Instead, it allowed the TSOs to arrive at a solution they deemed most adequate, within the confines of the legal requirements as clarified in the Contested Decision without adding any further conditions as to the entity to operate the CMF function. This is expressly set out in the Contested Decision: *“The Agency evaluated that it cannot amend the proposal from TSOs to provide the requirements of the second sentence of Article 21(3)(e) of the EB Regulation because such amendments would require significant revision and additions to the Proposal (...)”*<sup>67</sup> and *“Therefore, instead of defining the entity for the operation of the capacity management function, the Agency provided an obligation on TSOs to develop a proposal for amendment of the aFRRIF in which they should propose the designation of the entity that will perform the capacity management function in accordance with Article 21(3)(e) of the EB Regulation”*<sup>68</sup>. The Board of Appeal notes that this responds to the TSOs’ own requests (e.g. email from TSOs to ACER of 28/11/2019: *“If you decide to add the CMF as a new function in the aFRR and mFRR IFs anyway, we would very much appreciate if you could leave the door open for performing the CMF to the designation of a TSO other than the one performing the AOF and Settlement functions”*<sup>69</sup>).

146. The Board of Appeal considers that, if the Agency would not have inserted the TSOs’ task to propose the designation of a single entity or multiple entities fulfilling the requirements of Article 21(3)(e) of the EB NC for the CMF, this would have been contrary to the EB NC. In this context, the Board of Appeal notes that the designation of a CMF entity is inextricably linked to the question whether the Agency was competent to require that the aFRR-Platform operates the CMF. As will be set out in the Third Consolidated Plea, the Board of Appeal finds that this requirement was lawful. Hence, the Agency was entirely within its right, and indeed followed the most prudent course of action, when it required the TSOs to modify the Contested Decision’s aFRRIF in order to designate the CMF entity within a reasonable timeframe of 2 years.

147. Once more, in so doing, the Contested Decision fits within the objectives of the EB NC listed in its Article 3, namely enhanced efficiency and EU-wide integration in the balancing markets in the long term. It furthermore complies with the EU’s market-driven

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<sup>67</sup> Contested Decision, para 80.

<sup>68</sup> Contested Decision, para 82.

<sup>69</sup> Annex 14 to the Defence, email of 28/11/2019 from the TSOs to ACER attaching the second (revised) All TSOs’ aFRRIF Proposal.

energy regulation ensuring multipart balances between a variety of national and EU stakeholders.

148. Fifth, the Board of Appeal observes that the Agency's Defence explains, from a technical perspective, that Article 21(5) of the EB NC does not apply to any amendment to the aFRRIF but only governs amendments needed to guarantee the technical Go-Live of the platform (e.g changes to the common merit order list principle)<sup>70</sup>. This explains why these modifications, having an impact on technical functioning of the Platform, have to be supported by a CBA and have to be notified to the European Commission. It also explains why Article 21(6) of the EB NC provides that these modifications postpone the implementation of the Platform by 6 months. The Agency sets out that a change of governance in the CMF from one entity or entities to another entity or other entities does not affect the Platform's technical operation<sup>71</sup>. The Agency adds that the amendment imposed by Article 12 of the Contested Decision's aFRRIF will be governed by Article 6(3) of the EB NC, which does not prescribe a deadline and concerns amendments that do not interfere with the technical functioning of the Platform, such as governance issues, including the designation of an entity or entities to perform the CMF.
149. Sixth, with respect to Article 10 of the EB NC, the Board of Appeal observes that it contains indeed a possibility for TSOs to take the initiative to develop proposals and hold EU-wide public consultations on these draft proposals or amendment proposals in order to duly consider the stakeholders' views prior to submitting their proposals for regulatory approval, providing a sound justification for including or not including these views. The Board of Appeal notes in this regard that the TSOs duly held this public consultation from 26 April 2018 until 26 June 2018 prior to submitting their draft Proposal for regulatory approval on 18 December 2018<sup>72</sup>.
150. Contrary to what the Appellants allege, the Board of Appeal finds, in this respect, that, when the Contested Decision's aFRRIF mandates all TSOs to develop a proposal for amendment of the aFRRIF in order to designate a CMF entity, the Agency exercises its exclusive competence under Article 6(10)(b) of Regulation (EU) 2019/942 pursuant to the NRAs' joint referral under Article 5(7) of the EB NC and does not by any means usurp the TSOs' competence to take initiatives to develop proposals and hold consultations under Article 10 of the EB NC.

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<sup>70</sup> Defence, paras 139-147.

<sup>71</sup> Defence, para 144.

<sup>72</sup> Contested Decision, paras 5 and 6.

151. The Board of Appeal considers, moreover, that the implementation of Article 12 of the Contested Decision's aFRRIF to table the necessary amendment to designate a CMF entity will be governed by Article 6(3) of the EB NC which requires that TSOs to organise a new public consultation on the issue in accordance with Article 10 of the EB NC.
152. In the light of the above, the Board of Appeal considers that, by adopting the Contested Decision, the Agency properly steered the TSOs, without exceeding its competences, in a direction of an efficient cross-border operation of the aFRR-Platform, which is indispensable for an EU-wide integration pursued by the EB NC, and required them to revise the proposal in such a way that would ensure compliance with the applicable legal framework.
153. The Board of Appeal concludes that, in so doing, the Agency did not infringe Articles 10 and 21(5) of the EB NC by exceeding its competence.
154. It follows that the Third Plea of the Appeal of Appellants I to VII must be dismissed as unfounded.

*Third Consolidated Plea - Infringement by ACER of Article 21 of the EB NC in its decision to impose a single entity structure on the TSOs.*

155. Appellants I to VII argue in the Fourth Plea of their Appeal<sup>73</sup> and Appellants VIII and IX argue in the Third Plea of their Appeal<sup>74</sup> that the Contested Decision (i) infringed Article 21(2) of the EB NC by imposing a single entity structure; (ii) infringed 21(2) of the EB NC by requiring the aFRR-Platform to perform the CMF; and (iii) infringed 21(3)(e) of the EB NC by requiring the aFRR-Platform to perform the CMF. Appellants I to VII argue in the Fourth Plea of their Appeal that the Contested Decision (iv) infringed Article 21(2) of the EB NC by requiring the CMF to be implemented for other balancing Platforms.
156. The Agency begins by defending that the Board of Appeal's review in this regard should be limited to identifying manifest errors of assessment and that it is incumbent upon the Appellants to demonstrate any such manifest error. The Agency argues that there was no imposition by the Agency of a single entity structure, that imposing the CMF as a required platform function does not contravene Article 21(2) of the EB NC,

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<sup>73</sup> Paras 80-119 of the Appeal of Appellants I to VII.

<sup>74</sup> Paras 33-36 of the Appeal of Appellants VIII and IX.



that the Contested Decision fully complied with Article 21(3)(e) of the EB NC and that it correctly interpreted Articles 21(2) and 21(3) of the EB NC<sup>75</sup>.

157. Article 21(2) of the EB NC establishes that the operation of the aFRR-Platform can either be carried out by TSOs or by an entity created by TSOs, should be based on common governance principles and business processes and should, at least, consist of the AOF and the TTSF.
158. Article 21(3)(c) of the EB NC states that the TSOs' Proposal "*shall include at least: (...) (c) the definition of the functions required to operate the European platform.*"
159. Article 21(3)(e) of the EB NC requires that the Proposal either designates a single entity to perform all functions of the aFRR-Platform, or that it designates multiple entities. If multiple entities are designated, the Proposal has to ensure and demonstrate compliance with additional requirements on the allocation of functions and coordination between these functions, on governance, operation and regulatory oversight in line with the EB NC's objectives and on conflict resolution, namely "*(i) a coherent allocation of the functions to the entities operating the European platform; the proposal shall take full account of the need to coordinate the different functions allocated to the entities operating the European platform; (ii) that the proposed setup of the European platform and allocation of functions ensures efficient and effective governance, operation and regulatory oversight of the European platform as well as supports the objectives of this Regulation; and (iii) an effective coordination and decision making process to resolve any conflicting positions between entities operating the European platform*".
160. As a preliminary, but key point, the Board of Appeal observes, as set out above in the Second Consolidated Plea, that the Appellants' claim throughout the Appeals according to which the Agency would have "imposed" the single entity structure or "imposed" the CMF is void given that the characteristics of the bottom-up decision-making processes regarding the internal electricity market render any unilateral imposition impossible.
161. The Board of Appeal considers that the nature of this bottom-up decision-making process explains why the Contested Decision has been shaped in the way it was shaped. The Board of Appeal notes that, when differentiating between the AOF/TTSF and the CMF and requiring the designation of a single TSO or TSO-owned AOF/TTSF entity, the Agency closely aligned the aFRRIF with the third (revised) All TSOs' Proposal while duly taking account of the NRAs' Non-Paper. It notes that, by leaving the proposal of a designation of a CMF entity by virtue of Article 6(3) of the EB NC with all TSOs, the

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<sup>75</sup> Defence, paras 150-204.

Agency allowed for a bottom-up process on this aspect of the aFRRIF (*inter alia* a new public consultation). It notes that, when requiring an amendment of the aFRRIF in a 2-year timeframe for the designation of a CMF entity, the Agency closely mimicked the TSOs' proposal "*to insert an obligation on themselves to designate the entity that will perform the CMF by six months after approval of the implementation frameworks*" set out in its complementary assertions of 18 December 2019 to the third (revised) All TSOs' Proposal<sup>76</sup>.

162. Finally, it notes that, when opting for a 2-year timeframe to designate the CMF entity until January 2023, the Agency endeavoured to align the aFRRIF with the TSOs' request in the ENTSO-E power-point presentation of 16 September 2019, in which it explained to the Agency that the TSOs were evaluating the scope, benefits and drawbacks of a centralised capacity management module, the results of which would be ready in the second half of 2020<sup>77</sup>.

163. The Board of Appeal proceeds to a detailed analysis of this Plea.

### *3.1 Infringement of Article 21(2) of the EB NC by imposing a single entity structure on the TSOs.*

164. Appellants I to VII<sup>78</sup> and Appellants VIII and IX<sup>79</sup> argue that Article 21(2) of the EB NC provides for two options, namely the operation of the aFRR-Platform by "*TSOs*" (in plural, i.e. a multiple entity structure) or "*by means of an entity the TSOs would create themselves*" (in singular, i.e. a single entity structure). They allege that Article 21(2) of the EB NC does not demonstrate a preference for any option (multiple or single entity structure), whereas the Contested Decision's aFRRIF adopted a narrower approach by imposing a single entity structure (either a single TSO or a TSO-owned company). Appellants VIII and IX argue that Article 21(2) of the EB NC allows for both a multiple entity or a single entity structure, the only difference in case of a multiple entity structure being that additional requirements are imposed by Article 21(3)(e) EB NC.

165. Appellants I to VII argue that the Agency adopted a narrower approach than Article 21(2) of the EB NC because it considers that the entity foreseen in the EB NC should be a legal entity, that is a legal person enjoying full legal capacity. They add that the NRAs

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<sup>76</sup> Annex 7 to the Defence, joined as annex to an email of 18 December 2019 from the TSOs to ACER. See also Annex 10 to the Appeal of Appellants VIII and IX.

<sup>77</sup> Annex 9 to the Defence, "WGAS informal feedback to ACER on aFRR, Pricing and Entities", p. 7.

<sup>78</sup> Paras 86-93 of the Appeal of Appellants I to VII.

<sup>79</sup> Paras 33-34 of the Appeal of Appellants VIII and IX.

allowed the designation of a consortium to the extent that the additional requirements of Article 21(3)(e) of the EB NC were met.

166. The Board of Appeal refers to the table in the First Consolidated Plea on the Comparison of the Designation of the Entity/Entities to perform the functions of the aFRR Platform according to Article 21 of the EB NC. The table clearly demonstrates that the Contested Decision's aFRRIF requires the TSOs to (i) designate a single entity being a single TSO or a TSO-owned company for the Platform's AOF and TTSF by 24 July 2020 and (ii) to develop a proposal of necessary aFRRIF amendments to designate a CMF entity by 24 January 2023 and clarify whether this will be the same entity as the AOF/TTSF entity (in which case there will be a single entity structure) or a different entity from the AOF/TTSF entity (in which case there will be a multiple entity structure and compliance with the additional requirements of Article 21(3)(e) of the EB NC will need to be demonstrated).
167. As set out above in the First Consolidated Plea, the Board of Appeal considers that there is no contradiction between the third (revised) TSOs' aFRRIF Proposal and the Contested Decision's aFRRIF regarding the designation of an AOF/TTSF TSO or TSO-owned entity. The Board of Appeal notes that the Agency endorsed the third (revised) All TSOs' aFRRIF Proposal for the AOF/TTSF. With respect to this endorsement, the Contested Decision, expressly states that the Agency "*accepted the part of the TSOs' proposal*" designating a single entity for the AOF/TTSF<sup>80</sup>. The Agency clearly left the choice to the TSOs to propose whether and how to have the same or a different entity to perform the CMF without imposing further requirements (e.g. legal entity).
168. The Board of Appeal considers that neither the initial Proposal of the TSOs of 18 December 2018, nor the second (revised) Proposal of 28 November 2019, nor the third (revised) new Proposal of 13 December 2019 - even taking into account the complementary assertions submitted by the TSOs on 18 December 2019 – complied with Article 21 of the EB NC. The Board of Appeal notes, in this respect, that its assessment concerning the evaluation of the Proposal's compliance with Article 21 of the EB NC, concerns a matter of law and, as such, was carried out on the basis of a full review of the issue<sup>81</sup>.

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<sup>80</sup> Contested Decision, para 81.

<sup>81</sup> In line with its earlier decision-making, the Board of Appeal carried out a marginal review, assessing whether the Agency committed a manifest error of appreciation, of the Agency's technical analysis demonstrating that the process of updating cross-zonal capacities is most efficiently facilitated by a capacity management function that is the same across different platforms, mentioned in the Contested Decision, para 73(a).

169. Indeed, the Board of Appeal notes that none of these Proposals fully complied with the requirements for the designation of a single entity performing all aFRR-Platform functions, nor for the designation of multiple entities performing all aFRR-Platform functions and providing the necessary guarantees on allocation of functions and coordination between these functions, on governance, operation and regulatory oversight in line with the EB NC's objectives and provisions on conflict resolution, as required by the second sentence of Article 21(3)(e) of the EB NC. It also notes that this failure to comply with the legal requirements persisted despite extensive dialogue and debate and several opportunities being afforded to the TSOs to provide an appropriately modified Proposal.

170. The Board of Appeal considers, therefore, that the Contested Decision does not impose a single entity structure for the aFRR-Platform. The Contested Decision's aFRRIF requires the TSOs to designate a single entity for the AOF/TTSF (leaving it at the discretion of the TSOs to propose its form and design), not only because this is what the TSOs requested in their last (third revised) draft All TSOs' aFRRIF Proposal but also because all other All TSOs' Proposals putting forward a multiple entity had failed to comply with Article 21(3)(e) of the EB NC. What is more, the Board of Appeal considers that the Contested Decision's aFRRIF expressly allows that this single entity performing the AOF/TTSF be only of a temporary nature and could be converted in a multiple entity (complying with Article 21(3)(e) of the EB NC) when the CMF becomes mandatory (by 24 January 2023) given that the TSOs are given the occasion to propose that either the same entity as the AOF/TTSF entity be designated for the CMF or that a different CMF entity be designated without further requirements, letting it up to the TSOs to define the entity's form.

171. The Board of Appeal notes that, in the sequence of the dialogue between the Agency and all TSOs, the Agency set out its view on the efficiencies of a single entity structure in a presentation sent to the TSOs on 4 October 2019<sup>82</sup>, pursuant to which the TSOs submitted a second (revised) All TSOs' aFRRIF Proposal to the Agency designating a single TSO to perform the AOF/TTSF.

172. The Board of Appeal finds that it is incorrect to state that the Agency imposed a single entity structure in its Contested Decision and, what is more, that it is incorrect that the Agency imposed a single entity structure in its dialogue with the TSOs leading up to

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<sup>82</sup> Annex 12 to the Defence. Email from ACER to the TSOs of 4 October 2019, including ACER's "Note on Single Entity for Performing the Functions of the EU Balancing Platform".

the Contested Decision. During this dialogue, the Agency set out the advantages of a single entity structure but left the possibility to the TSOs open to choose a single entity structure or a multiple entity structure without any further requirement on its design (e.g. consortium or not). The only constant request of the Agency was that there be clarity as to whether All TSOs' Proposal designated a single entity or multiple entities (in which case compliance with the additional requirements of Article 21(3)(e) of the EB NC had to be ensured and demonstrated).

173. The Board of Appeal finds that the Agency was fully in line with the NRAs, who, in their Non-Paper, also held that the TSOs had the possibility to choose a single entity structure or a multiple entity structure but that All TSOs' Proposal could only obtain regulatory approval if there was clarity on which option was chosen and, in case a multiple entity structure was chosen, clarity on compliance with the additional requirements of Article 21(3)(e) of the EB NC. The Non-Paper states that *“Regulatory Authorities request that the content of Article 12 of the aFRRIF is rephrased and unambiguously specifies which of the two options is proposed, i.e. whether the platform will be operated (i) by an entity with full legal capacity created by the TSOs or (ii) by the TSOs themselves acting, as the case may be, in a consortium. In the latter case, the requirements set in Article 21(3)(e) of the EB GL shall be met”*<sup>83</sup>. The NRAs' Non-Paper adds that All TSOs' Proposal *“must not remain silent or vague”* on compliance with the additional requirements of Article 21(3)(e) of the EB NC and has to contain *“a sufficient amount of detail as regards the operational rules”*<sup>84</sup>.

174. Appellants I to VII argue that the Agency adopted a narrower approach than Article 21(2) of the EB NC because it considers that the entity foreseen in the EB NC should be a legal entity, that is a legal person enjoying full legal capacity, and refer to paragraph 69 of the Contested Decision. They add that the NRAs left the possibility open to designate a consortium to the extent the additional requirements of Article 21(3)(e) of the EB NC were met, whereas the Contested Decision's aFRRIF does not allow for a consortium as regards the AOF/TTSF but imposes a single entity. At the Oral Hearing in analogous case A-002-2020, they held that *“the NRAs clearly stated that a consortium (notwithstanding that it does not have legal personality) is permitted from a legal perspective under Article*

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<sup>83</sup> Annex 6 to the Defence, p. 14. See also Annex 5 to the Appeal of Appellants I to VII and Annex 8 of the Appeal of Appellants VIII and IX.

<sup>84</sup> Ibidem.

*20 of the Guidelines. ACER cannot claim that it acted in accordance with the NRAs' position.*"<sup>85</sup>

175. The Board of Appeal finds, in this respect, that the Agency invoked the lack of legal capacity of a consortium for the purpose of explaining that a consortium did not constitute a single entity but amounted, *de iure*, to a sum of various TSOs, leading to a multiple entity structure (and hence triggering the necessity to demonstrate compliance with the additional requirements of Article 21(3)(e) of the EB NC). It explained, in this context, that the consortium, foreseen by the initial All TSOs' Proposal, neither ensured nor demonstrated compliance with Article 21(3)(e) of the EB NC. In so doing, the Agency followed the same reasoning as the NRAs in their Non-Paper, which states that "*a consortium does not typically possess full legal capacity as it is not a legal person, and as such cannot be considered as an entity legally distinct from the TSOs*"<sup>86</sup>. In other words, neither the NRAs nor the Agency stated that a consortium did not qualify as designated entity *per se* but indicated that a consortium triggered the necessity to ensure and demonstrate compliance with the additional requirements of Article 21(3)(e) of the EB NC. The Board of Appeal notes that the Contested Decision explains this issue at length<sup>87</sup>. It was subsequently confirmed by the Agency's Defence<sup>88</sup> and Rejoinder<sup>89</sup> and reiterated at the Oral Hearing<sup>90</sup>. The Board of Appeal considers, in line with the NRAs and the Agency, that the multiple entity structure foreseen in Article 21(3)(e) of the EB NC allows for a consortium.

176. Finally, the Board of Appeal notes that the Appellants did not take the opportunity to set out their views on their opposition against a single entity structure during the public consultation, as transpires from Annex II to the Contested Decision, even though they could have expressed their view through statements in response to Question 5, in which

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<sup>85</sup> Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 002-2020 (consolidated), p.2, where Appellants I to VII refer to the Oral hearing of 18 June 2020 held in Case 001-2020 (consolidated): "*Our points remain the same as described in the previous hearing.*", read in conjunction with the Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 002-2020 (consolidated), p. 5.

<sup>86</sup> Ibidem.

<sup>87</sup> Contested Decision, paras 69-73.

<sup>88</sup> Defence, paras 154-160.

<sup>89</sup> Rejoinder, paras 111-112 and 161.

<sup>90</sup> Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 001-2020 (consolidated), p. 5. See also, Summary Minutes of the Oral Hearing of 18 June held in Case 002-2020, p.6: "*First, I would like to refer to the statements made earlier in A-001-2020 (cons.), this is the same discussion*" read in conjunction with Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 002-2020 (consolidated), p. 11: the Agency held that "*It can be done through the consortium, the only requirement of the Agency is that Article 21(3)(e) second sentence of EB Regulation should be respected: all governance rules must be established in the implementation framework*".

stakeholders were allowed to provide input on any topic related to the aFRRIF. This was confirmed by the Appellants at the Oral Hearing<sup>91</sup>.

*3.2 Infringement of Article 21(2) of the EB NC by requiring the aFRR-Platform to perform the CMF.*

177. Appellants I to VII<sup>92</sup> and Appellants VIII and IX<sup>93</sup> allege that the CMF is not a necessary function to operate the Platform, because Article 21(2) of the EB NC states that the aFRR-Platform “*shall consist of at least*” the AOF and TTSF, without mentioning the CMF. Appellants I to VII quote the Contested Decision which allegedly introduced the CMF as a new aFRR-Platform function that it defined as requiring it to perform and update cross-zonal capacities needed as an input to the AOF. They add that the Contested Decision acknowledges in paragraph 55 that “*the TSOs originally did not plan to organise the updating of cross-zonal capacities as a central platform function*” and that the TSOs’ initial All TSOs’ aFRRIF Proposal did not mention the CMF as a Platform function. They add that the NRAs’ Non-Paper did not contain a CMF requirement and that the Agency had limited competences to decide only on issues of disagreement between the NRAs.

178. According to Appellants I to VII, the Agency failed to explain why the CMF has to be a Platform function. They allege that the Agency justifies this on the basis of Article 37 of the EB NC, but that Article 37 of the EB NC does not mention CMF as a required function, even though it defines the process for the updating of cross-zonal capacity by the TSOs. They add that the Agency should have identified a legal basis for the CMF, given the impact on the aFRR-Platform and, hence, the nature of the TSOs’ balancing activities.

179. The Board of Appeal observes, as a preliminary issue, that the different functions performed by the aFRR-Platform<sup>94</sup> are as follows: (i) the AOF, which takes, among others, aFRR demands, the common merit order lists and aFRR cross-zonal capacities as

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<sup>91</sup> Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 001-2020 (consolidated), p. 27. Appellants I to VII stated that “*Since the public consultation did not mention these issues by way of specific questions or in ACER’s explanation of the consultation issues, to the best of their knowledge, the Appellants did not provide a specific comment on this point in the public consultation.*” Appellants VIII and IX adhered to this position.

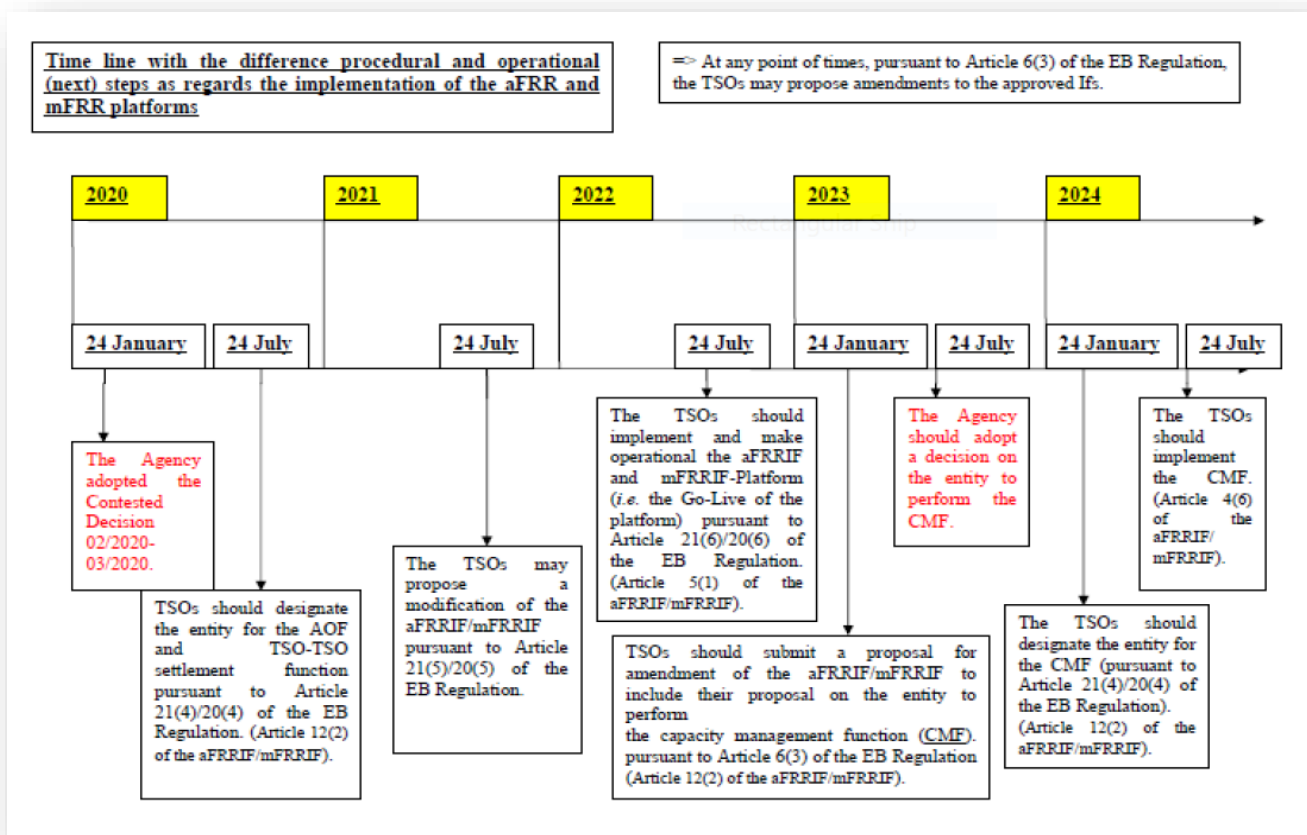
<sup>92</sup> Paras 94-108 of the Appeal of Appellants I to VII.

<sup>93</sup> Paras 35-36 of the Appeal of Appellants VIII and IX.

<sup>94</sup> Recital (10) and Article 6(1) of the aFRRIF in Annex 1 to the Contested Decision. See also ENTSO-E’s Explanatory Document on the aFRRIF of 20 April 2018. See also Annex 10 to the Appeal of Appellants VIII and IX: third (revised) All TSOs’ Proposal (which adds Common Invoicing as a separate function)

input and determines the amount of aFRR exchange between LFC areas, aiming to ensure the activation of the most cost-efficient bids through the optimisation algorithm; (ii) the TTSF, which calculates the settlement between TSOs of intended aFRR exchanges as a result of the cross-border FRR activation process for the frequency restoration process with automatic activation; and (iii) the CMF, which continuously updates cross-zonal capacities available for the aFRR exchanges on bidding zone borders and can be implemented in a decentralised or centralised way. The Cross-Zonal Capacity Calculation Function ('CCCF'), which calculates the capacity across zones, may be added if deemed efficient when implementing methodology for cross-zonal capacity calculation within the balancing timeframe in accordance with Article 37(3) of the EB NC.

180. The Board of Appeal also observes that the CMF is situated as follows on the timeline of the aFRRIF<sup>95</sup>: Table on the aFRRIF Timeline



Source: Agency's Defence.

181. Article 4(6) of the Contested Decision's aFRRIF - which has not been appealed by the Appellants - provides that the CMF shall be considered as a function required to operate

<sup>95</sup> Defence, p.20.



the aFRR-Platform no later than two years after the deadline for the implementation of the aFRR-Platform pursuant to Article 5(3)(b), i.e. by 24 July 2024<sup>96</sup>.

182. Article 4(2) of the Contested Decision's aFRRIF provides for a detailed definition of the underlying process of the CMF, which is the process of continuously updating the aFRR cross-zonal capacities for each of the relevant bidding zone border or set of bidding zone borders. These capacities are needed as an input for the AOF. Contrary to the Appellants' argument, even though Article 37 of the EB NC does not expressly mention the CMF, it defines its underlying process for the updating of cross-zonal capacities. Indeed, Article 37(1) of the EB NC reads as follows: "*After the intraday-cross-zonal gate closure time, TSOs shall continuously update the availability of cross-zonal capacity for the exchange of balancing energy or for operating the imbalance netting process. Cross-zonal capacity shall be updated every time a portion of cross-zonal capacity has been used or when cross-zonal capacity has been recalculated.*"

183. Following the aFRRIF's implementation timeline, this process will be carried out in a decentralised way until 24 July 2024 and in a centralised way as of 24 July 2024.

184. The Board of Appeal observes – similarly to what the Appellants mention and the Contested Decision<sup>97</sup> confirms – that the initial All TSOs' Proposal did not expressly mention the CMF. The Board of Appeal considers also that this is precisely one of the reasons of the lengthy dialogue between the Agency and the TSOs in the context of the bottom-up process of decision-making to achieve an internal electricity market. Again, the Board of Appeal considers that the Agency could not obtain clarity on whether a single entity structure or multiple entity structure was chosen (requiring compliance with Article 21(3)(e) of the EB NC) if there was no information on whether the proposed entity or entities would perform all functions or whether, months or years later during the aFRRIF's implementation, a new entity would be designated to perform the centralised CMF. The Contested Decision states that All TSOs' Proposal did "*not sufficiently address*" the Agency's concerns<sup>98</sup> and did "*not make clear which function of the Platform will perform the process of updating cross-zonal capacities*"<sup>99</sup>. The Board of Appeal finds that this is not contradicted by the NRAs' Non-Paper, which highlights that clarity on the multiple entity structure of Article 21(3)(e) of the EB NC was needed and

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<sup>96</sup> See also Articles 3(3) and 6(5) of the aFRRIF joined as Annex 1 to the Contested Decision.

<sup>97</sup> Contested Decision, para 55.

<sup>98</sup> Contested Decision, para 84.

<sup>99</sup> Contested Decision, para 54.

that this implied a delineation of “*all the functions*” necessary to perform the aFRR-Platform.

185. What is more, the Board of Appeal observes that it was an obligation for the Agency to gain clarity on the functions to be performed given that Article 21(3)(c) of the EB NC expressly requires that the aFRRIF includes the functions required to operate the aFRR-Platform.
186. The Appellants claim, in this regard, that Article 21(3)(c) of the EB NC only imposes the inclusion of “*required*” functions and that the CMF is not “*required*” to operate the aFRR-Platform. They add that the Contested Decision erroneously introduced the CMF as a “new” required aFRR-Platform function.
187. As will be set out below, the Board of Appeal finds that the Contested Decision neither introduced the CMF nor otherwise added the CMF as a new function of the aFRR-Platform that would not have been foreseen by the EB NC. It also finds that the CMF is a required function when operating the aFRR-Platform.
188. First, from a legal perspective, the TSOs have the obligation to carry out the process of continuously updating the availability of cross-zonal capacity - the same process that the Agency calls “CMF” - by virtue of Article 37(1) of the EB NC. Additionally, Article 21(3)(a) of the EB NC requires the aFRRIF to include a high-level design of the aFRR-Platform, and Article 21(3)(c) of the EB NC requires the aFRRIF to include a definition of the functions required to operate European platforms. The EB NC does not exhaustively list all Platform functions because its gradual integration process is, as already mentioned, a bottom-up process based on a close cooperation between all stakeholders. The Board of Appeal notes, moreover that, even though the EB NC does not exhaustively list all aFRR-Platform functions, Article 21(2) of the EB NC expressly stipulates that the aFRRIF must designate an entity or entities to perform “*at least*” the AOF and TTTF, implying that these functions are a minimum but that aFRR-Platforms are required to perform more functions. The expression “*at least*” means, according to the Oxford English Language Dictionary “*not less than, at the minimum*”. If the functions were limited to the AOF and TTTF, as the Appellants suggest, the requirement by Article 21(3)(c) of the EB NC on the inclusion of a definition of the functions required to operate the Platforms would be obsolete.
189. Second, from a legal, systemic and teleological perspective, the Board of Appeal notes that the CMF appears undoubtedly as a key asset to attain the EB NC’s objective of creation an internal electricity market, *inter alia* through an integration of balancing markets and promotion of balancing service exchanges, as set out by Article 3(1)(c) of the

EB NC. Bearing this objective in mind, it goes without saying that, when mandating the creation of EU-wide energy balancing Platforms, the EB NC's goal is to integrate electricity balancing across all balancing zones in the EU. A cross-zonal function such as a centralised CMF falls within the objectives of the EB NC.

190. The Board of Appeal refers to Recital (5) of the EB NC, which states that the EB NC “establishes an EU-wide set of technical, operational and market rules to govern the functioning of electricity balancing markets. It sets out rules for the procurement of balancing capacity, the activation of balancing energy and the financial settlement of balance responsible parties. It also requires the development of harmonised methodologies for the allocation of cross-zonal transmission capacity for balancing purposes. Such rules will increase the liquidity of short-term markets by allowing for more cross-border trade and for a more efficient use of the existing grid for the purposes of balancing energy. As balancing energy bids will compete on EU-wide balancing platforms, it will also have positive effects on competition.” The definition of the standard aFRR balancing energy product foreseen by Article 25 of the EB NC also aims at fostering cross-border exchanges and competition.

191. From a legal perspective, the Board of Appeal finds, therefore, that the CMF responds to the requirements of Article 37(1) and Article 21(3)(a) and (c) of the EB NC as well as a systemic and teleological interpretation of the EB NC.

192. Third, from a technical perspective - even though this is a complex, technical question on which the Agency enjoys a margin of discretion and the Board of Appeal's control is limited to assessing a manifest error of assessment, in line with its earlier decision-making<sup>100</sup> - the Board of Appeal finds that an aFRR-Platform requires the performance of the underlying process of the CMF in accordance with Article 37(1) of the EB NC, albeit in a decentralised fashion, as appears both from the Agency's Defence<sup>101</sup>, ENTSO-E's Explanatory Document<sup>102</sup> and even the initial All TSOs' aFRRIF Proposal itself<sup>103</sup>, and that this decentralised process of continuously updating the availability of cross-zonal capacities will remain in place during the transition period until the implementation of the centralised CMF becomes mandatory on 24 July 2024 in accordance with Article 4(6) of

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<sup>100</sup> Board of Appeal Decisions A-001-2017 paras 69 and 114; A-002-2018, para 59; A-001-2019, paras 43, 56, 233-239; A-003-2019, para 149 and A-006-2019, paras 41 and 47.

<sup>101</sup> Defence, paras 173 and 229.

<sup>102</sup> ENTSO-E's Explanatory Document.

<sup>103</sup> Annex 4 to the Defence Article 4(2) of All TSOs' aFRRIF Proposal of 18 December 2018 states that “each TSO shall continuously calculate and provide the aFRR cross-border capacity limits to the optimization algorithm for each of the relevant aFRR balancing borders or set of aFRR balancing borders by applying the following process (...)”.

the Contested Decision's aFRRIF (see Table on aFRR Timeline above). The third (revised) All TSOs' Proposal clearly defines the CMF as a centralised version of the existing continuous update of cross-zonal capacities: *"The purpose of the CMF shall be to update continuously the (x)FRR cross-zonal capacities for each of the relevant bidding zone borders or set of bidding zone borders such that at any time the cross-zonal capacities reflect the actually available cross-zonal capacities for (automatic/manual) frequency restoration power interchanges"*<sup>104</sup>.

193. The Board of Appeal notes that Appellants VIII and IX recognise in their Appeal that they only contest the inclusion of the CMF as a function of the Platform<sup>105</sup>. Their Reply states that *"It should be recalled that TenneT does not contest that capacity management should be performed (...)"*<sup>106</sup> and *"TenneT agrees with ACER that 'there is a process for continuously calculating the cross-zonal capacities that runs before the [activation optimisation function] with the aim to calculate and provide to the optimisation algorithm one of its inputs' (Defence, para 168)"*<sup>107</sup>. Similarly, even though Appellants VIII and IX held at the Oral Hearing that the CMF is, in their opinion, not essential for the Platform (calling it a capacity management "module" and not a function of the Platform) but for the TSOs, they acknowledged that this module optimises cross-zonal capacity for all Platforms and that *"Platforms match TSO demands with the merit order list, taking into account the CZCs, and the results are sent back to the TSOs and also to the CMF in order to ensure commitment of the use of the available CZC by the TSOs"*<sup>108</sup>. Similarly, Appellants I to VII recognise the CMF as a "module" in their Reply, even though they maintain that it is not essential<sup>109</sup>.

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<sup>104</sup> Annex 17 to the Defence, joined as annex to an email of 13 December 2019 from the TSOs to ACER., p. 3.

<sup>105</sup> Appeal of Appellants VIII and IX, para 35.

<sup>106</sup> Reply of Appellants VIII and IX, para 40. Appellants VIII and IX add that *"The disagreement arises on whether this function should be performed as a function of the Platform."*

<sup>107</sup> Reply of Appellants VIII and IX, footnote 55 to para 40.

<sup>108</sup> Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 001-2020 (consolidated), p. 27. Appellants VIII and IX held that *"The capacity management function (CMF) is an essential function for the TSOs (Note: not the platform) to match their demands for balancing capacity. However, the CMF module optimises cross zonal capacity (CZCs) for all platforms, not just PICASSO or MARI. CMF indicates to the platforms which CZC available is for each platform (successively TERRE, MARI and PICASSO/IGCC). The platforms already received the balancing energy bids via the TSOs and receive before every MTU the balancing capacity demands of the TSOs. Platforms match TSO demands with the merit order list, taking into account the CZCs and the results are sent back to the TSOs and also to the CMF in order to ensure commitment of the use of the available CZC by the TSOs. By that time, the platform is done, but the CMF will calculate the resulting available CZC for the next round. It therefore makes no sense to add the capacity management functionality to one of the platforms."*

<sup>109</sup> Reply of Appellants I to VII, para 53: *"The point of disagreement is whether this IT Module should be considered as a mandatory function of the Platform subject to the Article 20(2) designation process, as*

194. Quoting the Agency's Defence, the process *"will be implemented from the very beginning, because the platform cannot operate without it, but in a decentralised way (each TSO on its own). The TSOs are free to implement it in whichever manner they deem more efficient as there is no restriction in the decision with respect to that for the first two years."*<sup>110</sup> It is only after the designation of a CMF entity by 24 January 2023 that the centralised CMF will have to be implemented as inter- and intra-Platform function<sup>111</sup>. In other words, the CMF is not a "new" function but a required Platform function. What is new is its centralisation, which responds to a need for EU integration, at the core of the EB NC. This was set out by the Agency at the Oral Hearing in analogous Case A-002-2020: *"Even if it is decentralised, the platform cannot be operational without this process. As explained earlier, it is an input to the model, one of the three exogenous variables, and a constraint to the optimisation process". "The sequential allocation of cross-zonal capacity and the request to make it in a centralised way, to certain extent was requested by the NRAs. I can refer to the Non-Paper."*<sup>112</sup>

195. The Board of Appeal observes that the technical reality of electricity balancing Platforms suggests that they cannot operate without the underlying process of the CMF<sup>113</sup>. But, what is more, the Board of Appeal considers that the Agency and the NRAs advocate that the centralization of the CMF is also essential for the operation of the aFRR-Platform.

196. First of all, when analysing All TSOs' initial Proposal, the NRAs had agreed in their Non-Paper, Section IV(c) *"Need to Coordinate Sequential Allocation of Cross-zonal Capacity"* that the TSOs had to amend All TSOs' aFRRIF Proposal in order to resolve the update of available cross-zonal capacities in a *"coordinated"* approach and recommended *"centralisation"*<sup>114</sup>.

197. In so doing, the NRAs envisage centralisation both at intra-Platform and inter-Platform level<sup>115</sup>. The Contested Decision confirms that *"the technical analysis of the process of updating cross-zonal capacities revealed that this process requires both intra-platform*

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*evidenced in the TSOs' replies to ACER in this respect."* See also para 3: *"(..) the CMM process (a centralised process proposed by the TSOs as a single system for all information on available cross-zonal capacities for all balancing platforms) (..)"*.

<sup>110</sup> Defence, para 173. See also paras 169 and 170.

<sup>111</sup> Defence, paras 173 and 229.

<sup>112</sup> Summary Minutes of the Oral Hearing of 18 June held in Case 002-2020, p.6: *"First, I would like to refer to the statements made earlier in A-001-2020 (cons.), this is the same discussion"* read in conjunction with Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 002-2020 (consolidated), p. 10-11.

<sup>113</sup> Defence, paras 173 and 229.

<sup>114</sup> Annex 8 of the Appeal of Appellants VIII and IX, p.13

<sup>115</sup> NRAs' Non-Paper. Contested Decision, paras 16, 48 and 51.

*and inter-platform updating” and that the Agency considers that it should be a “central function that serves not only the aFRR-Platform but also other Platforms”*<sup>116</sup>.

198. Secondly, the Board of Appeal notes that the Agency finds that the CMF is “*an essential function*” for an aFRR-Platform because the AOF requires continuously updated cross-zonal capacities<sup>117</sup>. Given that the CMF is an indispensable input of the AOF and that there is no disagreement that the AOF is a required function for the operation of an aFRR-Platform, the CMF also qualifies as being required for the operation of an aFRR-Platform in accordance with Article 21(3)(e) of the EB NC. At the Oral Hearing, the link between the CMF and the AOF, the former being an input of the latter, was further explained in detail<sup>118</sup> and both Appellants I to VII and the Agency set out that the CMF is performed on an AOF-basis, implying that its frequency depends on the type of Platform<sup>119</sup>. In this respect, the Agency explains in the Contested Decision that the continuous updating of cross-zonal capacities is “*most efficiently done through a central function*”<sup>120</sup>.

199. Contrary to the Appellants’ argument, the fact that the Contested Decision grants all TSOs a 2-year transition period to implement the CMF and designate a CMF entity<sup>121</sup> does not imply that the CMF qualifies as a redundant Platform function. This argument is based on the reasoning that aFRR-Platforms are, at present, able to function without the CMF, which, as set out above, is an erroneous statement. The Board of Appeal observes that transition periods are standard occurrence in processes of gradual integration. Gradual integration processes – e.g. creating of a Euro-zone or a customs union – , just like gradual liberalisation processes, are characterised by transition periods, allowing all stakeholders to gradually adapt to the new situation. The Contested Decision’s aFRRIF is part of the gradual integration process of balancing energy markets, foreseen by the EB

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<sup>116</sup> Contested Decision, para 56.

<sup>117</sup> Contested Decision, para 79.

<sup>118</sup> Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 001-2020 (consolidated), p. 23-25. The Agency set out that “*We have to start with the Activation Optimization Function. It is a model consisting of the first-order solutions of optimisation problems: among others, the maximisation of the economic surplus (the objective function) subject to cross-zonal capacity or allocation constraints. In the model resulting from these first order solutions, there are three input-variables (or exogenous variables): (i) common merit order list (ii) demand of the TSO (iii) cross zonal capacity constraint. Therefore, the tracking of the available cross-zonal capacity (done by the CMF in a centralised way) will provide the model with an input and also a constraint for this optimization problem but this input will be fed into the model in a decentralised way as from the beginning. The advantage of the CMF is that it is done in the centralised way.*” Appellants I to VII set out that “*please note that the CMF does not relate to capacity allocation but rather a distribution of cross-zonal capacity limits as an input to the AOF*”.

<sup>119</sup> Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 001-2020 (consolidated), p. 25. The Agency set out that “*The update is done on an optimisation cycle basis. It depends on the Platform. It could be 1 second, 4 seconds or 30 seconds, so it happens with high frequency*”. Appellants I to VII set out that “*In the case of the aFRR, this occurs in real time and in the case of the mFRR, 15 minutes before real time.*”

<sup>120</sup> Contested Decision, para 79.

<sup>121</sup> Contested Decision, paras 55 and 82.

NC. To avoid any misunderstanding, the Contested Decision mentions expressly that the transition period does not in any way affect the essential nature of the CMF<sup>122</sup>. Furthermore, as already mentioned, the Board of Appeal notes that, when opting for a 2-year timeframe to designate the CMF entity until January 2023, the Agency endeavoured to align the aFRRIF with the TSOs' request in the ENTSO-E power-point presentation of 16 September 2019, in which it explained to the Agency that the TSOs were evaluating the scope, benefits and drawbacks of a centralised capacity management module, the results of which would be ready in the second half of 2020<sup>123</sup>.

200. In addition, contrary to the Appellants' arguments, the necessity of the CMF was already a part of the aFRRIF dialogue between all stakeholders, including the TSOs, as the Contested Decision evidences<sup>124</sup>. Moreover, from the very beginning, All TSOs' initial aFRRIF Proposal provided for a process of continuous updating of cross-zonal capacities<sup>125</sup> and the TSOs' complementary assertions of 18 December 2019 to the third (revised) All TSOs' aFRRIF Proposal stated that *"the TSOs propose a separate TSO for the capacity management function"*, as well as *"the TSOs have explained to the RAs and ACER their intention to centralise the capacity management to attain a standardised approach towards justification and monitoring of capacity limitations, a common GUI for all operators in Europe to update capacities, reporting, etc."*<sup>126</sup>. At the Oral Hearing, Appellants I to VII explained that this proposal was intended to be a *"compromise solution"*<sup>127</sup>.

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<sup>122</sup> Contested Decision, para 55 *"This transition period aims to prevent any delays in the implementation of the platforms, since meeting the implementation deadline should have a higher priority than implementing this function. For this reason, the Agency provided two additional years (after the deadline for implementation of the aFRR-Platform) for implementing the capacity management function."* See also footnote 9 in para 79.

<sup>123</sup> Annex 9 to the Defence, "WGAS informal feedback to ACER on aFRR, Pricing and Entities", p. 7.

<sup>124</sup> Contested Decision, para 48: *"the Agency, during the consultation with the regulatory authorities and TSOs, tried to clarify this process in terms of its overall functionality, as well as how it fits the structure of the aFRR-Platform"*; paras 53 and 73 (opinion by the Agency on All TSOs' second (revised) Proposal).

<sup>125</sup> Annex 4 to the Defence, Article 4(2) of All TSOs' aFRRIF Proposal of 18 December 2018 states that *"each TSO shall continuously calculate and provide the aFRR cross-border capacity limits to the optimization algorithm for each of the relevant aFRR balancing borders or set of aFRR balancing borders by applying the following process (...)"*.

<sup>126</sup> Annex 10 to the Appeal of Appellants VIII and IX, p.6. See also Annex 7 to the Defence, joined as annex to an email of 18 December 2019 from the TSOs to ACER.

<sup>127</sup> Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 001-2020 (consolidated), p. 24. Appellants I to VII set out that it was a *"compromise solution"*, in which the TSOs proposed a *"Capacity Management Module (the "CMM") separate from any of the platform functions to ensure the simultaneous centralised management of cross-zonal capacity and non-discriminatory access of one or the other platform to cross-zonal capacity. Even if the CMF were to be designated as a platform function, the TSOs did not consider that it would be an essential platform function, entailing compliance with the requirements of Article 21 EBGL"*. Appellants VIII and IX agreed with the statement made by Appellants I to VII and added that *"it is not debated that capacity management should be in place but it is not an essential function of the Platform."*

201. Finally, the Board of Appeal notes, once more, that the Appellants did not take the opportunity to set out their views on their opposition against a single entity structure during the public consultation, as transpires from Annex II to the Contested Decision, even though they could have expressed their view through statements in response to Question 5, in which stakeholders were allowed to provide input on any topic related to the aFRRIF.

### *3.3 Infringement of Article 21(3)(e) of the EB NC by requiring the aFRR-Platform to perform the CMF.*

202. Appellants I to VII<sup>128</sup> allege that the Contested Decision erroneously considers the process of updating cross-zonal capacity to be a required Platform function and therefore unlawfully applies the criteria of Article 21(3)(e) of the EB NC to a complementary function of the Platform, named the CMF. They argue that this enabled the Contested Decision to unlawfully apply the additional requirements of Article 21(3)(e) of the EB NC to the CMF<sup>129</sup>. They add that, in the hypothetical scenario that All TSOs' aFRRIF Proposal contemplated a multiple entity structure, the TSOs did not have the opportunity to elaborate on how these additional requirements might be satisfied. They argue that the TSOs did not volunteer this information because their Proposal contemplated a single entity structure. They also argue that it was incumbent upon the Agency to identify these requirements, which are efficiency criteria and, hence context-dependent, in order to guide the TSOs when providing the information to comply with the additional requirements of Article 21(3)(e) of the EB NC. Subsidiarily, the Appellants argue that they did not need to provide this information because the NRAs' Non-Paper only requested the TSOs to provide a "*sufficient amount of detail*"<sup>130</sup>. They furthermore accuse the Agency of invoking an erroneous interpretation of Article 21(3)(e) of the EB NC "*only to justify ACER's wider objective of amending the agreed position of the NRAs on the designation of the entity for aFRRIF*"<sup>131</sup>. Finally, Appellants I to VII argue that, if they had been required to provide information demonstrating compliance with Article 21(3)(e) of the EB NC, their All TSOs' Proposal would have been satisfactory because "*(a) some of the supporting infrastructure (in particular buildings and security, access to TSO communication infrastructure) already existing at each TSO premises would have*

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<sup>128</sup> Paras 109-116 of the Appeal of Appellants I to VII.

<sup>129</sup> Contested Decision, paras 79 and 80.

<sup>130</sup> Annex 6 to the Defence. Annex 5 to the Appeal of Appellants I to VII.

<sup>131</sup> Para 114 of the Appeal of Appellants I to VII.



*been utilised, significantly increasing overall efficiency; (b) no additional costs would have arisen due to platform implementation (e.g. a TSO already maintains a control centre for the regular operation and there is no increase in maintenance costs due to the operation of the platform). It is therefore not expected that common costs will be claimed for supporting infrastructure*<sup>132</sup>. They deplore that the Contested Decision does not record any assessment of these factors.

203. Appellants VIII and IX<sup>133</sup> allege that the CMF is not a necessary function to operate the Platform because Article 21(3)(e) of the EB NC states that the EB NC only applies to *“the functions defined in the proposal”* and the CMF was not defined in the Proposal. They also argue that the fact that the Agency could not itself amend the third (revised) All TSOs’ Proposal to ensure compliance with the additional requirements of Article 21(3)(e) of the EB NC<sup>134</sup> does not mean that this Proposal could not comply with these additional requirements, especially given that the Non-Paper only requested the TSOs to provide a *“sufficient amount of detail”*<sup>135</sup>.

204. On the question whether the CMF is necessary or required to operate an aFRR-Platform, the Board of Appeal refers to Section 3.2 of this Third Consolidated Plea, where it finds that the CMF is an essential function to operate an aFRR-Platform. In Section 3.2 above, the Board of Appeal observes that the CMF is not a new function but an existing function and that only its centralisation foreseen for 2024 is new. Section 3.2 above also sufficiently shows that the process of continuous updating of cross-zonal capacity was defined in All TSOs’ initial aFRRIF Proposal.

205. In this context, Appellants I to VII’s argument that they were not given the opportunity to elaborate on All TSOs’ aFRRIF Proposal’s compliance with the additional requirements of Article 21(3)(e) of the EB NC is inconsequential. This is because All TSOs’ aFRRIF Proposal’s compliance with these additional requirements was at the heart of the dialogue between the Agency and all TSOs from the very beginning. All TSOs’ aFRRIF initial Proposal was precisely sent back to all TSOs because of its lack of clarity on compliance with the additional requirements needed to designate a multiple entity, in particular a consortium (an issue that the NRAs had identified earlier in their Non-Paper). During this collaborative process, the TSOs were able to submit a second (revised) Proposal to the Agency on 28 November 2019 and a third (revised) Proposal on 13

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<sup>132</sup> Para 115 of the Appeal of Appellants I to VII.

<sup>133</sup> Paras 35-36 of the Appeal of Appellants VIII and IX.

<sup>134</sup> Contested Decision, para 80.

<sup>135</sup> Annex 8 of the Appeal of Appellants VIII and IX, p.14

December 2019. Furthermore, the Agency allowed the submission of the third (revised) Proposal even if it submitted after the deadline for consultation that the Agency had communicated to the TSOs, which demonstrates the Agency's spirit of cooperation in good faith. In the same spirit of good faith, the Agency accepted the TSOs complementary assertions on 18 December 2019 to its third (revised) Proposal and provided its opinion in writing to the TSOs on these assertions. The dialogue between the Agency and the TSOs was centred on the issue of compliance with the additional requirements of Article 21(3)(e) of the EB NC. The Agency's good faith is furthermore demonstrated by the fact that, faced with a lack of compliance of the third (revised) All TSOs' aFRRIF Proposal with the additional requirements of Article 21(3)(e) of the EB NC, instead of instructing TSOs on the designation of the CMF entity, the Agency left this issue up to the TSOs to make proposals in future at their discretion. The Board of Appeal considers, in this respect, that it is still left open to the TSOs to decide upon a single entity structure or multiple entity structure by 24 January 2023, rendering any imposition by the Agency irrelevant.

206. The Board of Appeal observes that Appellants I to VII's claim that they were not requested by the Agency to "volunteer" information on the additional requirements of Article 21(3)(e) of the EB NC or not sufficiently oriented by the Agency are equally immaterial. Multiple email exchanges demonstrate that the issue was consistently put on the table and that the Agency cooperated to assist the TSOs in drafting their All TSOs' aFRRIF Proposal, as will be set out in detail in the Sixth Consolidated Plea.
207. The Board of Appeal considers that the Agency duly consulted and advised the TSOs from July December 2019 until 18 December 2019 in order to assist them in drafting a Proposal that would comply with Article 21 of the EB NC. Due to the Agency's six-month deadline to take a decision on the Proposal, expiring on 24 January 2020, the Agency could not request the TSOs to complement their Proposal once again following their complementary assertions of 18 December 2019 to their third (revised) Proposal, as this would have jeopardised its ability to take the Contested Decision within the delay.
208. Given the contents of the Proposal's multiple drafts, none of which met the EB NC requirements - hence putting due integration of the internal electricity market at risk - and the lengthy consultations by the Agency, and especially given the complementary assertions submitted by the TSOs on 18 December 2019, the Agency duly identified a misreading of the EB NC, which, if not remedied in the Contested Decision, could have created a barrier for further integration of the electricity balancing markets contrary to the EB NC's objectives set out in Article 3 of the EB NC.

209. In Section 3.2, the Board of Appeal also finds that the Agency adopted a Contested Decision's aFRRIF that was in line with the NRAs' Non-Paper. Appellants I to VII's Plea that their All TSOs' Proposal would have been satisfactory for the NRAs is immaterial because (i) the NRAs jointly requested the Agency to adopt the Contested Decision on 24 July 2019 as per Article 5(7) of the EB NC; and (ii) the Board of Regulators' favourable opinion to the draft Contested Decision demonstrates that at least two thirds of the NRAs was in agreement with the Contested Decision.
210. Whereas Appellants VIII and IX allege that "*it does not automatically follow from a lack of definitive decision on whether one or multiple entities will perform the functions of the problem, that there is not enough detail to ensure compliance with the additional requirements of (...) Article 21(3)(e) EB Regulation*", the Board of Appeal observes that the TSOs' mandate under Article 21(1) of the EB NC to develop an aFRRIF Proposal necessarily requires a clear determination of the entity or entities that will perform all aFRR-Platform functions as transpires from a reading of Article 21(2), (3) and (4) of the EB NC.
211. Indeed, it would be impossible for the NRAs (or ACER in its stead) to verify compliance of the Proposal with Article 21(2), (3) and (4) of the EB NC if the Proposal would not specify which entity or entities will perform which functions. This information is essential to enable the regulatory authorities to verify that the Proposal complies with:
- Article 21(2) of the EB NC - requiring that the aFRR-Platform "*be operated by TSOs or by means of an entity the TSOs would create themselves*" and "*be based on common governance principles and business processes and shall consist of at least the activation optimisation function and the TSO-TSO settlement function*" -,
  - Article 21(3) of the EB NC – requiring that the Proposal "*shall include at least (a) the high level design of the European platform; (b) the roadmap and timelines for the implementation of the European platform; (c) the definition of the functions required to operate the European platform; (d) the proposed rules concerning the governance and operation of the European platform, based on the principle of non-discrimination and ensuring equitable treatment of all member TSOs and that no TSO benefits from unjustified economic advantages through the participation in the functions of the European platform; (e) the proposed designation of the entity or entities that will perform the functions defined in the proposal. Where the TSOs propose to designate more than one entity, the proposal shall demonstrate and ensure: (i) a coherent allocation of the functions to the entities operating the European platform. The proposal shall take full account of the need to coordinate the different functions allocated to the entities*

*operating the European platform; (ii) that the proposed setup of the European platform and allocation of functions ensures efficient and effective governance, operation and regulatory oversight of the European platform as well as supports the objectives of this Regulation and (iii) an effective coordination and decision making process to resolve any conflicting positions between entities operating the European platform”*; and

-Article 21(4) of the EB NC stipulating that “*by six months after the approval of the proposal for the implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation, all TSOs shall designate the proposed entity or entities entrusted with operating the European platform pursuant to paragraph 3(e).*”

212. Even though the TSOs repeatedly expressed an intention to designate a single entity, the third (revised) All TSOs’ aFRRIF Proposal limited the functions of the said entity to the AOF and the TTSF, whilst foreseeing an *ad hoc* designation of the same or another entity for cross-platform functions. Accordingly, the Proposals clearly left the possibility open of a performance of the AOF and TTSF by one entity and the performance of cross-platform functions by another entity. In other terms, none of the versions of All TSOs’ aFRRIF Proposal guaranteed the designation of an incontrovertible single entity but left the door open to the designation and setting of multiple entities.

213. The Board of Appeal concludes, therefore, that the way the TSOs designated entities in All TSOs’ Proposal *de facto* left this designation open through an amenable option to either designate a single entity or multiple entities. This would not have been *per se* contrary to Article 21(3)(e) of the EB NC if All TSOs’ Proposal had provided the necessary guarantees on allocation of functions, coordination between these functions, governance, operation and regulatory oversight and conflict resolution, as required by Article 21(3)(e) of the EB NC. Yet, none of the versions of the Proposal contained sufficient guarantees in this respect.

#### *3.4 Infringement of Article 21(2) of the EB NC by requiring the CMF to be implemented for other balancing Platforms.*

214. Appellants I to VII<sup>136</sup> allege that Article 4(6) of the Contested Decision’s aFRRIF erroneously requires that the CMF be the same for other balancing Platforms, in terms of contents and/or the entity in charge of the operation. They argue that this requirement is not provided for by the EB NC. They claim that Articles 19, 20, 21 and 22 of the EB NC

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<sup>136</sup> Paras 117-118 of the Appeal of Appellants I to VII.

on the creation of each of the RRIF, mFRRIF, aFRRIF and INIF specify that they shall include at least the definition of functions required to operate their respective Platforms. In the Appellants' view, these functions may differ in nature and scope from Platform to Platform, even if they may be similar.

215. The Agency's Defence<sup>137</sup> states that the technical analysis showed that the process of updating cross-zonal capacities is "*most efficiently facilitated by a CMF that is the same across different Platforms*", referring to para 73(a) of the Contested Decision..

216. Article 4(6) of the aFRRIF reads as follows: "*No later than two years after the deadline for the implementation of the aFRR-Platform pursuant to Article 5(3)(b) all TSOs shall establish a CMF, which shall implement the continuous process described in paragraph 2. In case other balancing platforms have such function, the CMF shall be the same across these platforms, if the same obligation is imposed in the relevant implementation framework for these platforms*".

217. The Board of Appeal refers to Section 3.2 above of the Third Consolidated Plea as regards the convenience a centralization of the continuous updating of cross-zonal capacity both at intra-Platform and inter-Platform level, as recommended both by the NRAs in their Non-Paper and the Agency in its Contested Decision.

218. Indeed, the NRAs' Non-Paper clearly states that "*All Regulatory Authorities therefore agree that TSOs should coordinate the steps for the determination of available cross-zonal capacity in article 4 of the aFRRIF with the other Platforms. All Regulatory Authorities believe that the aFRRIF should include a provision that, when interchanges resulting from other European Platform(s) physically impact borders that are not part of that Platform to the extent that it endangers operational security, TSOs shall resolve the issue in a coordinated manner and jointly propose measures to avoid or mitigate the occurrence of similar issues in the future*"<sup>138</sup>.

219. The NRAs explain the reasons behind their agreement: "*All Regulatory Authorities are mindful that the sequential allocation of cross-zonal capacity across different balancing energy processes as described in article 4(2) will, if used in the preceding balancing process, reduce the availability of cross-zonal capacity for TSOs in a particular direction for the subsequent process. Areas that structurally rely on aFRR activations for their balancing needs may be particularly affected, and that this may in*

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<sup>137</sup> Defence, paras 193-201.

<sup>138</sup> Annex 6 to de Defence, p. 13-14. Annex 5 to the Appeal of Appellants I to VII and Annex 8 of the Appeal of Appellants VIII and IX.

turn lessen the efficiency of the aFRR-Platform itself given that the aFRR-platform is the last process after the intraday market.”<sup>139</sup>.

220. The Contested Decision sets out that the process of updating cross-zonal capacities entails the updating of cross-zonal capacities both at intra- and inter-Platform level:

*“(a) during the operation of the aFRR-Platform (intra-platform level): e.g. due to balancing energy exchanges determined by the aFRR-Platform or other cross-zonal exchanges or limitations occurring during the operation of the aFRR-Platform;*

*(b) before the operation of the aFRR-Platform (inter-platform level): e.g. due to balancing energy exchanges determined by the platforms preceding the aFRR-Platform or other cross-zonal exchanges or limitations occurring before the operation of the aFRR-Platform.”*<sup>140</sup>

221. The Contested Decision confirms that *“the technical analysis of the process of updating cross-zonal capacities revealed that this process requires both intra-platform and inter-platform updating”* and that the Agency considers that it should be a *“central function that serves not only the aFRR-Platform but also other Platforms”*<sup>141</sup>. It adds, with respect to the operation of cross-platform functions, that the technical analysis showed that the process of updating cross-zonal capacities is most efficiently facilitated by a capacity management function that is *“the same across different platforms”*<sup>142</sup>. However, in order not to prejudice the other Platforms, the Agency made the obligation conditional upon a similar wording in the RRIF, mFRRIF and INIF<sup>143</sup>.

222. Considering the gradual process of the harmonisation of electricity balancing, the Board of Appeal notes that the need for cross-platform operations is not a new need introduced by the Contested Decision, but that its appropriateness was discussed even before the adoption of the EB NC: *“An integrated cross-border BM is intended to maximise the efficiency of balancing by using the most efficient balancing resources, while safeguarding operational security. The exchange of balancing services across borders may involve the cross-border trade of balancing energy (including imbalance netting) and of balancing capacity. The core element for the integration of EU BMs are the models for cross-border exchanges of balancing energy that should emerge in different geographical areas and gradually be integrated into a single European platform*

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<sup>139</sup> Ibidem.

<sup>140</sup> Contested Decision, para 51.

<sup>141</sup> Contested Decision, para 56.

<sup>142</sup> Contested Decision, para 73.

<sup>143</sup> Contested Decision, para 56.

where all TSOs would have access to different types of balancing energy, subject to the availability of cross-border transmission capacity.”<sup>144</sup>

223. In its Defence, the Agency illustrates the efficiencies of cross-platform CMF with an example: *“For example, if there is any demand from a TSO for mFRR balancing energy, this TSO will determine the volume of this demand prior to the volume of its demand for aFRR balancing energy since the activation time of mFRR products is more remote from the real time than the activation time of aFRR products (as it is the case with day-ahead and intraday buy orders of market participants). This is also the reason why cross-zonal capacities for aFRR are determined after the cross-zonal capacities for mFRR”*<sup>145</sup>.
224. The Board of Appeal notes that the TSOs themselves advocate the efficiency of cross-platform operations in the third (revised) All TSOs’ aFRRIF Proposal<sup>146</sup> and Complementary Assertions to this third (revised) Proposal<sup>147</sup>, which both stipulated that *“all platforms shall use the same cross-platform capacity management function (CMF)”* and that *“the TSOs intend to maximise the efficiency of the platforms by establishing cross-platform functions”*.
225. Importantly, the Board of Appeal observes that the Appellants do not indicate any difference in operating the CMF on the RR-, mFRR- or IN-Platforms that would impede its cross-platform operation, especially if one takes account of the fact that Article 4(6) of the mFRRIF of Decision No.03/2020<sup>148</sup> provides for a similar cross-platform provision as Article 4(6) of the Contested Decision’s aFRRIF. When asked at the Oral Hearing of analogous Case A-002-2020 whether there was any difference in operating the CMF on the mFRR- Platform, the RR-, the aFRR- or the IN-Platforms that would impede its cross-platforms operation, Appellants I to VII did not invoke any difference but limited their answer to the statement that *“The Appellants do not draw any legal distinction with their legal arguments being no different regarding the necessity or otherwise of the CMF as a platform function: the CMF is not necessary for either the mFRR platform or the aFRR platform.”*<sup>149</sup>.

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<sup>144</sup> Annual Report of ACER and the Council of European Energy Regulators (‘CEER’) on the Results of Monitoring the Internal Electricity and Gas Markets in 2014, 30 November 2015, p. 211-212.

<sup>145</sup> Defence, para 197.

<sup>146</sup> Annex 17 to the Defence, joined as annex to an email of 13 December 2019 from the TSOs to ACER, p.1.

<sup>147</sup> Annex 7 to the Defence, joined as annex to an email of 18 December 2019 from the TSOs to ACER. See also Annex 10 to the Appeal of Appellants VIII and IX.

<sup>148</sup> ACER Decision No.03/2020 of 24 January 2020, Annex 2 of the Appeal of Appellants VIII and IX.

<sup>149</sup> Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 002-2020 (consolidated), p.2, where Appellants I to VII refer to the Oral hearing of 18 June 2020 held in Case 001-2020 (consolidated): *“Our points remain the same as described in the previous hearing.”*, read in conjunction with the Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 002-2020 (consolidated), p. 11.

*Conclusion on the Third Consolidated Plea.*

226. It follows that the Fourth Plea of the Appeal of Appellants I to VII and the Third Plea of the Appeal of Appellants VIII to IX must be dismissed as unfounded.

*Fourth Consolidated Plea - Infringement by ACER of Articles 16 and 52(1) of the EU Charter of Fundamental Rights.*

227. According to the Fifth Plea of the Appeal of Appellants I to VII<sup>150</sup>, even if the Agency were to have discretion to impose a single entity structure in Article 12 of the Contested Decision's aFRRIF, it exercised that discretion in a manner which infringed Articles 16 and 52(1) of the EU Charter of Fundamental Rights ('the Charter'). They argue that the Contested Decision leads to unnecessary expenditure in infrastructure and requires significant implementation efforts; disregards the ability to exercise cross-platform functions as TSOs (in particular, the capacity management module) as well as the TSOs' proven expertise in coordinating projects of a similar nature (e.g. balancing in a multi-TSO environment); has a significant impact on the advanced work already conducted by TSOs prior to the Contested Decision (e.g. collaboration on aFRR-Platform algorithms and relevant business specifications); triggers operational risks deriving from the centralization of all functions in a single entity; and fails to take account of existing examples of successful cooperation projects between TSOs as entities operating these kinds of platforms (e.g. IGCC and TERRE).

228. In this regard, the Appellants oppose the fact that the Agency allegedly refused a consortium structure or the allocation of the aFRR-Platform functions to a joint-venture for reasons of "*equal treatment and management control and a risk that other TSOs would become captive of the designated TSO in case of disputes or contract expiry*" and refer to IGCC and TERRE as successful platforms<sup>151</sup>.

229. The Agency primarily argues that the Contested Decision does not impose a single entity structure and, subsidiarily, that the Contested Decision did not infringe Article 16 of the Charter. In so doing, it alleges that the Appellants are regulated entities and that their right to conduct a business is constrained by EU law, referring to earlier Board of Appeal Decision A-004-2019; it adds that the Board of Appeal's review should be limited to a manifest and grave error of assessment because the Agency had to decide on complex

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<sup>150</sup> Paras 120-128 of the Appeal of Appellants I to VII.

<sup>151</sup> Paras 125-126 of the Appeal of Appellants I to VII.



and technical matters and argues that any restriction of the freedom to conduct a business would have been justified by the public interest given that the aFRRIF ensures the proper functioning of the internal market in electricity and aims at a proper cooperation between Member States on the management of balancing energy<sup>152</sup>.

230. Article 16 of the Charter provides that *“the freedom to conduct a business in accordance with Union law and national laws and practices is recognised”*.

231. Article 52(1) of the Charter states that *“any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms or others”*.

232. First, the Board of Appeal observes that this Plea rests on the interpretation, which the Board of Appeal does not subscribe - as set out in detail in the Third Consolidated Plea - , that the Contested Decision “imposed a single entity structure” for the aFRR-Platform.

233. Subsidiarily, the Board of Appeal notes, in line with its earlier decision-making<sup>153</sup>, that the Appellants are TSOs, as created and defined by Article 2(35) of the Recast Electricity Directive, i.e. *“a natural or legal person who is responsible for operating, ensuring the maintenance of and, if 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 transmission of electricity”*<sup>154</sup>. In accordance with the Electricity 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.

234. Consequently, the Appellants’ 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. Given that the Appellants are regulated entities under Article 2(35) of the Electricity Directive, their right to conduct its business is constrained by EU regulation. If the applicable sector regulation provides that NRAs

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<sup>152</sup> Paras 205-231 of the Defence.

<sup>153</sup> Board of Appeal Decision A-004-2019 (paras 312-313).

<sup>154</sup> Recast Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU.

shall approve All TSOs' aFRRIF Proposals, and that the Agency substitutes the NRAs in case they jointly request so, TSOs are, in their quality of regulated entities, bound by these regulatory requirements. While granting TSOs monopolistic rights to certain infrastructure, the electricity 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 Appellants are therefore bound by the EB NC, which provides that, in case all NRAs make a joint request in this sense, the Agency decides in their stead<sup>155</sup>. The fact that voluntary pilot projects – e.g. TERRE and IGCC – are successful is not able to alter the fact that the TSOs are bound by the applicable regulatory framework, in particular the EB NC. The Board of Appeal observes, in this regard, that the bottom-up decision-making process foreseen in the EB NC gives all stakeholders the opportunity to take stock of the experience gained in pilot projects.

235. It follows that the Fifth Plea of the Appeal of Appellants I to VII must be dismissed as unfounded.

*Fifth Consolidated Plea - Infringement by ACER of the principle of proportionality.*

236. According to the Sixth Plea of the Appeal of Appellants I to VII and the Third Plea of the Appeal of Appellants VIII and IX<sup>156</sup>, the Agency infringed the principle of proportionality in adopting the Contested Decision's aFRRIF. Appellants I to VII argue that, by taking a decision on a matter of NRA agreement which fundamentally transforms the nature of the TSOs' balancing activities, the Contested Decision is manifestly disproportionate as a means to achieve the objectives of the EB NC; that the Contested Decision is neither necessary (it chooses a less efficient solution, places operational security at risk, triggers delays in delivery, etc.) nor suitable (other successful platforms such as IGCC and TERRE operate differently) to achieve the objectives pursued. Appellants VIII and IV argue that there were other measures than the single entity structure to ensure compliance with the EB NC and that the Agency should have chosen the least onerous measures, adding that "*in the case at hand, a system without a single entity requirement can still achieve an efficient and well-functioning platform in line with additional requirements of Articles 20(3)(e) and 21(3)(e) EB, and would at the same time*

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<sup>155</sup> See, by analogy, Board of Appeal Decisions A-004-2019 (paras 312-313).

<sup>156</sup> Paras 129-140 of the Appeal of Appellants I to VII and para 36 of the Appeal of Appellants VIII and IX.

*be less onerous on TSOs.*” They refer to the TSOs’ complementary assertions of 18 December 2019 to the third (revised) version of All TSOs’ aFRRIF Proposal in Annex 10 to their Appeal<sup>157</sup>.

237. The Agency’s Defence<sup>158</sup> primarily argues that the Contested Decision does not impose a single entity structure and, subsidiarily, that the Contested Decision did not infringe the principle of proportionality. In so doing, it alleges that the Board of Appeal’s review should be limited to a manifest and grave error of assessment because the Agency had to decide on complex and technical matters and highlights the efficiencies of (i) a company owned by the TSOs acting as a single entity (versus one TSO acting as a single entity), namely as regards equal treatment and management control; monitoring, auditing and controlling the costs; changing the entity and contracts; cross-platform functions; access to information and independent market facilitator (referring to para 73 of the Contested Decision and ACER’s Note on Single Entity for Performing the Function of the EU Balancing Platforms<sup>159</sup>) and of (ii) the inclusion of the CMF in the aFRR-Platform (referring to paras 54-55 of the Contested Decision).

238. The principle of proportionality is a general principle of EU law. Article 5(4) TEU provides that *“under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”* The principle is expressly mentioned in Article 3(2)(a) of the EB NC (*“When applying this Regulation, Member States, relevant regulatory authorities, and system operators shall (a) apply the principles of proportionality and non-discrimination”*) and Recital (45) of Regulation (EU) 2019/942 (*“In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.”*).

239. First, the Board of Appeal notes that this Plea is void because it is based on the erroneous interpretation that the Contested Decision imposed on the TSOs the single entity structure, set out at length in the Third and Fourth Consolidated Pleas.

240. Subsidiarily, in the Board of Appeal’s consistent decision-making practice, it has been confirmed that the Agency enjoys a certain margin of discretion in the assessment of complex technical issues but that the discretionary power granted to the Agency in respect of a decision such as the Contested Decision is not unlimited. It is circumscribed

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<sup>157</sup> Annex 10 to the Appeal of Appellants VIII and IX, p.6. See also Annex 7 to the Defence, joined as annex to an email of 18 December 2019 from the TSOs to ACER.

<sup>158</sup> Paras 205-231 of the Defence.

<sup>159</sup> Annex 12 to the Defence, ACER’s “Note on Single Entity for Performing the Function of the EU Balancing Platforms”, joined as annex to an email of 4 October 2019 from ACER to ENTSO-E.

by various conditions and criteria which limit the Agency's discretion, which include the requirements specifically set out in the relevant legal framework and the general principles of EU Law, including the principle of proportionality<sup>160</sup>.

241. The Board of Appeal considers that the main objective of the EB NC is the integration of electricity balancing markets to enhance the efficiency of European balancing processes<sup>161</sup>. In this context, the Contested Decision's aFRRIF was adopted upon joint request of the NRAs under Article 5(7) of the EB NC and is a result of the gradual integration foreseen by the EB NC. It also goes without saying that this EB NC's objective of integration cannot be achieved if TSOs apply rules for the performance of the aFRR-Platform functions that diverge from the integrated framework provided for by the EB NC. As set out in the First, Second and Third Consolidated Pleas above, the Contested Decision's aFRRIF does not exceed what is necessary to achieve the objective of the EB NC. Indeed, the Contested Decision's aFRRIF could not have ensured compliance with the EB NC in the absence of a demonstration by All TSOs' aFRRIF Proposal that the proposed multiple entities complied with the EB NC. Likewise, the Contested Decision's aFRRIF could not have been silent on the CMF and leave it up to the TSOs to decide on the issue as this would have been contrary to the EB NC.

242. Hence, the Board of Appeal considers that the Contested Decision was necessary and proportionate to attain the objective of integrating the European electricity balancing markets provided by the EB NC.

243. Finally, the Board of Appeal considers the argument of Appellants I to VII according to which the 2-year transition period would endorse the non-essential nature of the CMF to be immaterial. As set out above in the Third Consolidated Plea, gradual integration processes are characterised by transition periods, allowing all stakeholders to gradually adapt to the new situation. The Contested Decision's aFRRIF is part of the gradual integration process of balancing energy markets, foreseen by the EB NC.

244. It follows that the Sixth Plea of the Appeal of Appellants I to VII and the Third Plea of Appellants VIII and IX must be dismissed as unfounded.

*Sixth Consolidated Plea - Infringement by ACER of Articles 6(11) and 14(6) of Regulation (EU) 2019/942 and Article 41 of the EU Charter of Fundamental Rights.*

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<sup>160</sup> Board of Appeal Decisions A-001-2017, paras 69 and 114; A-002-2018, para 59; A-001-2019, paras 43, 56, 233-239; A-003-2019, para 149 and A-006-2019, paras 41 and 47.

<sup>161</sup> Article 3 of the EB NC.

245. According to the Seventh Plea of the Appeal of Appellants I to VII<sup>162</sup>, the Agency infringed Articles 6(11) and 14(6) of Regulation (EU) 2019/942 and Article 41 of the EU Charter by failing to properly consult in a fair and transparent manner or to provide any firm indication of its intended decision to the NRAs or TSOs prior to the adoption of the Contested Decision, specifically in what concerns the CMF. The Appellants refer, in this regard, to the scope of the public consultation and to the exchanges with TSOs and NRAs, including within the Agency's Board of Regulators. At the Oral Hearing, Appellants I to VII held that *"Finally, ACER has imposed this profound structural change without a transparent consultation process with the TSOs or with the wider community of stakeholders"*<sup>163</sup>.
246. The Agency argues that the Plea is manifestly unfounded, that it duly and fully met its obligation to consult and hear interested parties prior to the adoption of the Contested Decision, and that there was no deficient statement of reasons for the decision<sup>164</sup>.
247. Article 6(11) of Regulation (EU) 2019/942 requires the Agency, prior to adopting a decision under Article 6(10) of the same Regulation, to consult with NRAs and TSOs concerned.
248. Article 14(6) of Regulation (EU) 2019/942 requires the Agency to inform any party concerned of its intention to adopt a decision, prior to that adoption, and to afford those parties a chance to express their views on the matter.
249. Article 14(7) of Regulation (EU) 2019/942 requires individual decisions of the Agency to state the reasons on which they are based for the purpose of allowing an appeal on the merits.
250. Article 41(a) of the Charter foresees the fundamental right to be heard before an individual measure affecting one is taken.
251. Article 41(c) of the Charter foresees the obligation for due reasoning of decisions.
252. In line with its earlier decision-making practice<sup>165</sup>, the Board of Appeal states that the Agency must comply with the fundamental rules of the TFEU and the general principles of EU law, and this includes the Charter and the principles of transparency and good administration contained in Article 15 of the TFEU. In its earlier decision-making practice, the Board of Appeal set out that the Charter codifies some of the fundamental rights governing EU procedural law, in particular Article 41 of the Charter establishing

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<sup>162</sup> Paras 141 to 160 of the Appeal of Appellants I to VII.

<sup>163</sup> Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 001-2020 (consolidated), p. 16.

<sup>164</sup> Paras 239-264 of the Defence.

<sup>165</sup> Board of Appeal Decisions A-002-2018 paras 101, 128 and 131, A-006-2109 paras 106-142, A-001-2018, paras 112-118.

the right to good administration. The right to good administration requires that decisions be taken pursuant to procedures that guarantee fairness, impartiality and timeliness. In other words, good administration creates a duty of care to respect the right of every person to have his or her affairs handled impartially, fairly and within a reasonable time and obliges the administration to carefully establish and review all the relevant factual and legal elements of a case taking into account not only the administration's interests but also all other relevant interests, prior to making decisions or taking other steps<sup>166</sup>.

253. The Board of Appeal also observes that the Charter's procedural rights are not absolute rights. Their purpose is not to create abstract procedural obstacles, but to protect the rights of the addressees and other persons concerned by a decision, as provided for by the regulations applicable to such decision and by relevant case law<sup>167</sup>.

254. The Board of Appeal finds, similarly to the Agency's Defence, that this Plea is manifestly unfounded as it is at odds with the reality of the procedure which led to the adoption of the Contested Decision. The Board observes, furthermore, that Appellants I to VII did not challenge the facts of the Contested Decision facts, more particularly paras 4-20 and 67-77 of the Contested Decision, which evidence a lengthy dialogue between the TSOs and the Agency, with an in-depth analysis of the issue challenged by the present appeal, i.e. the single entity structure and the functions to be performed by the aFRR-Platform.

255. With respect to the argument of Appellants I to VII that the Agency's public consultation was too narrow and did not tackle the single entity structure and the functions to be performed by the aFRR-Platform, the Board of Appeal notes, first, that All TSOs' initial aFRRIF Proposal submitted on 18 December 2018 to the NRAs had already been the object of a first public consultation from 26 April 2018 until 26 June 2018. Second, after the Agency became competent to take the Contested Decision on 24 July 2019, it not only carried out another public consultation on All TSOs' aFRRIF Proposal from 28 October 2019 till 18 November 2019 and but also closely collaborated with all NRAs and TSOs in parallel to the public consultation and further consulted on the Proposal during teleconferences, meetings and written exchanges from July 2019 until December 2019<sup>168</sup>. The Board of Appeal notes, furthermore, as set out in Section 3.3 of the Third

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<sup>166</sup> See Opinion of AG van Gerven in Case C-16/90 Eugen Nölle EU:C:1991:402; and Case C-269/90 TU München EU:C:1991:438

<sup>167</sup> Board of Appeal Decision A-001-2017, para 124.

<sup>168</sup> Contested Decision, para 10 containing a list of teleconferences.

Consolidated Plea, that the single entity structure and the functions to be performed by the aFRR-Platform were at the heart of the dialogue between the TSOs and the Agency.

256. Thus, for example, in an email sent by the Agency to the TSOs in September 2019, the Agency mentioned its desire to involve the TSOs in the process at an early stage, including among the topics highlighted for discussion, which were still being debated with NRAs, the “entity discussion”<sup>169</sup>. The TSOs’ position on the disputed issues is clearly set out in slides 8-9 of the presentation prepared by ENTSO-E, dated 16 September 2019<sup>170</sup>. The Agency continued the discussion with the TSOs on these disputed issues, in significant detail and with evolving drafts of the aFRRIF Proposal, in several subsequent exchanges, such as in the emails of 4 October 2019<sup>171</sup>, of 19 November 2019<sup>172</sup>, of 4 December 2019<sup>173</sup>, of 6 December 2019<sup>174</sup>, of 13 December 2019<sup>175</sup>, and of 17 December 2019<sup>176</sup>. The email of ENTSO-E of 13 December 2019, under the heading “Clarity on entities”, welcomed the Agency’s “*email expressing ACER’s main concerns and your request for clarity on our proposed approach*”, and attached “*a document explaining both*”, which included a third (revised) version of All TSOs’ aFRRIF Proposal<sup>177</sup>, specifically tackling the single entity structure and CMF issue<sup>178</sup>. Not only did the TSOs take part in these exchanges of emails and presented their views on several occasions, but the Agency shared the TSOs’ views with the NRAs, in a spirit of complete openness and debate (see, e.g., emails of 28 and 29 November 2019 on the second (revised) All TSOs’ aFRRIF Proposal)<sup>179</sup>.

257. The Board of Appeal notes that, in their reply to the Agency’s public consultation, All TSOs explicitly contradict Appellants I to VII’s description of the subject-matter of the public consultation, ENTSO-E noted that the Agency was seeking “*the opinion of stakeholders on the issues of disagreement between the RAs, as well as on additional topics related to the design of the European Platform for aFRR*”<sup>180</sup>. It also notes that in their response to Question 5 of the public consultation, Appellants I to VII could have expressed their views on any topic of the aFRRIF, including the single entity structure or

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<sup>169</sup> Annex 8 to the Defence, p. 1-3.

<sup>170</sup> Annex 9 to the Defence.

<sup>171</sup> Annex 12 to the Defence.

<sup>172</sup> Annex 13 to the Defence.

<sup>173</sup> Annex 15 to the Defence.

<sup>174</sup> Annex 16 to the Defence.

<sup>175</sup> Annex 17 to the Defence.

<sup>176</sup> Annex 10 to the Defence.

<sup>177</sup> Annex 17 to the Defence.

<sup>178</sup> Annex 17 to the Defence.

<sup>179</sup> Annex 14 to the Defence.

<sup>180</sup> Annex 6 to the Appeal of Appellants I to VII.

aFRR-Platform functions, but that they did not seize this opportunity. Appellants I to VII state in their Reply that *“the issues in question were not yet on the table”*<sup>181</sup>. The Board of Appeal observes, however, that the issue of the designated entity and the functions of the Platform had been at the heart of the discussions since the NRAs’ Non-Paper and at the very beginning of the Agency’s consultation process with the TSOs.

258. The Board of Appeal also notes, in line with the Agency’s statement at the Oral Hearing<sup>182</sup>, that the Appellants erroneously seem to interpret the bottom-up decision-making process, including extensive consultations, as a trial, whereby the TSOs would be in defence and exercise their “rights of defence”. This is manifestly unfounded.

259. The Board of Appeal further notes that the suggestion that the NRAs would not have been duly informed of the intended decision prior to its adoption is entirely misplaced in the context of the Agency’s decision-making process. Aside from the extensive consultation and dialogue process, the NRAs would necessarily have been informed of the draft decision through the Board of Regulators and a qualified majority of them had to approve the draft decision.

260. With respect to the argument of Appellants I to VII argument that the Agency should have continued the dialogue with the TSOs after their complementary assertions of 18 December 2019 arguing that the CMF was not a required Platform function, and should have launched another public consultation or at least a workshop on the issue, the Board of Appeal notes that during the collaborative process between the Agency and the TSOs, all TSOs were able to submit a second (revised) Proposal to the Agency on 28 November 2019 and a third (revised) Proposal on 13 December 2019. The Board of Appeal notes, in this respect, that the Agency allowed the submission of the third (revised) Proposal even if it was submitted after the deadline for consultation that the Agency had communicated to the TSOs, which demonstrates the Agency’s spirit of cooperation in good faith. In the same spirit of good faith, the Agency accepted the TSOs complementary assertions on 18 December 2019 to its third (revised) Proposal and provided its opinion in writing to the TSOs on these assertions. It was only because of its duty under the Regulation (EU) 2019/942 to take a decision by 24 January 2020 that the Agency was obliged to end the consultations in order to proceed to its decision-making, which also had to allow for a debate by the NRAs within the Agency’s Board of Regulators<sup>183</sup>. The Board of Appeal

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<sup>181</sup> Reply of Appellants I to VII, para 89.

<sup>182</sup> Summary Minutes of the Oral Hearing of 18 June 2020 held in Case 001-2020 (consolidated), p. 22.

<sup>183</sup> See Board of Appeal Decision A-004-2019, para 188: *“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*



observes that the Agency adopted the Contested Decision on the last day of its six-month deadline to take a decision, i.e. on 24 January 2020.

261. Regarding the alleged need for another (this would be *de facto* a third) public consultation or a workshop on All TSOs' aFRRIF Proposal, the Board of Appeal observes that timing did not allow for these actions. Furthermore, the Board of Appeal notes that the Contested Decision grants Appellants I to VII more opportunities to reconsider the issue than another consultation or a workshop: it enables all TSOs to propose an aFRRIF to designate the CMF entity in accordance with Article 6(3) of the EB NC – which implies the organisation of a new public consultation under Article 10 of the EB NC - and grants the TSOs a 2-year period to do so, in line with the TSOs' own request.

262. As extensively described in paras 245 to 259 of the Agency's Defence, Appellants I to VII (together with the other TSOs and NRAs) were explicitly informed and invited to express their views, *inter alia*, on the single entity structure and the Platform functions. They were repeatedly consulted and repeatedly exercised their rights and presented their views to the Agency on these subjects.

263. As for the Appellants I to VII's arguments concerning failure to duly reason the Contested Decision<sup>184</sup>, the Board of Appeal observes that the parties agree that the Agency has a duty to duly reason its decisions. This obligation is specifically foreseen in Article 14(7) of Regulation (EU) 2019/942 and also derives from Article 296 TFEU and the general principles of EU Law, including Article 41(2)(c) of the Charter and has been confirmed by consistent case-law of European Courts<sup>185</sup>. Pursuant to this duty, the reasoning followed by the Agency must be disclosed in a clear and unequivocal fashion, firstly to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to verify whether or not the decision is well founded and, secondly, to permit the European Courts to exercise its power to review the lawfulness of the measure<sup>186</sup>.

264. The discord of the parties is whether the Agency complied with this duty.

265. The Board of Appeal notes, again, that this procedural right is not an absolute right and that it is settled case-law that the degree of precision of the reasoning must be

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*competences in this regard, it is just as much the Director's ad he 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."*

<sup>184</sup> Paras 158-159 of the Appeal of Appellants I to VII.

<sup>185</sup> Case T-700/14 *TVI v Commission* EU:T:2017:447, para 79.

<sup>186</sup> Case C-350/88 *Delacre and Others v Commission* ECLI:EU:C:1990:71, paras 15 and 16; Case T-217/01 *Forum des migrants v Commission* ECLI:EU:T:2003:106, para 68; and Case T-183/00 *Strabag Benelux v Council* EU:T:2003:36, para 55.

weighed against practical realities as well as against time and available technical facilities for making such decision<sup>187</sup>. The obligation to duly reason decisions is meant to allow its addressees to understand the content and reasoning of the decision and to be able to challenge them, as well as to allow for the control of this reasoning in the context of judicial review.

266. First, Appellants I to VII have failed to explain why they believe the Contested Decision not to be sufficiently reasoned, whereas they bear the burden of proof.

267. Second, they have manifestly been able to understand the content and reasoning of the Contested Decision and have challenged them before this Board of Appeal.

268. Third, the Contested Decision contains a detailed explanation in Section 6.2.7 entitled “*Assessment of the requirements for the proposed designation of the entity*” justifying in detail the underlying reasons to Article 12 of the Contested Decision’s aFRRIF. Far from being succinct, the explanation of Section 6.2.7 covers 5 pages of the decision (p. 16-20). In addition, section 6.2.3.1 entitled “*Updating of cross-zonal capacities*” justifies the necessity of the CMF, covering 4 pages of the decision (p.11-14). The explanations in Sections 6.2.7 and 6.2.3.1 also provide details on the consultative dialogue prior to the Agency’s decision-making process.

269. Fourth, the Board of Appeal notes that the Agency did not have to amend All TSOs’ third (revised) aFRRIF Proposal of 13 December 2019 with respect to the single entity structure for the AOF/TTSF given that this Proposal already contained this structure<sup>188</sup>. This proposal also acknowledged the CMF as a centralised version of the existing continuous update of cross-zonal capacities (see Section 3.2 of the Third Consolidated Plea, above).

270. Fifth, the Board of Appeal observes that the Contested Decision not only explains in great detail the choice made in its aFRRIF, but also observes the aFRRIF is joined as Annex I to the Contested Decision together with a marked-up version of the TSOs’ initial Proposal of 18 December 2018 (Annex Ia) and a comprehensive Response of the Agency to the Public Consultation, (Annex II).

271. Sixth, the Board of Appeal finds that the arguments put forward by Appellants I to VII evidence its dissatisfaction or discontent with the reasons that the Agency set out in the Contested Decision in a clear and unequivocal fashion rather than an absence of duly stated reasons or the impossibility for Appellants to understand these reasons.

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<sup>187</sup> Board of Appeal Decision A-001-2017, para 126.

<sup>188</sup> Annex 17 to the Defence, joined as annex to an email of 18 December 2019 from the TSOs to ACER.

272. The Board of Appeal concludes that the Agency did not fail to adequately state reasons in its Contested Decision.

273. Finally, in their Appeal, Appellants I to VII also request to the Board of Appeal to require the Agency to disclose certain documentation and to provide them with a right to make observations on the outcome of such disclosure<sup>189</sup>.

274. First, the Board of Appeal observes that the Agency did not request that any of the annexes to its Defence be treated as confidential. This implies that Appellants I to VII have had access to extensive information on unredacted email correspondence and other documentation between Agency and the TSOs leading up to the Contested Decision:

<b>Annex 7 to the Defence</b>	Email from TSOs to ACER on 18/12/2019 + attached complementary assertions by the TSOs to the third (revised) All TSOs' Proposal
<b>Annex 8 to the Defence*</b> <b>Annex 26 to the Rejoinder</b>	Email and exchanged amendments to the draft Proposal ACER-TSOs in September 2019, as of 4 September 2019.
<b>Annex 9 to the Defence</b>	Slides of TSOs' presentation on 16/9/2019 "WGAS informal feedback to ACER on aFRR, Pricing and Entities.
<b>Annex 10 to the Defence</b>	String of emails between ACER and TSOs from 27/11/2019 until 17/12/2019.
<b>Annex 11 to the Defence</b>	Slides of TSOs' presentation of 27/11/2019 on CMM.
<b>Annex 12 to the Defence</b>	Email from ACER to the TSOs on 4/10/2019 + attachment (Agency's Note on Single Entity for Performing the Functions of the EU Balancing Platform)
<b>Annex 13 to the Defence</b>	Email from ACER to the TSOs on 19/11/2019 + attached amendments to the draft Proposal
<b>Annex 14 to the Defence</b>	Email from ACER to the TSOs on 29/11/2019 + attached second (revised) version of All TSOs' Proposal
<b>Annex 15 to the Defence</b>	Email from ACER to the TSOs on 4/12/2019 + comments by ACER to the second (revised) version of All TSOs' Proposal
<b>Annex 16 to the Defence</b>	Email from ACER to the TSOs on 6/12/2019 + attached amendments to the draft Proposal
<b>Annex 17 to the Defence</b>	Email from the TSOs to ACER on 13/12/2019 + attached third (revised) version of All TSOs' Proposal

\*Annex 8 contains 6 different documents, ranging from 10-A-001-2020 to 16-A-001-2020.

275. Second, the Chairperson acting on behalf of the Board of Appeal denied the requested disclosure in a duly reasoned decision in accordance with Article 20(1) of the Board of Appeal's Rules of Procedure<sup>190</sup> on 2 June 2020 (the 'Disclosure Decision').

276. In its Disclosure Decision, the Chairperson of the Board of Appeal sets out that, according to the applicable legal provisions, it grants access to documents following the adversarial principle, the rights of defence and the principle of transparency. However, it has also an obligation to refuse access to documents where their disclosure would infringe any legal provisions requiring the protection of the confidential nature of information. In line with settled case law, the Board of Appeal must ensure that confidentiality and

<sup>189</sup> Paras 161(d) of the Appeal of Appellants I to VII.

<sup>190</sup> Decision of the Board of Appeal (BoA) of the Agency for the Cooperation of Energy Regulators (ACER) No 1-2011 as amended on 5 October 2019 laying down the rules of organisation and procedure of the Board of Appeal of the Agency for the Cooperation of Energy Regulators

business secrecy are safeguarded in respect of information contained in files communicated to it by the parties. The Board of Appeal explained that it follows from the settled case-law of the Court of Justice of the European Union that the Board of Appeal “*must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration. It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, so as to ensure that the proceedings as a whole accord with the right to a fair trial*”.<sup>191</sup> As the European Court of Human Rights noted, it might be necessary in some cases to withhold certain evidence from the defence to preserve the fundamental rights of another individual or to safeguard an important public interest.<sup>192</sup>

277. The Disclosure Decision clarified that it is for the Board of Appeal to ensure that the rights of both parties are safeguarded, including the ability of a party to have sufficient time to prepare its defence.<sup>193</sup> According to the General Court, the principle of respect for the rights of the defence requires that the entity concerned is informed of the evidence adduced against it to justify the measure adversely affecting it and it should also be given the opportunity effectively to make known its view on that evidence.<sup>194</sup> Therefore, the Disclosure Decision had to be made prior to the final decision.

278. In the Disclosure Decision, the Chairperson of the Board of Appeal found that, in this case, Appellants I to VII had sought an order for disclosure of the following documents, in unredacted form: (i) a copy of any assessment conducted by ACER under Article 21(5) of the EB NC, to determine whether and how the TSOs could perform the CBA necessary to support the amendment required by Article 12(2) of the aFRRIF and (ii) copies of any templates recording the views of the Board of Regulators and ACER on the Decision and aFRRIF prior to their adoption.

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<sup>191</sup> See by analogy Judgment of the Court of 14 February 2008, Varec, C-450/06, EU:C:2008:91, para 55.

<sup>192</sup> See Judgment of the European Court of Human Rights of 16 February 2000, Rowe and Davis v The United Kingdom [GC] no 28901/95, para 61 and Judgment of the European Court of Human Rights of 24 April 2007, V v Finland, no 40412/98, para 75.

<sup>193</sup> See Judgment of the Court of 8 November 2005, Leffler, C-443/03, EU:C:2005:665, para 52.

<sup>194</sup> See Judgment of the General Court of 6 September 2013, Bank Melli Iran v Council, T 35/10 and T 7/11, EU:T:2013:397, para 82.

279. The Chairperson of the Board of Appeal found that, to the extent that their nature was perceivable from Appellants I to VII's request, both groups of documents in question fell under the category of documents "*drawn up by an institution [EU agency] for internal use or received by an institution [EU agency], which relates to a matter where the decision has not been taken by the institution*", or of documents "*containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned*". As set out in Article 4(3) of the Regulation on access to documents held by EU Institutions,<sup>195</sup> access to documents with this nature shall be refused, even after the decision has been taken, if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
280. The Chairperson of the Board of Appeal considered that Appellants I to VII had not argued for the existence of any overriding public interest in disclosure of the requested documents, nor was it manifest which overriding public interest would be pursued by such disclosure.
281. Furthermore, even if it were possible to set aside that exception, Appellants I to VII have neither argued nor shown that disclosure of such documents to Appellants I to VII was necessary to allow them to adequately exercise their rights of defence in the present Appeal. Indeed, the Appeal which was submitted was fully articulated and contained a wide range of arguments, none of which seemed to be dependent on access to the requested documents. The Board of Appeal was unable to carry out a proportionality assessment of the conflicting interests without a justification of the reasons why access to certain documents was deemed necessary, specifically the facts to be proven or determined within one or more specific pleas.
282. First, the Chairperson of the Board of Appeal found in its Disclosure Decision that Appellants I to VII had not expressly provided any arguments justifying their request for access to copies of any templates recording the views of the Board of Regulators and ACER on the Decision and aFRRIF prior to their adoption.
283. Second, the Chairperson of the Board of Appeal found that the Appeal had included a single argument to justify the request for access to a copy of any assessment conducted by ACER under Article 21(5) of the EB NC, which they requested "*to determine whether*

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<sup>195</sup> Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43)

*and how the TSOs could perform the cost-benefit analysis necessary to support the amendment required by Article 12(2) of the aFRR Implementation Framework”*<sup>196</sup>.

284. The Chairperson of the Board of Appeal observed that the only ground of appeal to which the justification for access was connected was the Third Plea in law<sup>197</sup>, where it is argued that the Agency infringed Articles 10 and 21(5) of the EB NC by exceeding its competence when obliging the TSOs to submit a proposal for amendment of the aFRRIF. The Chairperson of the Board of Appeal found that, regardless of the existence of such documents, access to copies of any assessment conducted by ACER under Article 21(5) of the EB NC was not of sufficient relevance to discuss the competence of the Agency to oblige TSOs to submit a proposal for amendment of the aFRRIF. In other words, access to these documents was not necessary to allow Appellants I to VII to adequately exercise their rights of defence in the present case. The Chairperson of the Board of Appeal observed, moreover, that the Appeal did not adduce any other ground of appeal for which the said access would be of relevance.

285. It follows that the Seventh Plea of the Appeal of Appellants I to VII must be dismissed as unfounded.

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<sup>196</sup> Paras 75, 76 and 161(d) of the Appeal of Appellants I to VII.

<sup>197</sup> Paras 70-79 and 161(d) of the Appeal of Appellants I to VII.

DECISION

On those grounds,

THE BOARD OF APPEAL

Hereby confirms the Contested Decision and dismisses the Appeal for annulment.

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.

SIGNED



Andris Piebalgs

Chairperson of the Board of Appeal

SIGNED



Ronja Linßen

Acting Registrar of the Board of Appeal