

**DECISION**

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

**of 29 June 2023**

- Case number:** A-007-2022
- Language of the case:** English
- Appellant:** *Swissgrid AG* (“Swissgrid” or “the Appellant”)  
Represented by: P. DE BAERE, P. L’ECLUSE, V. LEFEVER, K. T’SYEN and V. ION (Van Bael & Bellis srl/bv)
- Defendant:** *European Union Agency for the Cooperation of Energy Regulators*  
 (“ACER” or “the Defendant”)  
Represented by: C. ZINGLERSEN and its legal representative B. CREVE (Kromann Reumert)
- Application for:** Remittal to the competent body of ACER of Decision No 14/2022 of the European Union Agency for the Cooperation of Energy Regulators of 30 September 2022 on the Amendment to the Implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with manual activation, insofar as it amends Article 2(1)(o) of the Implementation framework for the European platform for the exchange of balancing energy from frequency restoration reserves with manual activation as approved by ACER Decision No 03/2020 of 24 January 2020.<sup>1</sup>
- Board composition:** A. BIONDI (Rapporteur), M. SUPPONEN (Technical Rapporteur), K. WIDEGREN, K. SARDI, P.EECKHOUT and M. PREK (Chair)

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

**HAS ADOPTED THIS DECISION:**

***I. Procedural steps following the adoption of the Contested Decision***

1. On 30 September 2022, ACER adopted Decision No 14/2022<sup>2</sup> (hereinafter “the Contested Decision”) on the Amendment to the Implementation framework for a

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<sup>1</sup> Decision No 03/2020 of the European Union Agency for the Cooperation of Energy Regulators of 24 January 2020 on the Implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with manual activation.

<sup>2</sup> Decision No 14/2022 of the European Union Agency for the Cooperation of Energy Regulators of 30 September 2022 on the Amendment to the Implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with manual activation.

European platform for the exchange of balancing energy from frequency restoration reserves with manual activation.

2. On 30 November 2022, the Appellant lodged an appeal with the Registry of the Board of Appeal (hereinafter “the Registry”) against the Contested Decision, requesting the Board of Appeal (hereinafter “the BoA”) to remit the case to the competent body of ACER for the adoption of a new decision.
3. On 16 December 2022, an announcement of appeal was published on the ACER’s website<sup>3</sup> and the Notice of Appeal was served to the Defendant.
4. On 22 December 2022, the parties were notified of the composition of the BoA hearing the appeal case.
5. On 19 January 2023, ACER submitted its Defence requesting the BoA to dismiss the appeal.
6. On 7 February 2023, the Registry acknowledged receipt of the Appellant’s request of 3 February 2023 for leave to submit a reply to ACER’s Defence.
7. On 7 February 2023, the Registry notified a request by the Chair to the Appellant in accordance with Article 20 of the Rules of Organisation and Procedure of the Board of Appeal<sup>4</sup> (hereinafter “the BoA Rules of Organization and Procedure”), inviting the Appellant to provide its views on the consequences of the order of the General Court of the European Union of 21 December 2022, *Swissgrid AG v European Commission* (T-127/21, EU: T: 2022:868) (hereinafter the “GCEU Order”, currently under appeal), if any, on the present case, by 28 February 2023.
8. On 10 February 2023, the Appellant requested an extension of the time-limit to address the procedural measure until 14 March 2023. On 14 February 2023, an extension of the time-limit until 14 March 2023 was granted to the Appellant, by way of exception, considering the justifications provided and without this constituting a precedent to be relied upon for future cases.
9. On 14 March 2023, the Appellant submitted its Observations in response to the Chair’s request of 7 February 2023.
10. On 12 April 2023, the parties were summoned to attend the oral hearing to be held on 10 May 2023.
11. Organisational requirements compelled the BoA to reschedule the oral hearing to 5 May 2023.
12. On 21 April, the parties were summoned to attend the rescheduled oral hearing of 5 May 2023.
13. On 24 April 2023, the announcement of the hearing was published on ACER’s website<sup>5</sup>.
14. On 5 May 2023, the oral hearing took place. Upon the Appellant’s request in its Notice of Appeal, witnesses were heard at the oral hearing.

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<sup>3</sup> [https://www.acer.europa.eu/sites/default/files/documents/en/The\\_agency/Organisation/Board\\_of\\_Appeal/Announcements%20of%20Appeal/A-007-2022-SwissgridIvACER-AnnouncementofAppeal.pdf](https://www.acer.europa.eu/sites/default/files/documents/en/The_agency/Organisation/Board_of_Appeal/Announcements%20of%20Appeal/A-007-2022-SwissgridIvACER-AnnouncementofAppeal.pdf).

<sup>4</sup> Decision BoA No1-2011 laying down the rules of organisation and procedure of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators, as amended last on 5 October 2019.

<sup>5</sup> [https://extranet.acer.europa.eu/en/The\\_agency/Organisation/Board\\_of\\_Appeal/Announcements%20of%20Appeal/A-001-2022%20-%20PSE%20v%20ACER%20-%20Announcement%20-%20hearing.pdf](https://extranet.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Announcements%20of%20Appeal/A-001-2022%20-%20PSE%20v%20ACER%20-%20Announcement%20-%20hearing.pdf).

## **II. Forms of order sought by the Parties**

15. In its Notice of Appeal, the Appellant requests the BoA to declare the appeal admissible and well-founded and to find that the following provisions of the Contested Decision are illegal and, therefore, to remit them to the competent body of ACER: the part of Article 1(b) of Annex I to the Contested Decision that amends the definition of “member TSO” (formerly Article 2(1)(o) of Annex I to ACER Decision No 03/2020); recital 141 of the Contested Decision, to the extent it refers to amending the definition of “member TSO” in Article 1(b) of Annex I to the Contested Decision (formerly Article 2(1)(o) of Annex I to ACER Decision No 03/2020); and any other recital of the Contested Decision referring to the amendment to the definition of “member TSO”.
16. The Appellant also requests the BoA to provide to the competent body of ACER sufficient reasoning, direction and explanation as to the correct application and interpretation of the relevant provisions of the applicable legislation to enable it to issue a new and valid decision.
17. The Defendant requests the BoA to dismiss the appeal in its entirety as unfounded.

## **III. Pleas in law**

18. The Appellant challenges the Contested Decision insofar as it amends Article 2(1)(o) of the Implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with manual activation (hereinafter “mFRRIF”) as adopted by ACER Decision No 03/2020 of 24 January 2020.
19. The Appellant sets out six pleas on the basis of which it contests the relevant elements of the Contested Decision.
20. In its first plea, the Appellant alleges that the Contested Decision infringes Article 5(6) of 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 (hereinafter the “ACER Regulation”)<sup>6</sup> and Article 5(1) of Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing<sup>7</sup> (hereinafter the ‘EB Regulation’). In particular:
  - (a) the Appellant claims that the Defendant lacks the competence to approve an amendment to the definition of “member TSO” in the mFRRIF in the absence of a proposal from the TSOs to this effect;
  - (b) the Appellant claims that the Defendant unlawfully exercised its power to revise All TSOs’ proposals of 31 March 2022 for amendments to the mFRRIF (hereinafter “all TSOs’ proposals”), because it failed to consider whether introducing an amendment to the definition of “member TSO” meets the standard of necessity imposed by Article 5(6) of the ACER Regulation and Article 5(1) of the EB Regulation; and
  - (c) the Appellant claims that the Defendant acted outside its competence to “revise” by supplementing all TSOs with an element that is not related to the subject-matter of all TSOs’ proposals.
21. In its second plea, the Appellant claims that the Contested Decision is vitiated by the Defendant’s failure to afford the Appellant the right to be heard pursuant to Article 14(6)

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<sup>6</sup> OJ L 158, 14.6.2019, p. 22.

<sup>7</sup> OJ L 312, 28.11.2017, p. 6.

of the ACER Regulation and Article 41(2)(a) of the Charter of Fundamental Rights of the European Union<sup>8</sup> (hereinafter “Charter of Fundamental Rights”).

22. In its third plea, the Appellant alleges that the Contested Decision infringes Article 1(6) and Article 1(7) of the EB Regulation, as the Defendant lacks the substantive competence to adopt or amend the mFRRIF in a manner that causes the non-participation of the Appellant (Switzerland) in the platform for the exchange of balancing energy from frequency restoration reserves with manual activation (hereinafter the “mFRR Platform”).
23. In its fourth plea, the Appellant claims that the Contested Decision is vitiated by the Defendant’s failure to observe the principle of sound administration enshrined in Article 41 of the Charter of Fundamental Rights when taking steps to exclude the Appellant (Switzerland) from participating in the mFRR Platform without due regard to the action brought on 26 February 2021, which at that time was pending before the General Court of the European Union in the GCEU order.
24. In its fifth plea, the Appellant alleges that the Contested Decision infringes Article 14(7) of the ACER Regulation, Article 296 of the Treaty on the Functioning of the European Union<sup>9</sup> (hereinafter “TFEU”), and Article 41(2)(c) of the Charter of Fundamental Rights by failing to provide an adequate statement of reasons.
25. In its sixth plea, the Appellant claims that the Contested Decision contravenes the principle of protection of legitimate expectations, as it constitutes the retroactive withdrawal of a measure, which had conferred individual rights or similar benefits on the Appellant.

#### **IV. Admissibility**

26. The BoA needs to examine *ex officio* whether an appeal is admissible *ratione temporis*, *ratione personae* and *ratione materiae* in accordance with Article 28 (1) and (2) of the ACER Regulation.
27. Admissibility *ratione personae* is regulated by Article 28(1) of the ACER Regulation, which provides that “any 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”.
28. Furthermore, Article 15(1) of the BoA Rules of Organization and Procedure provides that “[T]he grounds on which an appeal shall be ruled inadmissible shall include the following: [...] (d) the appellant is neither an addressee of the decision contested by the appeal nor able to establish direct and individual concern according to Article 28(1) of Regulation (EU) 2019/942”.
29. As regards admissibility *ratione materiae*, Article 28(2) of the ACER Regulation provides that the appeal shall include a statement of the grounds for appeal and that it is for the BoA to decide upon the appeal.
30. Article 2 of the Contested Decision establishes that the addressees of the same Decision are all the EU TSOs. The Contested Decision is not addressed to the Appellant.

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<sup>8</sup> OJ C 326, 26.10.2012, p. 391.

<sup>9</sup> OJ C 326/47, 26.10.2012, p. 47.

31. The question to examine is, therefore, whether the Appellant is both directly and individually concerned within the meaning of Article 28(1) of the ACER Regulation and whether the appeal is admissible.

*Arguments of the Parties*

32. The Appellant alleges that the appeal against the Contested Decision is admissible because, in its opinion, the Contested Decision is an individual decision within the meaning of Article 2(d) of the ACER Regulation and is of direct and individual concern to the Appellant within the meaning of Article 28(1) of the ACER Regulation. In the Appellant's view, the Appellant is directly and individually concerned by the Contested Decision because of the following: (i) the Contested Decision directly affects the legal situation of the Appellant through the amendment of the definition of "member TSO", excluding the Appellant from membership and from participating in the mFRR Platform; (ii) the Contested Decision applies automatically without leaving any discretion to the addressee TSOs with respect to the Appellant's loss of membership; and (iii) the Contested Decision is of individual concern to the Appellant given that the novel condition for membership of the mFRR Platform is satisfied by all member TSOs except for the Appellant, by virtue of its place of establishment.
33. The Defendant argues that the appeal should be declared inadmissible. Its main argument relies on the GCEU Order. In more details, the case was brought by the Appellant against a European Commission letter of 17 December 2020 that contained the European Commission's position on the possible participation of the Appellant in another energy balancing platform, the RR Platform (Terre). The European Commission maintained that participation was dependent on a specific decision of the European Commission itself on whether the criteria listed in Article 1(6) and (7) of the EB Regulation had been satisfied.
34. The above-mentioned provisions of the EB Regulation are hereby reproduced: Article 1(6) of the EB Regulation: *"The European platforms for the exchange of standard products for balancing energy may be opened to TSOs operating in Switzerland on the condition that its national law implements the main provisions of Union electricity market legislation and that there is an intergovernmental agreement on electricity cooperation between the Union and Switzerland, or if the exclusion of Switzerland may lead to unscheduled physical power flows via Switzerland endangering the system security of the region"*. Article 1(7) of the EB Regulation: *"Subject to the conditions of paragraph 6, the participation of Switzerland in the European platforms for the exchange of standard products for balancing energy shall be decided by the Commission based on an opinion given by the Agency and all TSOs. The rights and responsibilities of Swiss TSOs shall be consistent with the rights and responsibilities of TSOs operating in the Union, allowing for a smooth functioning of balancing market at Union level and a level-playing field for all stakeholders"*.
35. According to the European Commission *"for as long as no such decision is adopted, Switzerland may not participate. No such decision was adopted by the Commission"* (Commission letter of 17 December 2020).
36. The Appellant challenged the lawfulness of the European Commission letter before the General Court. In the GCEU Order, the General Court held that the European Commission letter could not be classified as an act capable of having legal effects, and therefore, the action for annulment under Article 263 of the TFEU had to be held inadmissible. The General Court further specified that under Article 1(7) of the EB

Regulation, the European Commission is still entitled to refuse that participation, even if the conditions of Article 1(6) of that Regulation, which justify such authorisation, were to be satisfied (at paragraph 25). Therefore, compliance with the two conditions of Article 1(6) of the EB Regulation merely enables the European Commission to adopt a position on the question whether such participation should be authorised, but does not impose on it to authorise that participation. According to the General Court “*the adoption of a decision authorising Switzerland and, therefore, the TSOs established there to participate in European balancing platforms depends solely on the choice made by the Commission, which has a discretion in that regard*” (paragraph 29).

37. According to the Defendant, the GCEU Order unequivocally confirms that the participation of a Swiss TSO, such as the Appellant, in a European platform for the exchange of standard products for balancing energy, such as the mFRR Platform, is only possible if the European Commission first authorises Switzerland and thereby the Swiss TSO to participate in the platform. Consequently, if the authorization is missing, then membership to the mFRR Platform is barred to the Appellant as a third country TSO.
38. Therefore, according to the Defendant, the Appeal is inadmissible *ratione personae*, because the Appellant has not established direct and individual concern in accordance with Article 28(1) of the ACER Regulation and Article 15(1) of the BoA Rules of Organization and Procedure.
39. In the Defendant’s opinion, the Appellant is not directly concerned by the Contested Decision because that decision does not affect the legal situation of the Appellant regarding the Platform concerned. The Defendant claims that, since the entry into force of the EB Regulation on 18 December 2017, the Appellant’s legal situation is determined by Article 1 of the EB Regulation; the latter only allows the Appellant to participate in the mFRR Platform upon prior authorisation of the European Commission and such prior authorisation has not been granted.
40. The Defendant also claims that the Appellant is not individually concerned by the Contested Decision, because that decision only affects TSOs to which the EB Regulation applies, i.e. EU TSOs, whereas the Appellant is a non-EU TSO. The Defendant adds that the Appellant is, in its view, not treated differently from other non-EU TSOs as regards the definition of “member TSO” of the Contested Decision. Finally, the Defendant alleges that, even if successful, the appeal is not liable to procure any advantage for the Appellant.
41. In its Observations, pursuant to the BoA Chair’s procedural measure inviting the Appellant to provide its views on the consequences of the GCEU Order, the Appellant states that the GCEU Order has no implications on the admissibility of its appeal.
42. The Appellant introduces a differentiation between membership of the mFRR Platform, on the one hand, and participation to the mFRR Platform, on the other hand. In its opinion, a member TSO who physically connects to the mFRR Platform and uses the mFRR Platform (“*going live*” on the mFRR Platform) is a participating TSO. This implies, in its view, that a member TSO can either be a participating or “*live member*” on a platform or a non-participating member on a platform. In its view, the participation or non-participation of a member TSO depends on circumstances such as the security of the system, the existence of an intergovernmental agreement, etc. but does not affect the TSO’s membership of the platform. According to this interpretation, member TSOs can participate or not participate to a platform. This implies that (i) a participating TSO has to be a member TSO (only member TSOs can participate to or “*go live*” on a platform)

- and that (ii) a non-participating TSO can still be a member TSO of a platform.
43. The Appellant alleges that, according to the EB Regulation, any European Commission's decision by virtue of Article 1(7) EBR and the GCEU Order exclusively relate to the Appellant's participation and not to the Appellant's membership. In the Appellant's view, according to the EB Regulation, any European Commission's decision by virtue of Article 1(7) of the EB Regulation and the GCEU Order does not imply that the Appellant cannot be a member TSO of the mFRR Platform, but only that the Appellant cannot participate or "*go live*" on the mFRR Platform due to the absence of the European Commission's authorisation to participate to the platform.
  44. The Appellant alleges that the Contested Decision, by contrast, relates to the Appellant's membership of the mFRR Platform and not to the Appellant's participation to the mFRR Platform. In its view, the Contested Decision erroneously deprives the Appellant of its ability to be a member TSO of the mFRR Platform, whereas the EB Regulation, the European Commission's decision, the GCEU Order and ACER Decision No 03/2020 allow the Appellant's membership of the mFRR Platform. According to the Appellant, the European Commission's decision, confirmed by the GCEU Order, mainly and temporarily deprives the Appellant from its ability to participate in or "*go live*" on the mFRR Platform whilst allowing for the Appellant's membership. The Appellant therefore adduces that, by suppressing the Appellant's membership, the Defendant added a second, unlawful filter to the Appellant's inability to participate in the mFRR Platform, beyond the EB Regulation, the European Commission's decision and the GCEU Order.
  45. The Appellant considers that, if a future European Commission decision by virtue of Article 1(7) of the EB Regulation were to authorise the Appellant's participation due to a change in circumstances (e.g. security of the system), the suppression of the Appellant's ability to be a member TSO deriving from the Contested Decision would impede such participation. The Appellant adds that an amendment by the Defendant of the Contested Decision in order to ensure alignment with any such potential European Commission's authorisation would not be automatic but fully depend on the Defendant's discretion, given that neither the EB Regulation nor the ACER Regulation foresee a mechanism to oblige the Defendant to proceed with such amendment, considering that Article 1(7) of the EB Regulation only requires ACER's opinion on the European Commission's decision.
  46. In sum, the Appellant opines that the GCEU Order has no bearing on its claim that the Defendant should not have created a second, unlawful filter to the Appellant's participation to the mFRR Platform when adopting the Contested Decision, and that the Defendant should have maintained a neutral definition of "member TSO" as it had previously done in ACER Decision No 03/2020, which did not prejudge the Appellant's membership whilst allowing the European Commission to decide upon the Appellant's participation or non-participation in accordance with Article 1(7) of the EB Regulation.
  47. The Appellant concludes that the GCEU Order has no implications on its direct and individual interest in the appeal.
  48. The Appellant alleges that the GCEU Order, exclusively relating to the Appellant's participation in the mFRR Platform, does not affect its direct concern because of the following: (i) the Appellant retains a direct interest in the suppression of its membership of the mFRR Platform by the Contested Decision, adding a second, unlawful filter to its ability to participate to the mFRR Platform beyond the EB Regulation; and (ii) the Contested Decision affects the Appellant's contractual rights and commercial relations

with the EU, given that the Contested Decision's mFRRIF is incorporated in the TSOs' contractual framework agreement governing the mFRRIF.

49. It also alleges that the GCEU Order does not affect its individual concern because (i) the Appellant is in a unique position as it is the only non-EU TSO whose participation is foreseen by the EB Regulation and (ii) the Contested Decision's clarification of the definition of member TSO is exclusively directed to the Appellant and not to other non-EU TSOs.
50. Finally, the Appellant alleges that it maintains an interest in the appeal notwithstanding the GCEU Order, because it wishes to restore the definition of member TSO previously set out in ACER Decision No 03/2020, which did not add a second, unlawful filter to the Appellant's participation to the mFRR Platform.

#### *Assessment*

51. The analysis of admissibility of appeals needs to be carried out by the BoA in line with its duties and prerogatives "*in a manner which ensures respect for the principle of procedural economy, that is, the need to conclude proceedings swiftly so as to create legal certainty, while at the same time guaranteeing the effective protection of the rights of the parties and compliance with the panoply of the right to good administration*" (Decision of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators of 9 December 2022 in case A-002-2022, paragraph 31).
52. Further, in order to decide whether the Appeal is to be considered admissible, the case law on admissibility of actions for annulment against acts brought by natural or legal persons under Article 263 of the TFEU, must be used by the BoA as a compass when discharging its duties (BoA A-002-2022, cit. above, paragraph 35).
53. As such, the case law provides that an action lies only if the binding legal effects of the act challenged are capable of affecting the interests of the applicant by bringing about a distinct change in his or her legal position (judgment of the Court of 13 October 2011, *Deutsche Post AG and Federal Republic of Germany v European Commission*, C-463/10 P and C-475/10 P, EU: C: 2011:656, paragraph 37 and the case-law cited).
54. In order to determine if the above test is satisfied in the present case, it is necessary to conduct an initial analysis of the provisions of the EB Regulation, on which the Contested Decision is based.
55. Any EU legislative text must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part (judgment of the Court of 1 March 2016, *Kreis Warendorf and Osso*, C-443/14 and C-444/14, EU: C: 2016:127, paragraph 27 and judgement of the Court of 15 February 2023, *Austrian Power Grid AG and Others v ACER*, T-607/20, ECLI: EU: T: 2023:65, paragraph 39, currently under appeal) and to its wording (judgment of the Court of 1 December 2005, *Italian Republic v Commission of the European Communities*, C-301/03, EU: C: 2005:727, paragraphs 21 to 24).
56. The EB Regulation should therefore be examined by reference to its regulatory aim and framework.
57. The main aim of the EB Regulation, as confirmed in the *Austrian Power Grid AG and Others v ACER* judgement (cit. above, paragraphs 107 to 109), is to contribute to "*a fully functioning and interconnected internal energy market*" (Recital 1), by maintaining security of energy supply, increasing competitiveness and ensuring that all consumers



can purchase energy at affordable prices. Further, Article 3(1)(c) of the EB Regulation states that this Regulation aims, *inter alia*, at integrating balancing markets and promoting opportunities for trade in balancing services while contributing to operational security. These objectives need to be achieved through a process of harmonization, whereby the different actors (TSOs, power exchanges, regulators) to whom the EB Regulation applies, concur, within their respective prerogatives, in setting up a “*wide set of technical, operational and market rules to govern the functioning of electricity balancing markets*” (Recital 5).

58. The wording of the EB Regulation also clearly delimits its scope of application because, pursuant to Article 1(3), the EB Regulation applies to all transmission systems and interconnections in the EU. The only exception for participation in the European platforms for the exchange of standard products for balancing energy concerns TSOs operating in Switzerland, subject to the conditions listed in Article 1(6) and (7) of the same Regulation.
59. The BoA considers that the EB Regulation should also be inserted into its wider context. The EU regulatory process has gradually resulted in a complex EU legal regulatory framework composed of both primary legislation and “*various network codes established by means of Commission regulations*” (judgment of the Court of 2 September 2021, *European Commission v Federal Republic of Germany*, C-718/18, EU: C: 2021:662, paragraph 122 and BoA Decision of 29 April 2021, A-013-2021, paragraph 61).
60. The nature, extent, manner, and therefore the legal position, in which the Swiss TSOs can participate in the European balancing platform framework must therefore be determined with reference to the specific provisions laid down in the EB Regulation and read in the light of the context set out above (see by analogy judgment of the Court of 17 January 2023, C-632/20 P, *Kingdom of Spain v European Commission*, EU: C: 2023:28, paragraph 112).
61. As stated above at paragraph 58, the participation of Swiss TSOs is dependent on the content and procedure laid down in Article 1(6) and (7) of the EB Regulation. In the absence of any decision taken by the European Commission, the Contested Decision simply applies Article 1 of the EB Regulation and reflects the state and progress of the regulation of the EU’s energy balancing platforms market.
62. Therefore, the Appellant’s situation is not determined by the Contested Decision but by the EB Regulation and, consequently, by the European Commission’s authorisation, which does not yet exist. In other words, the possibility of participating in the mFRR Platform depends on the European Commission, not on the Defendant.
63. Further, the Appellant maintains that it used to be a member of the mFRR platform under ACER Decision No 03/2020 up until the Contested Decision was adopted and that this loss of position from member to non-member status constitutes the basis of its direct and individual concern.
64. Contrary to the Appellant’s arguments, however, there was no change in its legal status brought about by the Contested Decision. The Appellant has never been admitted by the Defendant as a member TSO to the mFRR Platform.
65. Article 2 of ACER Decision No 03/2020 was addressed to all TSOs listed as: “50Hertz Transmission GmbH, Amprion GmbH, AS Augstsprieguma tĳkls, Austrian Power Grid AG, BritNed Development Limited (NL), BritNed Development Limited (UK), C.N.T.E.E. Transelectrica S.A., ĆEPS a.s. Creos Luxembourg S.A., EirGrid

Interconnector DAC, EirGrid plc, Elektroenergien Systemen Operator EAD, Elering AS, ELES, d.o.o., Elia System Operator SA, Elia System Operator NV/SA, Energinet Electricity System Operator, Fingrid Oyj, HOPS d.o.o., Hrvatski operator prijenosnog sustava, Independent Power Transmission Operator S.A., Kraftnät Åland Ab, Litgrid ABMAVIR ZRt, Moyle Interconnector Limited, National Grid Electricity Interconnector Limited, National Grid Electricity System Operator, Nemo Link Limited, Polskie Sieci Elektroenergetyczne, Red Eléctrica de España S.A., Rede Eléctrica Nacional, S.A., Réseau de Transport d'Electricité, Slovenská elektrizačná prenosová sústava, a.s., Svenska kraftnät, System Operator for Northern Ireland Ltd, TenneT TSO B.V., TenneT TSO GmbH, Terna Rete Elettrica Nazionale S.p.A., TransnetBW GmbH and VÜEN-Vorarlberger Übertragungsnetz GmbH".

66. Swissgrid was not one of the afore listed addressees. Following the amendments introduced by the Contested Decision, it cannot be then maintained that the Appellant could by consequence lose its membership of the mFRR Platform. If this were the case, its direct and individual concern could have been established.
67. Finally, the EB Regulation has been applicable since 18 December 2017 and Article 1 has not been amended since its entry into force. It follows that under the previous ACER Decision No 03/2020, the Appellant was in exactly the same position as it is currently and also needed an express authorisation from the European Commission.
68. It follows that the Contested Decision cannot be considered an act capable of affecting the interests of the Appellant by bringing about a distinct change in its legal position. As this requirement overlaps with the locus standi criteria, there is no further need to examine whether the Appellant is directly and individually concerned by the Contested Decision (order of the Court of 15 April 2021, C-622/20 P, *Validity Foundation and Center for Independent Living Association v European Commission*, EU: C: 2021:310, paragraph 39).

## **V. Conclusion**

For the above reasons, pursuant to Article 28(5) of the ACER Regulation, the Board of Appeal hereby declares the appeal inadmissible. Given that the appeal is declared inadmissible, there is no need to examine its substance.

Done at Ljubljana, 29 June 2023

*For the Registry*  
*The Registrar*  
S. VAONA

*For the Board of Appeal*  
*The Chairperson*  
M. PREK