

**ORDER OF THE BOARD OF APPEAL
OF THE AGENCY FOR THE COOPERATION OF ENERGY
REGULATORS**

28 December 2018

(Suspension of contested decision – Reasoned order)

Case number	A-002-2018
Language of the case	English
Applicant	PRISMA European Capacity Platform GmbH (Appellant) Represented by: Rechtsanwälte CMS Hasche Sigle
Defendant	Agency for the Cooperation of Energy Regulators Represented by: Alberto Pototschnig Director
Application for	Suspension of the application of Decision No. 11/2018 of 16 October 2018 adopted by the Agency for the Cooperation of Energy Regulators (hereinafter the ‘Agency’), pursuant to Article 19(3) of 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 ¹ .

THE BOARD OF APPEAL

composed of Andris Piebalgs (Chairman), Viorel Alicus, Miltos Aslanoglou, Yvonne Fredriksson, Jean-Yves Ollier, Dominique Woitrin (Members).

Registrar: Andras Szalay

gives the following

¹ OJ L 211, 14.08.2009, p.1

Order

I. Preliminary note

Article 19(2) of Regulation (EC) 713/2009 ('Regulation') lays down that the Board of Appeal shall decide upon the appeal within two months of the lodging of the appeal.

Article 19(3) of the Regulation further provides that an appeal shall not have suspensory effect, but the Board of Appeal may, if it considers that circumstances so require, suspend the application of the contested decision.

The Board of Appeal generally notes that, with regard to the two-month timeframe of an appeal proceeding in its entirety, the circumstances described in Article 19(3) of the Regulation, which would require the suspension of the application of the contested decision, must be of extraordinary nature.

II. Facts

The Appellant requested in its notice of appeal, received on 14/12/2018 by the Registry of the Board of Appeal, the suspension of application of the contested Decision No. 11/2018 of 16 October 2018 adopted by the Agency for the Cooperation of Energy Regulators.

The Chairman of the Board of Appeal, along with the service of the application for suspension on 17/12/2018, prescribed a time limit of 20/12/2018 to the Defendant to make its observations to the application.

The Defendant's observations were received by the Registry on 20/01/2017 and were forwarded to the Appellant on the same day.

III. Applicable regulations

Article 19(2)-(3) Regulation (EC) 713/2009

Article 26 Rules of Procedure of the Board of Appeal ('RoP')

IV. Admissibility

In compliance with Article 26(2) RoP, the application to suspend the application of the contested decision shall be admissible only if the applicant has challenged that decision in an action before the Board of Appeal. The Applicant, acting as Appellant in the case A-002-2018, challenged the decision and thus fulfilled the material admissibility criterion.

The relevant rules and regulations do not stipulate specific time limit for submitting suspension applications. It is adequate to request suspension along with the submission of the appeal.

With regard to the facts set up above, the Board of Appeal found the application for suspension admissible.

V. Merits

Article 26(3) RoP sets up two conjunctive conditions, further elaborating Article 19(3) of the Regulation, for the requests for suspension to be met; notably that the applicants shall state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the suspension.

The Board of Appeal cannot share the Defendant's interpretation² on the three substantive requirements (prima facie case, urgency and outweighing interest) for applications for interim measures in the present proceeding. The third requirement referred by the Defendant, according to which the applicant's interest in the imposition of interim measures must outweigh the other

² Paragraph 6 of the Defendant's observations

interests at stake in the proceedings, is not foreseen in Article 26 RoP, or elsewhere in the procedural documents, therefore the Board of Appeal in examining the application for suspension must remain on the basis of testing the ‘urgency’ and ‘prima facie’ conditions.

Urgency

Concerning the condition related to ‘urgency’, the Board of Appeal hereby states the followings.

In accordance with the undisrupted practice of the Court of Justice of the European Union (‘CJEU’), urgency must be assessed in the light of the need for an interlocutory measure in order to avoid serious and irreparable damage to the party seeking the interim relief³.

The Board of Appeal examined whether the Applicant suffers from such serious and irreparable damage.

The Applicant referred to the information received that GSA has already started to implement the contested decision and signs service contracts with the concerned Transmission System Operators (‘TSOs’) to have all services in place for the 2019 yearly auctions. Within these circumstances, according to the Applicant, even if the contested decision were to be annulled, it cannot be ensured that the newly signed service contract can be reversed⁴.

The Defendant expressed its view that the Applicant did not demonstrate serious and irreparable harm but that of purely economic as well as of hypothetical nature. The argument for suspension, according to the Defendant, is not plausible either.⁵

The relevant case law of the CJEU followed by the Board of Appeal requires personal affection⁶ on behalf of the applicant by those serious and irreparable damage and actual, direct and non-hypothetical exposure of these effects⁷. It is required that that damage be predictable with a sufficient degree of probability. In this sense, a potential damage is of hypothetical nature and, as such, is not to taken into account in the decision upon suspension of the contested act.

³ Order in Case C-7/04 P(R) *Commission v Akzo and Akcros* [2004] ECR I-8739, paragraph 36; order in Case C-76/08 R par. 31, order in C-180/01 P-R *Commission v NALOO* [2001] ECR I-5737, paragraph 52 etc.

⁴ Paragraph 136 of the Notice of appeal

⁵ Paragraphs 12-19 of the Defendant’s observations

⁶ Order in Case 111/88 R *Greece v Commission* par. 15, order in Case 142/87 R *Belgium v Commission* par. 23

⁷ Order in Case T-241/00 R *Azienda Agricola Le Canne v Commission* par. 34

The Board of Appeal found, although the Applicant may refer to actual and direct harm, the argument is not substantiated why its particular and extraordinary interest lays in the immediate suspension of the contested decision. The Applicant did not clarify further whether the alleged contracts between the concerned TSOs and GSA are already concluded or when are they foreseen in the immediate future. In the absence of this justification, the Board of Appeal is not in the position to be able to assess whether the suspension of the application of the contested decision would result in a change in the status of these contracts or the referred contracts are already in existence regardless of a potential suspension order.

The Board of Appeal further notes that even if the necessity and inevitable timeliness of the requested suspension had sufficiently justified by the Applicant, it would have remained unsubstantiated why the harm caused is irreparable, in other words, what are the reasons, which render the contracts irreversible according to the Applicant.

Due to the reasons summarized above, the urgency of the application at hand could not reasonably be established.

Prima facie case

In compliance with Article 26(3) RoP, as written above, the two conditions laid down therein are conjunctive.

With regard to the opinion of the Board of Appeal related to the first condition, the urgency criterion has not been fulfilled. It renders unnecessary to assess the other, *prima facie* case criterion.

The application on suspension, therefore, must be dismissed.

ORDER

On those grounds,

THE BOARD OF APPEAL

hereby orders that

the application for suspension of the application of the contested ACER Decision No. 11/2018 of 16 October 2018 is dismissed.

For the Board of Appeal:

Andris Piebalgs

Chairman of the Board of Appeal

The signature is delegated to:

Andras Szalay

Registrar

