ACER
European Union Agency for the Cooperation of Energy Regulators

A-004-2019_R

DECISION

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

of 21 April 2023

Case number:	A-004-2019_R
Language of the case:	English
Appellants:	*Magyar Energetikai és Közmű-szabályozási Hivatal* ("MEKH" or "Appellant I")
	Represented by: P. SÁGVÁRI
	FGSZ Földgázszállító Zrt ("FGSZ" or "Appellant II")
	Represented by: S. FERENCZ and K. TERHES
Defendant:	*European Union Agency for the Cooperation of Energy Regulators* ("ACER" or "the Defendant")
	Represented by: C. ZINGLERSEN
Interveners:	*President of the Polish Energy Regulatory Office* ("ERO")
	in support of Appellant I
	Slovak Regulatory Office for Network Industries ("RONI")
	in support of Appellant I
Relaunched procedure:	after judgment of the General Court of 16 March 2022 *MEKH and FGSZ v ACER* (Joined Cases T-684/19 and T-704/19) leading to the annulment of Board of Appeal Decision A-004-2019 of 6 August 2019 dismissing the appeal against ACER Decision No 05/2019 ("Decision A-004-2019")
Board composition:	K. WIDEGREN (Rapporteur), P. EECKHOUT, A. BIONDI, K. SARDI, M. SUPPONEN, and M. PREK (Chair)

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

HAS ADOPTED THIS DECISION:

I. Facts giving rise to the decision

1. On 9 April 2019, ACER adopted Decision No 05/2019 on the incremental capacity project proposal for the Mosonmagyaróvár Interconnection Point[1] at the border between Hungary and Austria ("the HUAT project") approving the HUAT project ("ACER Decision No 05/2019").

2. On 6 June 2019, Appellant I filed an appeal against ACER Decision No 05/2019 before the Board of Appeal.

3. On 7 June 2019, Appellant II filed an appeal against ACER Decision No 05/2019 before the Board

[1] Decision No 05/2019 of the Agency for the Cooperation of Energy Regulators of 9 April 2019 on the incremental capacity project proposal for the Mosonmagyaróvár Interconnection Point.

of Appeal.

4. On 6 August 2019, the Board of Appeal consolidated both appeals into case A-004-2019 (consolidated) and adopted Decision A-004-2019 dismissing both appeals against ACER Decision No 05/2019 as partly inadmissible and unfounded in their remaining parts.

5. By applications lodged on 7 and 15 October 2019 respectively, Appellant I and Appellant II applied for the annulment of Decision A-004-2019 before the General Court of the European Union (hereinafter "GCEU").

6. On 16 March 2022, the GCEU issued its judgment in Joined Cases T-684/19 and T-704/19 *MEKH and FGSZ v ACER* (judgment of 16 March 2022, T-684/19 and T-704/19, ECLI:EU:T:2022:138), annulling Decision A-004-2019 (hereinafter "judgment of 16 March 2022").

7. The judgment of 16 March 2022 was not appealed before the Court of Justice of the European Union.

II. Procedural steps relevant for the decision

8. On 24 January 2023, the Board of Appeal *ex officio* relaunched the appeal case under reference number A-004-2019_R.

9. To this end, on 24 January 2023, the Board of Appeal invited Appellant I, Appellant II and the Defendant to submit by 24 February 2023 their observations, if any, on the conclusions to be drawn from the judgment of 16 March 2022.

10. Appellant I and the Defendant submitted their observations to the Board of Appeal on 22 and 24 February 2023 respectively.

11. On 28 February 2023, Appellant II submitted its observations to the Board of Appeal.

III. Main observations of the Parties

12. Appellant I observes that the practical implications of the judgment of 16 March 2022 on the HUAT case are limited since the subsequent auction carried out by the TSOs for the HUAT capacities in July 2020, whilst the GCEU proceedings were ongoing, ended with a negative result given that no bid was made by any market participant, rendering the creation of incremental capacity at the HUAT border obsolete.

13. Appellant I observes, in addition, that the general implications of the judgment of 16 March 2022 are that Chapter V of Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems[2] (hereinafter "CAM NC") has become inapplicable. In its view, this inapplicability has caused a general lack of legal soundness in terms of implementing other incremental procedures, even though Appellant I notes that, before the judgment of 16 March 2022, no incremental procedure had been successful and no incremental procedure had, hence, led to the establishment of new infrastructure. Given that the annulment was based on a lack of competence of the European Commission to adopt the incremental capacity process of Chapter V of the CAM NC rules on the basis of Regulation (EC) 715/2009 of 13 July 2009 on conditions for access to the natural gas transmission networks[3] (hereinafter the "Gas Regulation"), Appellant I considers that the EU legislature might remedy this lack of sufficient legal basis during the ongoing review of the Gas Regulation under the

[2] Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013, OJ L 72, 17.3.2017, p.1.
[3] Regulation (EC) 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, OJ L211, 14.08.2009, p.36.

Hydrogen and Decarbonised Gas Market Package. In Appellant I´s opinion, in the spirit of the judgment of 16 March 2022, the incremental capacity procedure should be based on a mutual agreement of TSOs and the supervision of regulatory authorities.

14. Appellant II deplores the fact that any practical implications of the judgment of 16 March 2022 on the HUAT case were doomed to be theoretical due to the lack of suspensive effect of the GCEU proceedings. Appellant II also observes that the incremental process reached a negative result since the binding auction was unsuccessful, given that market participants did not apply for the announced HUAT incremental capacity and that this lack of success avoided that Appellant II was obliged to construct the new HUAT infrastructure. In its view, the subsequent annulment of Decision A-004-2019 by the judgment of 16 March 2022 has no practical implications anymore on the HUAT case.

15. Appellant II observes, in addition, that the general implications of the GCEU´s judgment of 16 March 2022 are that Chapter V of the CAM NC is inapplicable due to the European Commission´s lack of competence to adopt Chapter V of the CAM NC. Its interpretation of the judgment of 16 March 2022 is that the European Commission lacks competence to adopt rules on incremental capacity because capacity allocation and congestion management do not include the notion of future capacity, but refer to existing capacity. Appellant II considers that, given the inapplicability of Chapter V of the CAM NC, it is up to TSOs to cooperate and decide whether to proceed with incremental capacity projects and how. Appellant II adds that the latest version of the new Hydrogen and Decarbonised Gas Market Package seems to grant regulatory competence to the European Commission by introducing the notion of incremental capacity in the frame of capacity allocation and congestion management. Finally, Appellant II shares its views on the procedure of Chapter V of the CAM NC and the interpretation of some of its rules by ACER in the interest of future regulation.

16. The Defendant observes that there are no practical implications of the judgment of 16 March 2022 on the HUAT case because the incremental capacity process for the Mosonmagyaróvár interconnection point at the HUAT border that was the subject of ACER Decision No 05/2019 and, subsequently, of Decision A-004-2019 of the Board of Appeal, is no longer in existence. The Defendant clarifies that said incremental capacity process was fully completed on 6 July 2020, when the incremental capacity was offered in an auction to request binding commitments for capacity from network users. The Defendant adds that zero capacity was booked, rendering the result of the economic test assessing the commercial viability of the project negative, and that the project was terminated in accordance with Article 22(3) of Chapter V of the CAM NC.

17. The Defendant observes, in addition, that the general implications of the judgment of 16 March 2022 are that Chapter V of the CAM NC is inapplicable but has not been annulled by the GCEU. In the Defendant´s view, this implies that, in principle, the obligations in Chapter V of the CAM NC still exist for TSOs and NRAs, but ACER´s capacity to intervene in case of disagreement between NRAs has been questioned by the judgment of 16 March 2022. The Defendant states that, consequently, should the Board of Appeal decide to remit the case to ACER, it would be unclear on what legal basis ACER could still take a decision on the incremental capacity proposal.

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

18. Article 266 TFEU provides that *"[T]he institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgement of the CJEU"*.

19. Article 29 of Regulation (EU) 2019/942 of 5 June 2019 establishing a European Union Agency

for the Cooperation of Energy Regulators[4] (hereinafter "Regulation (EU) 2019/942") provides that *"(...) ACER shall take the necessary measures to comply with the judgments of the Court of Justice."*

20. Based on these provisions, the Board of Appeal shall take the necessary measures to comply with the judgements of the GCEU.

V. Lack of need to pursue the relaunched case

21. The HUAT project subject of Decision A-004-2019 was terminated in July 2020, prior to the judgment of 16 March 2022.

22. In their respective observations, both Appellants and the Defendant acknowledge the termination of the HUAT project in July 2020.

23. Consequently, the appeals by Appellant I and Appellant II have become redundant and the present relaunched case lacks any subject-matter.

24. In addition, when annulling Decision A-004-2019, the GCEU declared Chapter V of the CAM NC inapplicable without annulling it.

25. In this respect, two circumstances must be taken into consideration: (i) the rationale for the adoption of a potential new Board of Appeal Decision is the fulfillment of its obligation under Article 266 TFEU to adopt any measure necessary to comply with the operative part of the GCEU´s judgment; and (ii) EU institutions and bodies may only act within the limits of the powers conferred on them, as laid out by Article 13(2) TEU.

26. Given that Chapter V of the CAM NC was declared inapplicable, the Board of Appeal cannot act anymore based on Regulation (EU) 2019/942 in combination with Chapter V of the CAM NC as its competence has ceased to exist in relation to Chapter V of the CAM NC following the judgment of 16 March 2022. In addition, none of the parties suggested in their observations that the Board of Appeal should (or could) take any action on that basis.

27. It follows from the above that there is no need to pursue the relaunched case A-004-2019_R as it lacks any subject-matter and that, in any event, the Board of Appeal is not empowered to take decisions in relation to Chapter V of the CAM NC.

28. For the above reasons, the Board of Appeal, pursuant to Article 28(5) of Regulation (EU) 2019/942, hereby establishes that there is no need to pursue the case and closes it.

For the above reasons, the Board of Appeal hereby:

1. establishes that there is no further need to pursue the relaunched case A-004-2019_R.;

2. establishes that case A-004-2019_R is closed.

Done at Ljubljana, 21 April 2023.

For the Registry	*For the Board of Appeal*
The Registrar	*The Chairperson*
S. VAONA	M. PREK

[4] 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 (recast), OJ L 158, 14.06.2019, p.22.