

**COVER SHEET**

It is recommended that this cover form is used when submitting a procedural document to the Board of Appeal of the Agency for the Cooperation of Energy Regulators in appeal proceedings within the meaning of Articles 19 to 21 of Regulation (EC) No 713/2009.

Please note that this form cannot be submitted on its own. It should always be accompanied by a written submission or pleading.

Please read the Rules of Procedure (*Decision BoA No 1-2011 Laying down the rules of organisation and procedure of the Board of Appeal of the Agency for the Cooperation of Energy Regulators*) and the "*Practice Directions to Parties to Appeal proceedings before the Board of Appeal of the Agency for the Cooperation of Energy Regulators*" before completing this form.

The latest versions of the Rules of Procedure, the Practice Directions and this form can be downloaded from the Agency's website ([http://www.acer.europa.eu/The\\_agency/Organisation/Board\\_of\\_Appeal/Pages/Rules-of-procedure.aspx](http://www.acer.europa.eu/The_agency/Organisation/Board_of_Appeal/Pages/Rules-of-procedure.aspx)). This form can be completed on screen. If you are completing the form by hand, please write legibly using black or blue ink.

Date of Submission: 27 March 2020	Name: Mr. Arjan Kleinhout	Signature: 
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**I. GENERAL INFORMATION**

<b>A-005-2020</b> (Appeal number if already notified)	Decision 03/2020 (Contested decision number, if no appeal number)
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<b>TITLE OF PROCEDURAL DOCUMENT:</b>	
Notice of appeal	

<b>PERSON SUBMITTING THE DOCUMENT:</b>	Role in the proceeding: Appellant
Name (legal entity or first name and surname): TenneT TSO GmbH and TenneT TSO B.V.	
Address TenneT TSO GmbH: Bernecker Straße 70, 95448 Bayreuth, Germany	
Address TenneT TSO B.V.: Utrechtseweg 310, 6812 AR Arnhem, the Netherlands	

<b>REPRESENTATIVE appointed</b>	<input type="checkbox"/> <u>Yes</u>
Arjan Kleinhout and Koen Orbons of De Brauw Blackstone Westbroek N.V., with the right of substitution	
Address: Claude Debussylaan 80, P.O. Box 75084, 1070 AB Amsterdam, the Netherlands	

<b>Address for service (if different from above):</b>

<b>Agreement on accepting service by e-mail and/or fax (person or representative):</b>	
By email <input checked="" type="checkbox"/> <u>Yes</u>	E-mail for service: Arjan.Kleinhout@debrauw.com / Koen.Orbons@debrauw.com
By fax <input checked="" type="checkbox"/> <u>No</u>	Fax for service: N/A

<b>Telephone, e-mail and/or fax for communication other than service (person or representative):</b>	
Telephone: +31 20 577 1348 / +31 6 51856188	Fax: +31 20 577 1775
E-mail: Arjan.Kleinhout@debrauw.com / Koen.Orbons@debrauw.com	
<b>Language</b>	<input checked="" type="checkbox"/> <u>English</u>

<b>Confidentiality request</b>	<input checked="" type="checkbox"/> <u>No</u>
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<sup>1</sup> Please note that, in accordance with Article 13 of the Rules of Procedure and Article 4.1 of the Practice Directions, any request for confidentiality shall be made in writing at the time the document is lodged, under a separate heading of the procedural document in question or by a separate application lodged together with the principal document, and shall indicate the relevant words, figures or passages for which confidentiality is claimed, together with sufficiently detailed reasons for that request.

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**II. TABLE OF ANNEXES**

List of Annexes		
ANNEX NO.	NAME AND TYPE OF ANNEX Each annex should be numbered, listed and described individually. Please indicate with “yes” or “no” whether the annex is presented as evidence.	EVIDENCE YES / NO
1	ACER Decision 02/2020	No
2	Acer Decision 03/2020	No
3	Power of attorney of TenneT TSO GmbH to A.A. Kleinhout and K. Orbons	No
4	Power of attorney of TenneT TSO B.V. to A.A. Kleinhout and K. Orbons	No
5	Articles of Association of TenneT TSO GmbH	No
6	Articles of Association of TenneT TSO B.V	No
7	Extract from the Dutch Chamber of Commerce, as proof of the authority of B.G.M. Voorhorst to confer the power of attorney on A.A. Kleinhout and K. Orbons	No
8	NRAs Non-Paper aFRR	Yes
9	NRAs Non-Paper mFRR	Yes
10	TSO's answers to ACER's questions	Yes

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**III.CONFIDENTIALITY REQUEST**

Each confidentiality claim should be identified with the exact localization in the pleading or annex. A detailed justification shall be provided for the maintenance of confidentiality.		
PAGE AND PROCEDURAL DOCUMENT	IDENTIFICATION OF BODY OF THE TEXT OR DOCUMENT	JUSTIFICATION
N/A	N/A	N/A

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## IV. ANNOUNCEMENT OF APPEAL<sup>2</sup>

<b>Case</b>	A-005-2020
<b>Appellant:</b>	TenneT TSO GmbH and TenneT TSO B.V.
<b>Appeal received on</b>	23 March 2020
<b>Subject matter</b>	ACER's imposition of an entity requirement for the European platform for the exchange of balancing energy from FRR with manual activation
<b>Keywords</b>	Electricity Balancing Guidelines Regulation, Single entity requirement, ACER's competences, ACER's power of revision
<b>Contested decision Number:</b>	ACER Decision 03/2020
<b>Language of the case</b>	English

### Remedy sought by the Appellant

The Appellant requests the Board of Appeal to:

annul ACER Decision 03/2020. Because the parts where ACER exceeded its powers cannot be separated from the parts which could be lawful, the Decisions should be annulled in their entirety.

### Pleas in law and main arguments

The contested decision was adopted on 24 January 2020

The Appellant contests the Agency's decision. The Appellant's claims and arguments can be summarised as follows:

ACER obliges the transmission system operators ("TSOs") to appoint one single entity or one joint venture structure for the functions of activation optimisation, TSO-TSO settlement and capacity management (the "Single Entity Requirement"). TenneT disagrees with the Single Entity Requirement for the following reasons.

(i) First and (ii) second plea: The Single Entity Requirement exceeds ACER's competences under the Electricity Balancing Guidelines Regulation (Regulation 2017/2195); The Single Entity Requirement exceeds ACER's competences under the ACER Regulation (Regulation 2019/942)

- ACER states that its competence to take a decision arises from Article 5(7) Electricity Balancing Guidelines Regulation and Article 6(10) ACER Regulation, which applies "where the relevant regulatory authorities have not been able to reach agreement (...) or upon their joint request".
  - With regard to the Single Entity Requirement, neither condition for conferring decision making power on ACER was fulfilled in this case, as the relevant NRAs had reached an agreement on this issue, and the NRAs had not requested ACER to take a revision decision on this point.

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- ACER's competence to take decisions (other than confirming the NRAs position) cannot and should not be extended to issues that NRAs have reached agreement on or where the NRAs have not requested this, in the way ACER has extended its competences in this case.
- In accordance with the principle of subsidiarity, ACER shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States. In the case at hand, ACER was therefore precluded from imposing the Single Entity Requirement, as the Member States had already jointly agreed on an effective course of action which was compliant with EU law.

(iii) Third Plea: ACER's decision to impose the Single Entity Requirement is contrary to Articles 20(2) and 21(2) EB Regulation

- Articles 20(2) and 21(2) Electricity Balancing Guidelines Regulation allow the platform to be operated by more than one entity.
- Leaving open the possibility of a multi-entity system does not automatically imply that the additional requirements of Articles 20(3)(e) and Article 21(3)(e) EB Regulation cannot be fulfilled.
- The capacity management function is not a necessary function to operate the platform.
- The applicable rules should be interpreted in line with the principle of proportionality; a system without a Single Entity Requirement can still achieve a well-functioning platform, and would at the same time be less onerous on TSOs.

(iv) Fourth Plea: the ACER Regulation does not confer competence to revise decisions to ACER in the case at hand

- The text of Article 6(10) ACER Regulation does not confer competence to revise decisions to ACER in the case at hand.
- ACER can also not rely on a broader competence of revision to impose the Single Entity Requirement.
  - While Article 5(2) ACER Regulation - and only this Article - does grant ACER the competence for "revision and approval", this competence arises in the context of the approval of TCM proposals, while the Decisions were taken in the context of the resolution of an inability to agree among NRAs.

#### Further information

More information on the appeal procedure can be found on the 'Appeals' section of the Agency's website:

[http://www.acer.europa.eu/The\\_agency/Organisation/Board\\_of\\_Appeal/Pages/default.aspx](http://www.acer.europa.eu/The_agency/Organisation/Board_of_Appeal/Pages/default.aspx)

<sup>2</sup> Announcement published in accordance with Article 9 of Decision BoA No1-2011 Laying down the rules of organisation and procedure of the Board of Appeal of the Agency for the Cooperation of the Energy Regulators.

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**V. Checklist supporting the filing of an appeal**

- Appellant's name and address**
- Proof of existence in law**, if the appellant is a legal person
- Representative**: name and business address, if appointed
- Power of attorney**, if a representative is appointed
- Acceptance of electronic service/method chosen**: fax – e-mail
- Fax number and/or e-mail address**, if service accepted using fax and/or e-mail
- The number of the Agency's contested decision**
- What is contested in the decision**
- Remedy sought**
- All the pleas in law and arguments of fact and law** relied on
- All the evidence and information related to that evidence**<sup>3</sup>
- Summary of the dispute**<sup>4</sup>
- Confidentiality request**, if applicable
- Signature and date**
- Copies**: sufficient number<sup>5</sup>
- Numbered paragraphs**
- Pagination**: consecutive numbering

<sup>3</sup> It is recommended to use the COVER SHEET as suggested on page 1.

<sup>4</sup> See Practice Directions, paragraph 2.7.

<sup>5</sup> See Article 1.2 of the Practice Directions.

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