

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

24 September 2020

*(Application for annulment – ACER Decision No. 10/2020 – duty to state reasons - Charter of Fundamental Rights of the EU - proportionality - access to documents)*

<b>Case number</b>	A-007-2020
<b>Language of the case</b>	English
<b>Appellants</b>	<p>Association Sans But Lucratif (‘aisbl’) “European Network of Transmission Operators for Electricity” (‘ENTSO-E’)</p> <p>Represented by: Hervé Laffaye, President of ENTSO-E and ENTSO-E’s legal representative Peter Willis (Bird &amp; Bird LLP),</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 of ACER, and Christophe Gence-Creux, Uros Gabrijel and Maria Barroso Gomes, Agents of ACER.</p>
<b>Interveners</b>	None.
<b>Application for</b>	<p>The revision or annulment of Decision No. 10/2020 of the European Union Agency for the Cooperation of Energy Regulators of 6 April 2020 on the definition of system operation regions (‘Decision No. 10/2020’ or ‘the Contested Decision’).</p> <p>Access to certain documentation.</p>

## THE BOARD OF APPEAL

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

**Acting Registrar:** Ronja Linßen

gives the following

### Decision

#### *I. Background*

##### *Legal background*

1. The Third Energy Package<sup>1</sup> and the Clean Energy for All Europeans Package<sup>2</sup> (‘Clean Energy Package’) identify a need for regional coordination of electricity system operation.
2. Recast Regulation (EU) 2019/943 (‘the Electricity Regulation’ or ‘ER’)<sup>3</sup> is one of the legislative acts of the Clean Energy Package. It sets the principles for the internal EU electricity market, which, *inter alia*, strives to enhance cross-border cooperation.
3. Recital 3 of the ER acknowledges that “*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>1</sup> Set of five legislative acts 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 and open and fair retail markets. It contains the former Electricity Directive 2009/72/EC; the former Electricity Regulation (EC)714/2009; the former Gas Directive 2009/73/EC; the former Gas Regulation (EC)715/2009; and the former ACER Regulation (EC)713/2009.

<sup>2</sup> Set of eight legislative acts on the energy performance of buildings, renewable energy, energy efficiency, governance and electricity market design, published in June 2019, after a *trialogue* between the European Commission, Council and Parliament. It is the fourth package of its kind, building further on the energy policy framework set by the Third Energy Package. It paves the way for a gradual transition away from fossil fuels and towards a carbon-neutral economy. The Clean Energy Package contains the Energy Performance in Buildings Directive (EU) 2018/844; the Renewable Energy Directive (EU) 2018/2001; the recast Electricity Directive (EU) 2019/944; the Energy Efficiency Directive (EU) 2018/2002; the Governance of the Energy Union Regulation (EU) 2018/1999; the recast Electricity Regulation (EU) 2019/943; the Risk Preparedness Regulation (EU) 2019/941 and the recast ACER Regulation (EU) 2019/942.

<sup>3</sup> Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for Electricity. It entered into force on 4 July 2019.

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

4. In order to foster enhanced cross-border cooperation, Chapter V of the ER creates a framework of enhanced regional coordination of electricity system operation throughout the EU.
5. Regional cooperation of electricity system operation was initiated by the transmission system operators (‘TSOs’) and the national regulatory authorities (‘NRAs’) through voluntary regional initiatives in the 1950’s<sup>4</sup>. These regional initiatives developed into the creation of voluntary Regional Security Coordinators (‘RSCs’). The first RSCs saw the light in 2008. Subsequently, Regulation (EU) 2017/1485<sup>5</sup> (‘SO GL’) and Regulation (EU) 2017/2196 establishing a network code on electricity emergency and restoration proceeded to the regulation of these RSCs. Participation of TSOs in RSCs was made mandatory in 2016. The ER consolidated this regional, bottom-up process in 2019. The regional coordination of electricity system operation foreseen by the ER is a gradual, bottom-up process, in which, at different points in time, various stakeholders - in essence ENTSO-E, the TSOs, the NRAs and the Agency - are required to take formal steps to attain certain milestones set by the ER.
6. The RSCs constituted “*a first step towards further regional coordination and integration of system operation*” as per Recital (6) of the SO GL. The RSCs were owned and appointed by the TSOs. Their six functions were to make non-binding recommendations limited to (i) coordinated security analysis, (ii) coordinated capacity calculation, (iii) outage coordination, (iv) short-term and medium-term adequacy forecasts, (v) consistency assessment of system restoration plans and (vi) common grid model building.
7. In order to enhance regional coordination, the ER replaces the RSCs by Regional Coordination Centres (‘RCCs’) (Article 35(2) of the ER).
8. Recital 53 of the ER reads: “*Coordination between transmission system operators at regional level has been formalised with the mandatory participation of transmission system operators in regional security coordinators. The regional coordination of transmission system operators should be further developed with an enhanced institutional framework via the establishment of regional coordination centres. The establishment of regional*

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<sup>4</sup> Association of the Transmission System Operators of Ireland (ATSOI), Baltic Transmission System Operators (BALTSO), European Transmission System Operators (ETSO), NORDEL, Union for the Coordination of the Transmission of Electricity (UCTE) and UK Transmission System Operators Association (UKTSOA).

<sup>5</sup> Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation.

*coordination centres should take into account existing or planned regional coordination initiatives and should support the increasingly integrated operation of electricity systems across the Union, thereby ensuring their efficient and secure performance. For that reason, it is necessary to ensure that the coordination of transmission system operators through regional coordination centres takes place across the Union. Where transmission system operators of a given region are not yet coordinated by an existing or a planned regional coordination centre, the transmission system operators in that region should establish or designate a regional coordination centre”.*

9. RCCs will be independent and impartial legal entities (Articles 35(3) and (4) and 45 of the ER). Additionally, there will be a stronger regulatory oversight over RCCs, both by the NRAs and by ACER, which decides upon their regional scope, can request information from the RCCs and issues opinions and recommendations to the RCCs (Articles 61 and 62 of Recast Electricity Directive (EU) 2019/944 and Article 46(2),(3) and (4) of the ER).
10. According to Article 37 of the ER, RCCs will perform 10 additional functions on top of the six above-mentioned RSC functions: (i) training and certification of staff working for RCCs; (ii) supporting the coordination and optimisation of regional restoration; (iii) post-operation and post-disturbance analysis and reporting; (iv) regional sizing of reserve capacity; (v) facilitation of regional procurement of balancing capacity; (vi) supporting the TSOs, at their request, in the optimisation of inter-TSO settlements; (vii) performing tasks related to the identification of regional crisis scenarios; (viii) performing tasks related to the seasonal adequacy outlooks (if delegated to RCCs); (ix) calculating the value for the maximum entry capacity available for the participation of foreign capacity in capacity mechanisms and (x) performing tasks related to support TSOs in the identification of needs for new transmission capacity.
11. Recital (55) of the ER clarifies that RCCs *“should carry out tasks where their regionalisation brings added value compared to tasks performed at national level. The tasks of regional coordination centres should cover the tasks carried out by regional security coordinators pursuant to the Commission Regulation (EU) 2017/1485 (12) as well as additional system operation, market operation and risk preparedness tasks. The tasks carried out by regional coordination centres should not include real-time operation of the electricity system.”* Recital (56) adds that, in performing their tasks, RCCs *“should contribute to the achievement of the 2030 and 2050 objectives set out in the climate and energy policy framework”.*
12. Article 42 of the ER establishes that, of the RCCs’ 16 functions, 14 functions will be limited to issuing non-binding recommendations - in a similar fashion to the RSCs - but two of

them, namely coordinated security analysis and coordinated capacity calculation, will amount to coordinated actions that are binding upon the TSOs. Recital (57) of the ER states, in this regard, that RCCs “*should primarily act in the interest of system and market operation of the region. Hence, regional coordination centres should be entrusted with the powers necessary to coordinate the actions to be taken by transmission system operators of the system operation region for certain functions and with an enhanced advisory role for the remaining functions.*”

13. Whereas the geographical scope of the RSCs corresponded to one or more Capacity Calculation Regions (‘CCRs’)<sup>6</sup> and their number was limited to a maximum of six<sup>7</sup>, the ER does not limit the amount of RCCs and provides them with a geographical scope of their own: the System Operation Regions (‘SORs’). The SORs determine the geographical scope for regional coordination. RCCs will perform their functions in a SOR.
14. In the step-based, bottom-up logic of the ER, Article 30(1)(f) and 36(1) of the ER require ENTSO-E to adopt a proposal for the definition of SORs, specifying which TSOs, bidding zones, bidding zone borders, CCRs and outage coordination regions (‘OCRs’) are covered by each of the SORs, and to submit it by 5 January 2020 to ACER for decision. Within three months of receipt, ACER has to either approve or propose amendments in accordance with Article 36(3) of the ER and Article 7(2)(a) of Regulation (EU) 2019/942<sup>8</sup> (‘Regulation (EU) 2019/942’ or ‘ACER Regulation’). Article 7(2)(a) of the ACER Regulation states that “*to carry out the tasks referred to in paragraph 1 in an efficient and expeditious manner, ACER shall in particular (a) decide on the configuration of system operation regions pursuant to Article 36(3) and (4) and issue approvals pursuant to Article 37(2) of Regulation (EU) 2019/943*”.
15. Article 36 of the ER lays down the criteria for the development and the content of the definition of SORs and reads as follows:  
*“Article 36*  
*Geographical scope of regional coordination centres*  
*1. By 5 January 2020 the ENTSO for Electricity shall submit to ACER a proposal specifying which transmission system operators, bidding zones, bidding zone borders, capacity*

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<sup>6</sup> Currently, there are 10 CCRs: (1) Baltic, (2) Channel, (3) Core, (4) Greece Italy (GRIT), (5) Hansa, (6) Italy North, (7) Ireland and United Kingdom (IU), (8) Nordic, (9) South East Europe (SEE) and (10) South West Europe (SWE).

<sup>7</sup> Article 77(2)(b) of the SO GL limits their number to six. The six RSCs are CORESO (2008), TSCNET (2008), SCC (2015), Nordic RSC (2016), Baltic RSC (2016) and SEleNE-CC (2020).

<sup>8</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 (recast).

*calculation regions and outage coordination regions are covered by each of the system operation regions. The proposal shall take into account the grid topology, including the degree of interconnection and of interdependency of the electricity system in terms of flows and the size of the region which shall cover at least one capacity calculation region.*

*2. The transmission system operators of a system operation region shall participate in the regional coordination centre established in that region. In exceptional circumstances, where the control area of a transmission system operator is part of various synchronous areas, the transmission system operator may participate in two regional coordination centres. For the bidding zone borders adjacent to system operation regions, the proposal in paragraph 1 shall specify how the coordination between regional coordination centres for those borders is to take place. For the Continental Europe synchronous area, where the activities of two regional coordination centres may overlap in a system operation region, the transmission system operators of that system operation region shall decide to either designate a single regional coordination centre in that region or that the two regional coordination centres carry out some or all of the tasks of regional relevance in the entire system operation region on a rotational basis while other tasks are carried out by a single designated regional coordination centre.*

*3. Within three months of receipt of the proposal in paragraph 1, ACER shall either approve the proposal defining the system operation regions or propose amendments. In the latter case, ACER shall consult the ENTSO for Electricity before adopting the amendments. The adopted proposal shall be published on ACER's website.*

*4. The relevant transmission system operators may submit a proposal to ACER for the amendment of system operation regions defined pursuant to paragraph 1. The process set out in paragraph 3 shall apply.”*

16. Recital (54) of the ER stipulates, with respect to the geographical scope of RCCs, that it *“should allow them to contribute effectively to the coordination of the operations of transmission system operators across regions and should lead to enhanced system security and market efficiency”*. It adds that RCCs *“should have the flexibility to carry out their tasks in the region in the way which is best adapted to the nature of the individual tasks entrusted to them.”* According to Recital (59) of the ER, ENTSO-E should ensure that the activities of RCCs are coordinated across regional boundaries.

17. The definition of SORs enters into force as of the publication of the Contested Decision on ACER’s website (Article 36(3) of the ER), allowing for a 2-year transition period between this milestone and the next milestone, i.e. the start of the operation of the RCCs within their

respective SORs, which is foreseen for 1 July 2022 (Article 35(2) of the ER). The definition of SORs consequently entered into force on 6 April 2020<sup>9</sup>.

*Facts giving rise to the dispute*

18. Following a public consultation organised by the ENTSO-E from 24 October 2019 until 20 November 2019 as required by Article 31 of the ER, ENTSO-E submitted its “*Proposal for System operation Regions in accordance with Article 36(1) of the Electricity Regulation*” (‘ENTSO-E’s SOR Proposal’) to the Agency on 6 January 2020<sup>10</sup>. ENTSO-E’s SOR Proposal defined seven SORs: (1) Central European SOR (‘CE SOR’); (2) Nordic SOR; (3) Baltic SOR; (4) South West Europe SOR (‘SWE SOR’); (5) South East Europe SOR (‘SEE SOR’); (6) Greece-Italy SOR (‘GRIT SOR’) and (7) Ireland and United Kingdom SOR (‘IU SOR’<sup>11</sup>).
19. The Agency had not been informally consulted by ENTSO-E prior to the launch of the public consultation but participated to the consultation and provided a joint response, together with the NRAs, on 20 November 2020<sup>12</sup>.
20. Immediately upon receipt of ENTSO-E’s SOR Proposal, on 6 January 2020, the Agency launched a public consultation on ENTSO-E’s SOR Proposal, inviting all stakeholders to submit their comments by 19 January 2020. The results of the public consultation are attached as Annex II to the Contested Decision.
21. From 6 January 2020 until 10 March 2020, the Agency organised a bilateral consultation with ENTSO-E, closely cooperated with all NRAs, TSOs and ENTSO-E and further consulted on the intended amendments to ENTSO-E’s SOR Proposal during telephone conference calls and written, electronic exchanges<sup>13</sup>.
22. On 29 January 2020, ACER provided ENTSO-E and the NRAs with a *Note on the Legal Framework for the Definition of SORs*<sup>14</sup>, indicating that, according to ACER’s

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<sup>9</sup> According to Article 28(3) of the ACER Regulation, appeals lodged before the Boars of Appeal do not have suspensory effect.

<sup>10</sup> Annex 6 to the Appeal.

<sup>11</sup> ENTSO-E’s SOR Proposal states: “*Following the Withdrawal of the United Kingdom from the European Union and where a SOR encompasses the United Kingdom, the proposal for the IU SOR shall take into account the contractual framework applicable in the relations between the United Kingdom and the European Union.*”

<sup>12</sup> Para 5 of the Contested Decision. Annex 5 to the Appeal.

<sup>13</sup> Paras 8, 9, 16 and 23 of the Contested Decision and Annexes 16-20 to the Defence.

<sup>14</sup> Annex 8 to the Appeal.

interpretation of Article 36(2) of the ER, each TSO may only be a member of a single RCC as well as a first, informal version<sup>15</sup> of its amendments to ENTSO-E's SOR Proposal<sup>16</sup>.

23. On 17 February 2020, ENTSO-E submitted a Position Paper to ACER, opposing the Agency's intention to define a single CE SOR covering Continental Europe SA<sup>17</sup>.
24. On 20 February 2020, ACER drafted a second version of its amendments to ENTSO-E's SOR Proposal<sup>18</sup>.
25. On 3 March 2020, ACER produced a third version of its amendments to ENTSO-E's SOR Proposal<sup>19</sup>.
26. ACER's first, second and third informal versions<sup>20</sup> of its amendments to ENTSO-E's SOR Proposal suggested four SORs: (1) Central European synchronous area ('CE SA') would be 1 SOR ('CE SOR') including ENTSO-E's proposed SWE SOR, GRIT SOR and SEE SOR; (2) Nordic SOR; (3) Baltic SOR and (4) IU SOR.
27. On 5 March 2020, the Agency's Electricity Working Group ('AEWG') discussed both ENTSO-E's SOR Proposal and ACER's intended amendments to ENTSO-E's SOR Proposal<sup>21</sup>. The AEWG made recommendations to reach a compromise between both views to keep ENTSO-E's proposed SEE SOR, to include ENTSO-E's proposed SWE SOR in CE SOR and to change ENTSO-E's proposed GRIT SOR into a GRIT interface, excluding Northern Italy, which would be a part of CE SOR<sup>22</sup>.
28. On 16 March 2020, following the AEWG's advice and including the necessary amendments, ACER submitted a fourth, formal version of its amendments to ENTSO-E's SOR Proposal. In line with the recommendations of the AEWG, ACER's fourth version of the proposed amendments to ENTSO-E's SOR Proposal contained the definition of five SORs: (1) CE SOR including ENTSO-E's proposed SWE SOR, but excluding ENTSO-E's proposed GRIT SOR and SEE SOR; (2) Nordic SOR; (3) Baltic SOR; (4) IU SOR<sup>23</sup> and

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<sup>15</sup> This first version of ACER's amendments to ENTSO-E's SOR Proposal was an informal draft at working level because it did not include the views of the Agency's Electricity Working Group ('AEWG'). See Summary Minutes of the Oral Hearing of 2 September 2020, by teleconference, held in case A-007-2020, answer by the Defendant to Question 7, p. 21 and to Question 12 (first part), p. 28.

<sup>16</sup> Annex 7a to the Appeal.

<sup>17</sup> Annex 9 to the Appeal.

<sup>18</sup> Annex 7b to the Appeal.

<sup>19</sup> Annex 7c to the Appeal.

<sup>20</sup> These versions of ACER's amendments to ENTSO-E's SOR Proposal were informal drafts at working level. They did not include the views of the AEWG.

<sup>21</sup> Annexes 16, 17, 18 and 19 to the Defence,

<sup>22</sup> Annex 7 to the Defence.

<sup>23</sup> Para 84 of the Contested Decision states: "As per the Withdrawal Agreement, this Decision shall apply to the UK. Possible necessary changes to the configuration of SORs in the future in this regard are not excluded, although cannot be foreseen at present.", referring in footnote 8 to the Agreement on the withdrawal of the United

(5) SEE SOR. Central and Southern Italy qualifies as an interface between CE SOR and SEE SOR.

29. On 27 March 2020, the Board of Regulators of ACER delivered a favourable opinion on the fourth version of ACER's proposed amendments to ENTSO-E's SOR Proposal pursuant to Article 22(5) of the ACER Regulation<sup>24</sup>.
30. The Agency adopted the Contested Decision, which had to be in compliance with Article 36 of the ER, on 6 April 2020 on the basis of Article 7(2)(a) of the ACER Regulation<sup>25</sup>. Annex I to the Contested Decision contains the definition of five SORs: (1) CE SOR including ENTSO-E's proposed SWE SOR, but excluding ENTSO-E's proposed GRIT SOR and SEE SOR; (2) Nordic SOR; (3) Baltic SOR; (4) IU SOR<sup>26</sup> and (5) SEE SOR. Central and Southern Italy qualifies as an interface between CE SOR and SEE SOR.
31. The following graphs show the difference between ENTSO-E's SOR Proposal and the Definition of SORs joined as Annex I to the Agency's Contested Decision:

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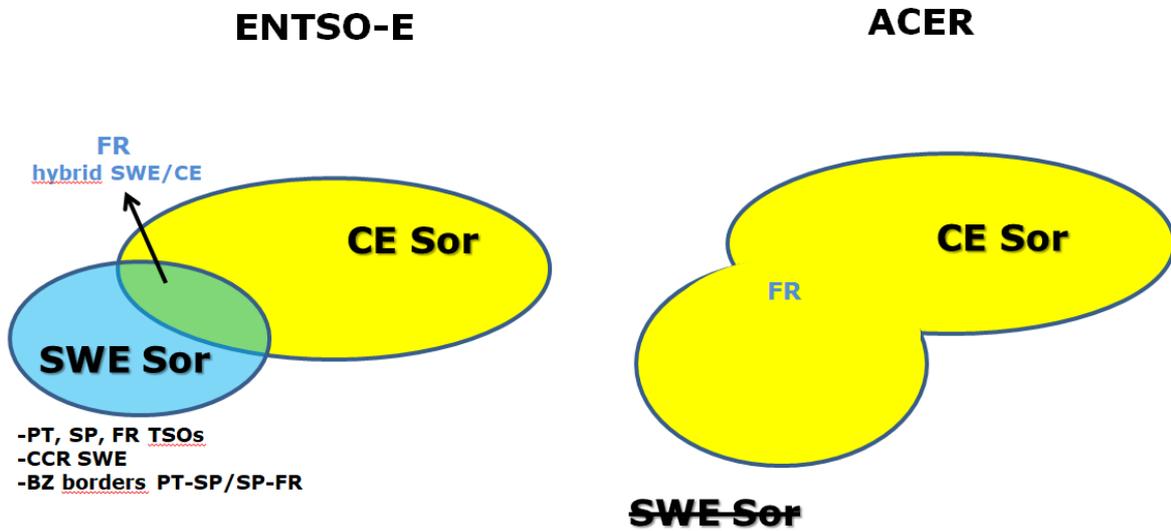
Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01 XT/21054/2019/INIT OJ C 384I , 12.11.2019, p. 1–17.

<sup>24</sup> Annex 9 to the Defence. All NRAs voted in favour of the Contested Decision except the Spanish and Czech NRAs.

<sup>25</sup> Annex 3 to the Appeal.

<sup>26</sup> Para 84 of the Contested Decision states: "*As per the Withdrawal Agreement, this Decision shall apply to the UK. Possible necessary changes to the configuration of SORs in the future in this regard are not excluded, although cannot be foreseen at present.*", referring in footnote 8 to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01 XT/21054/2019/INIT OJ C 384I , 12.11.2019, p. 1–17.

Graph 1 – Comparison of the Definition of SORs according to Article 36 of the ER as regards ENTSO-E’s proposed SWE SOR.



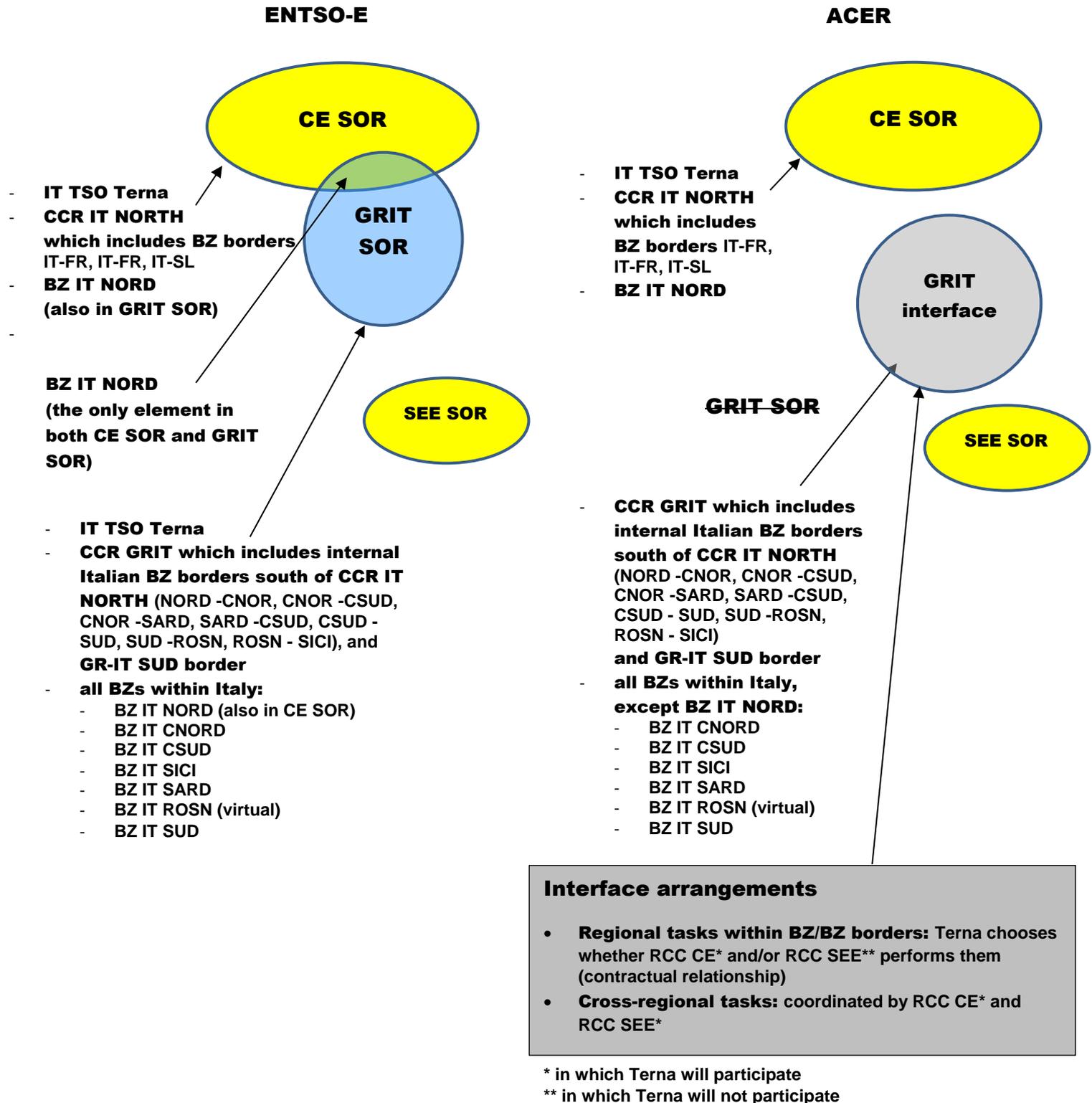

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Source: Agency’s Board of Appeal. Confirmed by the Parties at the Oral Hearing of 2 September 2020<sup>27</sup>.

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<sup>27</sup> Summary Minutes of the Oral Hearing of 2 September 2020, by teleconference, held in Case A-007-2020, answers by the Appellant and the Defendant to Question 1, p. 14-16.

Graph 2 – Comparison of the Definition of SORs according to Article 36 of the ER as regards ENTSO-E’s proposed GRIT SOR.



Source: Agency’s Board of Appeal. Confirmed by the Parties at the Oral Hearing of 2 September 2020<sup>28</sup>..

<sup>28</sup> Summary Minutes of the Oral Hearing of 2 September 2020, by teleconference, held in Case A-007-2020, answers by the Appellant and the Defendant to Question 1, p. 14-16.

### *Procedure*

32. On 4 June 2020, the Appellant submitted an appeal to the Registry of the Board of Appeal against the Contested Decision in case A-007-2020.
33. On 11 June 2020, the announcement of appeal was published on the website of the Agency.
34. On 19 June 2020, the Registrar communicated the composition of the Board of Appeal to the Parties.
35. On 16 July 2020, ACER filed its Defence with the Registry requesting the BoA to dismiss the appeal.
36. The Appellant requested the Board of Appeal, pursuant to Article 20(1),(2) and (3) of the Board of Appeal's Rules of Procedure<sup>29</sup>, to require the Agency to disclose the following documents, in whatever format they were held: (i) all notes or minutes of the discussions of the AEWG on 5 March 2020 and of the meeting of the AEWG on 10 March 2020, referred to in recitals 22 and 23 of the Contested Decision; and (ii) a copy of the presentation prepared for the videoconference between ACER and ENTSO-E on 14 February 2020, of which a screenshot of one slide was attached as Annex 10 to the Appeal, with a possibility to make written and/or oral submissions in respect of documents produced by the Agency. On 23 July 2020, the Chairperson acting on behalf of the Board of Appeal granted, in the specific circumstances of this case, the requested access to documents pursuant to Article 20(1),(2) and (3) of the Board of Appeal's Rules of Procedure in a duly reasoned decision ('Disclosure Decision'). The Board of Appeal therefore required the Agency to provide the Board of Appeal with the requested documents - both a confidential version for internal use by the Board of Appeal and a redacted version for the Appellant - within three working days of the notification of the Disclosure Decision.
37. On 20 July 2020, the Appellant requested, by email to the Registrar of the Board of Appeal, an extension of the deadline to submit its Reply from 29 July till 5 August 2020.
38. On 23 July 2020, the Registrar of the Board of Appeal notified the Appellant that the deadline to submit its Reply was extended until 5 August 2020.
39. On 29 July 2020, the Appellant was given access to a redacted version of disclosed Annexes 16, 18, 19 and 20 to the Defence. On 4 August 2020, the Appellant was given access to a redacted version of disclosed Annex 17 to the Defence. The Appellant was given the possibility to make written observations on the disclosed documents by 16 August 2020.

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<sup>29</sup> Decision of the Board of Appeal No1-2011 as amended on 5 October 2019 laying down the rules of organisation and procedure of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators.

40. On 5 August 2020, the Appellant filed its Reply to the Defence with the Registry. This Reply included written observations on the disclosed documents. No additional written observations on the disclosed documents were filed by the Appellant pursuant to its Reply.
41. On 5 August 2020, the Agency requested, by email to the Registry of the Board of Appeal, an extension of the deadline to submit its Rejoinder from 11 August till 25 August 2020.
42. On 6 August 2020, the Registry of the Board of Appeal notified the Agency that the deadline to submit its Rejoinder was extended until 25 August 2020.
43. On 25 August 2020, the Agency submitted its Rejoinder to the Registry.
44. On 27 August 2020, questions to prepare for the oral hearing were sent to the Parties in writing.
45. On 1 September 2020, the written part of the proceeding was closed.
46. The Board of Appeal held an oral hearing on 2 September 2020.

#### *Main arguments of the Parties*

47. The claims of the Appellant can be summarized as follows:
  - First plea: ACER infringed Article 36 of the ER by committing a manifest error of assessment in its application of the requirement set out in that Article to take into account in the definition of SORs the grid topology, including the degree of interconnection and of interdependency of the electricity system in terms of flows and the size of the region that is to comprise each SOR. This manifest error led ACER to include ENTSO-E's proposed SWE SOR in the CE SOR and to reject ENTSO-E's proposed GRIT SOR, thereby disregarding the fundamental objectives of Article 36 of the ER.
  - Second plea: ACER infringed the principle of proportionality by defining the CE SOR with a geographic scope disproportionate to the tasks for which the SOR provides the context for coordination, which will result in less efficient performance of the tasks allocated to RCCs and TSOs.
  - Third plea: ACER infringed Article 36 of the ER by interpreting it as prohibiting TSOs from participating in more than one RCC, contrary to the express words and purpose of the ER, particularly Articles 35 to 42, and by taking into account concerns about the implementation of Article 35 of the ER by TSOs and NRAs that it was not entitled to take into account, also leading to a definition of the relevant SORs that does not comply with Article 36 of the ER.
  - Fourth plea: ACER did not provide an adequate statement of reasons for its inclusion of ENTSO-E's proposed SWE SOR in the CE SOR and its rejection of ENTSO-E's proposed GRIT SOR.

-Fifth plea: ACER infringed an essential procedural requirement by not providing ENTSO-E with an adequate opportunity to give comments on ACER's intended inclusion of ENTSO-E's proposed SWE SOR in the CE SOR and its rejection of ENTSO-E's proposed GRIT SOR.

48. The Appellant requests the Board of Appeal to:

- a) Rule that the Appellant's appeal is well-founded, and to remit to the competent body of ACER (i) Article 1 of the Contested Decision and Article 3 of Annex I to the Contested Decision insofar as they include ENTSO-E's proposed SWE SOR in the CE SOR and fail to define a separate SWE SOR, and (ii) Article 1 of the Contested Decision and Article 3 of Annex I to the Contested Decision insofar as they fail to adopt ENTSO-E's SOR proposal of a GRIT SOR (the relevant parts of the Contested Decision), and those relevant parts of the Contested Decision only, all others being outside the scope of these proceedings;
- b) Insofar as it is necessary and insofar as the Board of Appeal is competent to do so, to annul the relevant parts of the Contested Decision; and
- c) Provide to the competent body of ACER sufficient reasoning<sup>30</sup> as to the correct interpretation of the relevant provisions of the ER to enable it to make a new decision in accordance with Article 28(5) of the ACER Regulation and Article 21(2) of the Rules of Procedure of the Board of Appeal.

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

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<sup>30</sup> The Appellant adds in para 49 of the Appeal that it requests the Board of Appeal to include, without limitation, reasoning as to: (a) the correct interpretation of the test set out in Article 36(1) and in particular the correct interpretation of the concept of "interdependency of the electricity system in terms of flows"; and (b) the question of whether a TSO may participate in more than one RCC, and thus the correct interpretation of Article 36(2). It also adds, in para 50 of the Appeal, that if the Board of Appeal is minded to decide this appeal on the basis of any plea other than the first plea and the third plea, it is requested nevertheless to set out, in its decision, its reasoning in respect of the first and third plea for the purposes identified in para 49.

## II. Admissibility

### *Admissibility of the appeal*

#### *Ratione temporis*

50. 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”.
51. The Appeal was submitted on 4 June 2020, challenging ACER Decision No.10/2020, which was notified to the Appellant on 6 April 2020 and published on ACER’s website on the same day of 6 April 2020.
52. The Appeal was received by the Registry by e-mail on 6 April 2020 and it contained the statement of grounds.
53. Therefore, the Appeals are admissible *ratione temporis*.

#### *Ratione materiae*

54. 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.
55. Article 2(d) of Regulation (EU) 2019/942 refers to individual decisions issued on the basis of Article 7(2)(a) of Regulation (EU) 2019/942.
56. Decision No.10/2020 was issued on the basis of Article 7(2)(a) of Regulation (EU) 2019/942, which refers to Article 36(3) and (4) of the ER. In accordance with Article 36(3) of the ER, the amendments to ENTSO-E’s SOR Proposal were proposed in Decision No.10/2020 on 6 April 2020, i.e. within 3 months of the receipt of ENTSO-E’s SOR Proposal, and following due consultation of ENTSO-E.
57. Therefore, since the Appeal fulfils the criterion of Article 28(1) of Regulation (EU) 2019/942, the Appeal is admissible *ratione materiae*.

#### *Ratione personae*

58. 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.”*

59. In accordance with Article 2 of the Contested Decision, the Appellant, a non-profit organisation with legal personality under Belgian law, is the addressee of the Contested Decision.

60. The Appeal is therefore admissible *ratione personae*.

### *Merits*

#### *Remedies sought by the Appellant*

61. The Appellant requests the Board of Appeal to (i) annul Article 1 of Decision No. 10/2020 and Articles 3 of Annex I to Decision No.10/2020 insofar as they include ENTSO-E’s proposed SWE SOR in the CE SOR and fail to define a separate SWE SOR, and (ii) annul Article 1 of the Contested Decision and Article 3 of Annex I to the Contested Decision insofar as they fail to adopt ENTSO-E’s SOR Proposal of a GRIT SOR; and to remit the case to the competent Agency body to replace Decision No. 10/2020 by a new Decision.

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

##### *Fourth Plea – Failure to provide a statement of reasons.*

62. According to the Fourth Plea of the Appeal<sup>31</sup>, the Agency failed to provide an adequate statement of reasons on essential parts of the Contested Decision, infringing the obligation to duly state reasons foreseen by Article 296(2) of the Treaty on the Functioning of the European Union (‘TFEU’) and the case-law of the Court of Justice of the European Union (‘CJEU’). The Appellant claims that the essential parts of the Contested Decision lacking an adequate statement of reasons are, on the one hand, ACER’s decision to merge ENTSO-E’s proposed SWE SOR and CE SOR, and, on the other hand, ACER’s decision to reject ENTSO-E’s proposed GRIT SOR and to define the Central and Southern Italian bidding zones and bidding zone borders and the GRIT CCR as an interface, depriving the Italian TSO Terna - Rete Elettrica Nazionale SpA (‘Terna’) of its participation in the RCC considered by the Appellant to be best placed to provide coordination services in that region. The Applicant claims that, as a consequence, those parts of the Contested Decision are invalidated.

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<sup>31</sup> Paras 177-183 of the Appeal. Para 99 of the Reply.

63. The Defendant responds in its Defence<sup>32</sup> that ACER met its duty to provide an adequate statement of reasons for the Contested Decision. In so doing, it refers to paragraphs 40, 41, 51-64 and 77-83 of the Contested Decision.
64. 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 the ACER Regulation and also derives from Article 296 TFEU and the general principles of EU Law, including Article 41(2)(c) of the Charter of Fundamental Rights of the EU (‘the Charter’), and has been confirmed by consistent case-law of European Courts<sup>33</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 their power to review the lawfulness of the measure<sup>34</sup>.
65. The discord of the parties is whether the Agency complied with this duty.
66. The Board of Appeal recalls its earlier decision-making practice<sup>35</sup>, in which it stated that the Agency must comply with the fundamental rules of the TFEU and the general principles of EU law, and this includes the Charter.
67. The Board of Appeal notes that the Charter’s procedural right is not an absolute right and that it is settled case-law that the degree of precision of the reasoning must be weighed against practical realities as well as against time and available technical facilities for making such decision, as provided for by the regulations applicable to such decision and by relevant case law<sup>36</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.
68. First, Article 36(3) of the ER mandates ACER to either approve ENTSO-E’s SOR Proposal or to propose amendments to ENTSO-E’s SOR Proposal pursuant to a consultation. In the ER’s step-wise, bottom-up regional coordination process of electricity system operation, ACER was not required to reiterate the entire process *ab initio* but to either approve

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<sup>32</sup> Paras 115-125 of the Defence. Paras 50-53 of the Rejoinder.

<sup>33</sup> Case T-700/14 *TVI v Commission* EU:T:2017:447, para 79.

<sup>34</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.

<sup>35</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, A-001-2020 paras 249, 251 and 263-272 and A-002-2020 paras 250, 252 and 264-273.

<sup>36</sup> Board of Appeal Decision A-001-2017, para 124-126; A-001-2020 para 253 and A-002-2020 para 254.

ENTSO-E's SOR Proposal or to bring amendments that were necessary to ensure compliance with the applicable regulation. Accordingly, to the extent that it amended ENTSO-E's SOR Proposal, the Agency had a duty to duly state the underlying reasons for these amendments.

69. Second, the Appellant duly explains in its Appeal why it believes the Contested Decision is not sufficiently reasoned with respect to two of its amendments to ENTSO-E's SOR Proposal, namely the merger of ENTSO-E's proposed SWE SOR and CE SOR and the rejection of ENTSO-E's proposed GRIT SOR.
70. Third, the Board of Appeal finds that the Contested Decision does not duly reason, in a clear and unequivocal fashion, how ACER's amendments to ENTSO-E's proposed SWE SOR and GRIT SOR comply with Article 36(1) of the ER.
71. Indeed, even though the Contested Decision assesses whether ENTSO-E's SOR Proposal complies with Article 36(1) of the ER in section 6.2.3 of the Contested Decision (paras 35-37) and whether ENTSO-E's SOR Proposal complies with Article 36(2) of the ER in section 6.2.4 of the Contested Decision (paras 38-41), the Contested Decision limits its assessment of ACER's amendments with respect to the proposed SWE SOR and GRIT SOR to their compliance with Article 36(2) of the ER. The Contested Decision fails to reason ACER's assessment of these amendments on their compliance with Article 36(1) of the ER in a clear and unequivocal manner.
72. As regards the merger of the proposed SWE SOR and CE SOR, section 6.2.4.3 of the Contested Decision contains a clear and unequivocal assessment of the compliance of ACER's amendments with Article 36(2) of the ER (paras 51-53 and 57) and of the possibilities under both Article 36(2) and Article 44 of the ER to take account of sub-regional specificities (paras 56 and 57). Section 6.2.4.3 of the Contested Decision only contains a single paragraph (para 55) on the assessment of the compliance of ACER's amendments with Article 36(1) of the ER. Moreover, without tackling the present or short-term situation, this paragraph 55 of the Contested Decision only briefly mentions future developments: *"In addition, the Agency notes that, with the establishment of binding interconnection targets, the Iberian Peninsula is expected to become more and more interconnected, and therefore more and more interdependent with Continental Europe, which reinforces the need to include this sub-region into the CE SOR."* Footnote 5 contains a reference to the interconnection targets of the Clean Energy Package, Article 194(1) TFEU and Recitals (6) and (28) of the ACER Regulation. Footnote 5 also contains the following statement: *"As stated in the Fourth Report State of the Energy Union, April 2019: 'A key priority of the Energy Union has been to end the energy isolation of disconnected*

*regions.(...) Greater integration of the Iberian peninsula is also being promoted by the support by the European Commission for the INELFE project and for a power line crossing the Bay of Biscay. These efforts will double the exchange capacity between France and Spain by 2025, bringing Spain closer to the 10% interconnection target, and progressively integrating the whole Iberian Peninsula into the internal electricity market.’”*

73. As regards the rejection of the proposed GRIT SOR, section 6.2.4.4 of the Contested Decision contains a clear and unequivocal assessment of the compliance of ACER’s amendments with Article 36(2) of the ER (paras 59-62) and of the coordination foreseen by ACER’s amendments (paras 63 and 64). Section 6.2.4.4 of the Contested Decision only contains a single paragraph (para 58) in relation to the criterion of Article 36(1) ER for the justification of the inclusion of the bidding zone ITALY NORD in the CE SOR. Paragraph 58 reads as follows: *“The bidding zone IT NORD is strongly influenced by electrical flows coming from northern neighbouring countries (including Switzerland) and also between other countries part of the CE SA (especially Germany). This influence is expected to increase in the future with new interconnections in development that will require coordinated actions among all the involved TSOs. Conversely, the IT NORD grid represents also a large portion of the Italian TSO’s control area, which ENTSO-E entirely placed in the GRIT SOR”*. However, section 6.2.4.4 does not contain ACER’s reasoning on the rejection of the proposed GRIT SOR from a perspective of Article 36(1) of the ER.
74. Furthermore, the Board of Appeal observes that the definition of SORs (joined as Annex I to the Contested Decision), the marked-up version of the ENTSO-E’s SOR Proposal (joined as Annex Ia to the Contested Decision) and the comprehensive Response of the Agency to ACER’s Public Consultation (joined as Annex II to the Contested Decision) do not remedy ACER’s above-mentioned failure to adequately state its reasoning in the Contested Decision. Annex I to the Contested Decision, containing the definition of SORs, merely defines CE SOR in Article 3(5)(d) following its merger with the proposed SWE SOR, and the coordination of the bidding zone borders of GRIT CCR in Article 4(5)(a)(ii), (d) and (e), but does not contain any justification for the merger of the proposed SWE SOR with the CE SOR and for the suppression of the proposed GRIT SOR from a perspective of Article 36(1) ER.
75. In this regard, the Board of Appeal finds that Article 36 of the ER defines two sets of requirements of the definition of SORs in its 1<sup>st</sup> and 2<sup>nd</sup> paragraph.
76. The criteria of Article 36(1) of the ER relate to (i) *“grid topology, including the degree of interconnection and of interdependency of the electricity system in terms of flows”* and (ii) *“the size of the region which shall cover at least one capacity calculation region.”*

77. The criteria of Article 36(2) of the ER are as follows: *“The transmission system operators of a system operation region shall participate in the regional coordination centre established in that region. In exceptional circumstances, where the control area of a transmission system operator is part of various synchronous areas, the transmission system operator may participate in two regional coordination centres. For the bidding zone borders adjacent to system operation regions, the proposal in paragraph 1 shall specify how the coordination between regional coordination centres for those borders is to take place. For the Continental Europe synchronous area, where the activities of two regional coordination centres may overlap in a system operation region, the transmission system operators of that system operation region shall decide to either designate a single regional coordination centre in that region or that the two regional coordination centres carry out some or all of the tasks of regional relevance in the entire system operation region on a rotational basis while other tasks are carried out by a single designated regional coordination centre.”*
78. The Board of Appeal observes that there is no patent contradiction or incompatibility between the criteria of Article 36(1) of the ER and the criteria of Article 36(2) of the ER. These criteria are cumulative. Hence, regardless of the correct legal interpretation of Article 36(2) of the ER, the Contested Decision had to motivate ACER’s amendments to ENTSO-E’s SOR Proposal on their compliance with both Article 36(1) and Article 36(2) of the ER.
79. The Board of Appeal finds, therefore, that Article 36(1) of the ER required the Contested Decision to reason in which way its definitions of SORs took account of the grid topology, including the degree of interconnection and the interdependency in terms of flows, and the size of the region, being at least a CCR (Article 36(1) ER).
80. In its Contested Decision, ACER explains the reasons for its amendments to the proposed SWE SOR and GRIT SOR from a perspective of compliance with Article 36(2) of the ER in a clear and unequivocal manner.
81. The Contested Decision explains, on the one hand, that ENTSO-E’s SOR Proposal would require the French TSO Réseau de Transport d’Electricité (‘RTE’) to participate in two RCCs (the RCC for the CE SOR and the RCC for SWE SOR), even though RTE’s control area is part of a single SA (Continental Europe SA)<sup>37</sup> and that *“the Agency considers that the participation of the French TSO in two SORs would be contrary to the wording of Article 36(2) of the Electricity Regulation”*<sup>38</sup>. It states that *“for this reason, the Agency*

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<sup>37</sup> Para 52 of the Contested Decision.

<sup>38</sup> Para 53 of the Contested Decision.

*defines an alternative CE SOR configuration in this regard, i.e. inclusive of the TSOs in the Iberian Peninsula and of the France-Spain bidding zone border*”<sup>39</sup>.

82. The Contested Decision explains, on the other hand, that ENTSO-E’s SOR Proposal would require the Italian TSO Terna to participate in two RCCs (the RCC for the CE SOR and the RCC for the GRIT SOR) even though Terna’s control area is part of a single SA (Continental Europe SA)<sup>40</sup> and that *“the Agency considers that the participation of the Italian TSO in two SORs would be contrary to the wording of Article 36(2) of the Electricity Regulation”*<sup>41</sup>. It states that *“for this reason, and following the AEWG’s advice, the Agency included Terna only in the CE SOR, confirming the integration of the bidding zoned borders of the IT NORD CCR in the CE SOR and removed GRIT SOR as originally proposed by ENTSO-E”*<sup>42</sup>.
83. Consequently, the Board of Appeal finds that the Contested Decision contains clear and unequivocal reasoning on the compliance of ACER’s amendments to the proposed SWE SOR and GRIT SOR with Article 36(2) of the ER, irrespective of the issue of the correctness of this reasoning, on which it is not necessary for the Board of Appeal to take a position in the present decision.
84. However, the Contested Decision does not explain in a clear and unequivocal manner how the amendments to the proposed SWE SOR and GRIT SOR comply with Article 36(1) of the ER.
85. Fourth, the Board of Appeal considers that the Appeal demonstrates that it was manifestly impossible for the Appellant to understand in a clear and unequivocal fashion the underlying reasoning of the Contested Decision on the merger of ENTSO-E’s proposed SWE SOR with CE SOR and the rejection of ENTSO-E’s proposed GRIT SOR.
86. The Board of Appeal considers that it would be wrong to hold that it was not necessary for the Agency to motivate its amendments to ENTSO-E’s SOR Proposal on their compliance with Article 36(1) of the ER because of the fact that these amendments were exclusively aimed at remedying an alleged lack of compliance with Article 36(2) of the ER.
87. The Board of Appeal also considers that the correctness or incorrectness of the Agency’s interpretation of Articles 36(1) and 36(2) of the ER does not exempt the Agency from its duty to duly motivate compliance with both sets of criteria in the text of the Contested Decision.

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<sup>39</sup> Para 54 of the Contested Decision.

<sup>40</sup> Paras 59-60 of the Contested Decision.

<sup>41</sup> Para 61 of the Contested Decision.

<sup>42</sup> Para 62 of the Contested Decision.

88. In effect, a mere reasoning that the definitions of SORs of the Contested Decision comply with Article 36(2) of the ER is not sufficient. Compliance with Article 36(2) of the ER does not automatically imply compliance with Article 36(1) of the ER. It is possible that definitions of SORs comply with Article 36(2) of the ER without sufficiently taking account of grid topology, including the degree of interconnection and the interdependency in terms of flows, and/or of the size of the regions.
89. Hence, a clear and unequivocal reasoning on the amendments' compliance with Article 36(1) of the ER was needed in the Contested Decision<sup>43</sup>.
90. The Board of Appeal concludes that the Agency failed to adequately state the reasons of the merger of ENTSO-E's proposed SWE SOR with CE SOR and the rejection of ENTSO-E's proposed GRIT SOR in its Contested Decision.
91. The lack of such clear and unequivocal reasoning on the compliance of ACER's amendments to the proposed SWE SOR and GRIT SOR with Article 36(1) of the ER in the Contested Decision amounts to an infringement of ACER's duty to duly reason its decisions foreseen in Article 14(7) of the ACER Regulation, Article 296 TFEU and the general principles of EU Law, including Article 41(2)(c) of the Charter.
92. It follows that the Fourth Plea of the Appeal must be upheld as founded. The Contested Decision must therefore be remitted to the Agency to ensure compliance with these findings.

#### *First Plea, Second Plea and Third Plea*

93. Due to the Contested Decision's failure to duly state the reasons of the decision reached by ACER, the Board of Appeal lacks the elements to rule conclusively on the pleas relating to the substance of the case, i.e. on the First Plea, regarding a manifest error of assessment in applying Article 36 of the ER, on the Second Plea, regarding an infringement of the principle of proportionality, and on the Third Plea, regarding infringements of Article 36 of the ER.

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<sup>43</sup> The Board of Appeal notes, for fullness, that this lack of motivation is neither satisfyingly remedied by the Defence (paras 69-98) nor by the Rejoinder (paras 39-45).

### *Fifth Plea – Failure to Consult*

94. In the Fifth Plea of the Appeal<sup>44</sup>, which is of purely procedural nature, the Appellant claims that the Agency failed to consult in an appropriate and timely fashion<sup>45</sup> and consequently breached the principle of good administration or duty of care, which is imposed on EU Agencies by Article 41 of the Charter, Article 11(1) and (2) of the Treaty on the European Union (TEU)<sup>46</sup> and Article 296(2) of the TFEU and “*includes a duty to act in good faith, to give consideration and attention to all the arguments presented and to the task in hand*”<sup>47</sup>.
95. The Appellant claims<sup>48</sup>, in particular, that the Agency did not raise the issue of compliance with Article 36(2) of the ER and the corresponding need to enlarge CE SOR in its response to ENTSO-E’s consultation of 20 November 2019<sup>49</sup> and that it was only in its Note on the Legal Framework for the Definition of SORs of 29 January 2020<sup>50</sup> that it addressed the issue for the first time. According to the Appellant, the introduction of a fundamental change at such a late stage in the process deprived it of the opportunity to provide a comprehensive assessment of its implications and to show ACER that this change would infringe the ER and be less efficient<sup>51</sup>.
96. The Defendant responds in its Defence<sup>52</sup> that ACER consulted in an appropriate and timely fashion. It claims that it indicated incipient concerns on ENTSO-E’s SOR Proposal’s compliance with Article 36(2) of the ER concisely in its response to ENTSO’s consultation of 20 November 2019 and extensively in its Note on the Legal Framework for the Definition of SORs of 29 January 2020 and thereafter.
97. As a preliminary remark, the Board of Appeal observes that there is an overlap between the Fifth and the Fourth Plea, given that the Appellant reiterates the Defendant’s duty to state reasons according to Article 296(2) of the TFEU. The Board of Appeal therefore refers to its decision on the Fourth Plea above as regards the Appellant’s reiterated allegation concerning a failure to state reasons.

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<sup>44</sup> Paras 184-191 of the Appeal. Paras 100-106 of the Reply.

<sup>45</sup> Para 191 of the Appeal.

<sup>46</sup> Article 11 of the TEU contains democratic principles, according to which “1. *The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.*” and “2. *The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.*”

<sup>47</sup> Para 184 of the Appeal.

<sup>48</sup> Paras 15, 30 and 184-189 of the Appeal.

<sup>49</sup> Annex 5 to the Appeal.

<sup>50</sup> Annex 8 to the Appeal.

<sup>51</sup> Para 190 of the Appeal.

<sup>52</sup> Paras 126-137 of the Defence. Paras 54-60 of the Rejoinder.

98. The Board of Appeal acknowledges that the Defendant has a duty to consult. Article 14 of the ACER Regulation, entitled “*Consultations, transparency and procedural safeguards*” provides that “(6) *Before taking any individual decision as provided for in this Regulation, ACER shall inform any party concerned of its intention to adopt that decision, and shall set a time limit within which the party concerned may express its views on the matter, taking full account of the urgency, complexity and potential consequences of the matter.*”
99. Furthermore, in line with its earlier decision-making practice<sup>53</sup> and as set out above in the Fourth Plea, 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 - in particular Article 41 of the Charter establishing the right to good administration - and the principles of transparency and good administration contained in Article 15 of the TFEU. 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>54</sup>.
100. As already set out above regarding the Fourth Plea, 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>55</sup>.
101. The Board of Appeal finds that the Appellant’s claim that ENTSO-E was not adequately and timely consulted is unfounded and factually inaccurate.
102. The Board observes, first of all, that the Appellant does not challenge the fact that the Agency held multiple consultations with the TSOs, the NRAs and ENTSO-E. These consultations are set out in the facts of the Contested Decision, more particularly paras 7-9 and 14-25 of the Contested Decision, as well as Annexes 7-10 to the Appeal and Annexes 6-9 and 16-20 to the Defence, which evidence a lengthy dialogue between the Agency and

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<sup>53</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; A-001-2020, paras 250-262 and A-002-2020, paras 251-263.

<sup>54</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>55</sup> Board of Appeal Decision A-001-2017, para 124; A-001-2020, para 253 and A-002-2020 para 254.

ENTSO-E, with an in-depth analysis of the issue challenged by the present appeal, i.e. the correct interpretation of Article 36 of the ER.

103. Second, the Board of Appeal recalls that regional coordination of electricity system operation foreseen by the ER is a gradual, bottom-up process, in which, at different points in time, various stakeholders - in essence ENTSO-E, the TSOs and the NRAs - are required to take formal steps to attain certain milestones set by the ER. This step-wise process distinguishes between, on the one hand, ENTSO-E's public consultation, mandated by Article 31 of the ER during the preparation of ENTSO-E's SOR Proposal and, on the other hand, ACER's public consultation if it intends to make amendments to ENTSO-E's SOR Proposal, mandated by Article 36(3) of the ER.

104. The Appellant claims that the Agency did not raise the issue of compliance with Article 36(2) of the ER in its response to ENTSO-E's consultation of 20 November 2019. The Board of Appeal notes that, in the ER's bottom-up process, ENTSO-E's consultation was a part of ENTSO-E's function to prepare a SOR Proposal in accordance with Article 30(1)(f) and 36(1) of the ER. At that moment in time, the process essentially required an active, in-depth involvement of ENTSO-E, which would only be shifted to ACER upon submission of ENTSO-E's SOR Proposal to ACER. A relatively lesser in-depth involvement of ACER up until receipt of ENTSO-E's SOR Proposal is therefore in accordance with ER's decision-making process. In addition, the Board of Appeal considers that the Agency's response of 20 November 2019 indicated concerns on its compliance with Article 36(2) ER, even though they were not extensively elaborated upon<sup>56</sup>: "*ACER: It should be mentioned that provisions concerning RCCs as specified in Article 36(2) were taken into account.*"<sup>57</sup>; "*ACER: Please clarify the interpretation of Article 36(2) second sentence.*"<sup>58</sup>; "*Contrary to what the title of the section suggests, there is almost a complete absence of legal references in this section paving the way to potential misinterpretations as evidenced in the comments below*"<sup>59</sup>; "*Where are "large regions" mentioned in the recast El. Regul. Article 36.2 thereof speaks of Continental Europe synchronous area only.*"<sup>60</sup>; "*This is inaccurate; 36(2) states that TSOs (in exceptional circumstances) may participate in two RCCs*"<sup>61</sup>; and "*Where is this criteria assessed/used in the explanatory*

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<sup>56</sup> See also para 35 of the Defence.

<sup>57</sup> P. 247 of Annex 5 to the Appeal.

<sup>58</sup> P. 248 of Annex 5 to the Appeal.

<sup>59</sup> P. 265 of Annex 5 to the Appeal.

<sup>60</sup> P. 265 of Annex 5 to the Appeal.

<sup>61</sup> P. 265 of Annex 5 to the Appeal.

*document? A coherent structure assessing each element and the proposal as a whole against these and Article 36 criteria is missing”)*<sup>62</sup>.

105. Regardless of these preliminary concerns on the compliance of ENTSO-E’s SOR Proposal with Article 36(2) of the ER, as of the moment when the Agency became competent to take the Contested Decision, the issue of compliance with Article 36(2) of the ER has been at the heart of the discussions between the Defendant and the Appellant. When the Agency became competent to take the Contested Decision on 6 January 2020, it launched another public consultation on the same day till 19 January 2020 and also closely collaborated with the NRAs, TSOs and ENTSO-E in parallel to this public consultation. As early as 14 January 2020, the Agency enquired about Article 36(2) of the ER in a telephone conversation with the European Commission, the Danish NRA and the Danish TSO Energinet<sup>63</sup>. On 20 January 2020, the Agency discussed the interpretation of Article 36(2) of the ER in a telephone conversation with NRAs and TSOs from South West CCR<sup>64</sup>. On 21 January 2020, the Agency discussed the issue in a telephone conversation with ENTSO-E and all NRAs<sup>65</sup>. On 22 January 2020, the Agency discussed the issue with the Italian NRA and the Italian TSO Terna<sup>66</sup>. The issue was also extensively debated in ACER’s special working group, AEWG, which duly involved all NRAs, the European Commission and the EFTA Surveillance Authority in the discussions.

106. Third, in order to ensure clarity on its legal interpretation of Article 36(2) of the ER, the Agency provided ENTSO-E and the NRAs on 29 January 2020 with a Note on the Legal Framework for the Definition of SORs, fully dedicated to the issue<sup>67</sup>. Pursuant to this note, discussions on the definitions of SORs essentially related to ENTSO-E’s SOR Proposal’s compliance with Article 36(2) of the ER. The Appellant was extensively consulted, repeatedly exercised its rights and presented its views to the Agency on this subject. ENTSO-E submitted a Position Paper to ACER on 19 February 2020<sup>68</sup> and was given the opportunity to present the views of its Position Paper in a telephone call on 20 February 2020<sup>69</sup>. Taking account of the fact that the Agency’s three-month period to take a decision under Article 36(3) of the ER lasted from 6 January until 6 April 2020, 29 January 2020 is not excessively late in the process to initiate an in-depth debate on the legal

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<sup>62</sup> P. 266 of Annex 5 to the Appeal.

<sup>63</sup> Paras 37-38 of the Defence.

<sup>64</sup> Para 39 of the Defence.

<sup>65</sup> Para 39 of the Defence.

<sup>66</sup> Para 39 of the Defence.

<sup>67</sup> Annex 8 to the Appeal.

<sup>68</sup> Annex 9 to the Appeal.

<sup>69</sup> Para 20 of the Contested Decision. Para 41 of the Defence.

issue raised by Article 36(2) of the ER and the corollary enlargement of the CE SOR. But even if one were to consider that ACER's involvement on the issue occurred at a very late stage in the decision-making process, *quod non*, nothing impeded the Appellant to informally consult and informally share drafts of its SOR Proposal with the Agency prior to ENTSO-E's consultation, in particular given the fact that this is a well-established practice<sup>70</sup>. However, the Appellant acknowledges that it did not informally involve the Agency prior to its consultation<sup>71</sup> in spite of the latter's repeated requests<sup>72</sup>, which demonstrates the Agency's spirit of cooperation in good faith.

107. Finally, due to the Agency's three-month deadline to take a decision, expiring on 6 April 2020, the Agency could not prolong its debate with ENTSO-E on the issue of compliance with Article 36(2) of the ER any further, as this would have jeopardised its ability to take the Contested Decision within the delay<sup>73</sup>. Indeed, 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. The Board of Appeal observes that the Agency adopted the Contested Decision on the last day of its three-month deadline to take a decision, i.e. on 6 April 2020.

108. The Board of Appeal consequently finds that the Agency did not breach the principle of good administration beyond its findings on the Fourth Plea.

109. It follows that the Fifth Plea of the Appeal must be dismissed as unfounded

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<sup>70</sup> Para 34 of the Defence. This practice follows the rationale of Article 32 of the ER, entitled "*monitoring by ACER*", which requires ENTSO-E in 32(2) to submit information regarding the consultation process, and the other documents referred to in Article 30(1) to ACER for its opinion.

<sup>71</sup> Para 5 of the Contested Decision. Para 34 of the Defence. Para 75 of the Reply. Paras 56-57 of the Rejoinder.

<sup>72</sup> Annex 2 to the Defence (Point 3.2 of the Minutes of the SO CG Meeting of 28 November 2018) and Annex 4 to the Defence (invitation to ACER/ENTSO-E conference call of 3 October 2019).

<sup>73</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 competences in this regard, it is just as much the Director's and the 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.*" See also, A-001-2020, para 207; and A-002-2020, para 208.

DECISION

On those grounds,

THE BOARD OF APPEAL

Hereby remits the case to the Director of the Agency.

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

SIGNED



Andris Piebalgs

Chairperson of the Board of Appeal

SIGNED



Ronja Linßen

Acting Registrar of the Board of Appeal