

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

22 December 2020

*(Application for annulment – ACER Decision No. 13/2020 – competence of ACER –
proportionality – Charter of Fundamental Rights of the EU – access to documents)*

Case number	A-008-2020
Language of the case	English
Appellant	<i>Réseau de Transport d'Électricité</i> ('the Appellant') Represented by: Matthew LEVITT (Baker Botts (Belgium) LLP), legal representative
Defendant	<i>European Union Agency for the Cooperation of Energy Regulators</i> (‘the Defendant’, ‘the Agency’ or ‘ACER’) Represented by: Christian ZINGLERSEN, Director of ACER, and Christophe GENCE-CREUX, Athina TELLIDOU and Ernst TREMMEL, Agents of ACER.
Application for	The revision or annulment of Decision No. 13/2020 of the European Union Agency for the Cooperation of Energy Regulators of 24 June 2020 on the Implementation framework for a European platform for the imbalance netting process (‘Decision No. 13/2020’ or ‘the Contested Decision’). Access to certain documentation.

THE BOARD OF APPEAL

composed of Andris PIEBALGS (Chair), Michael THOMADAKIS (Rapporteur), Walter BOLTZ, Yvonne FREDRIKSSON, Jean-Yves OLLIER, Marius SWORA (Members).

Acting Registrar: Ronja LINßEN

gives the following

DECISION

I. Background

Legal background

1. In a power system, demand should be equal to supply at all times or, in other terms, the system frequency must be maintained close to its nominal value. Each transmission system operator ('TSO') has to carry out a real-time balance to avoid any frequency deviation, capable of triggering a system collapse or blackout. Electricity balancing is needed because, after careful planning, producers, suppliers and traders may often find themselves out of balance and exposed to TSOs balancing and settlement regime.
2. Balancing energy (the adjustment of balancing resources to maintain the system balance) is provided by Balancing Service Providers (BSPs) and can be provided either in real-time or secured in advance as balancing reserve products, i.e. available generation or demand capacity that can be activated to inject or withdraw balancing energy into or from the network and balance the system real-time.
3. In order to avoid or minimise the exchange of balancing energy, TSOs carry out an imbalance netting process ('INP'). The INP, defined in Article 3(2)(128) of Regulation (EU) 2017/1484 ('SO GL')¹, avoids the simultaneous activation of Frequency Restoration Reserves ('FRRs') in opposite directions. FRRs are balancing energy reserve products allowing for frequency restoration processes ('FRPs'), i.e. processes aimed at restoring frequency to the nominal frequency and, for synchronous areas consisting of more than one Load-Frequency Control Area ('LFC' area), aimed at restoring the power balance to the scheduled value.
4. Pursuant to Article 146 of the SO GL, the control target of the INP aims at reducing the amount of simultaneous counteracting FRR activations of the different participating LFC areas by imbalance netting power interchange.

¹ Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation.

5. In so doing, Article 3(2)(128) of the SO GL states that the INP shall take account of the respective Frequency Restoration Control Errors ('FRCEs')² as well as the activated FRR and will correct the input of the involved FRPs accordingly.
6. FRRs are, hence, an input of the INP without which the INP cannot be carried out.
7. Where necessary beyond the INP, TSOs exchange balancing energy reserve products. Three types of balancing reserve products are available, which are part of a sequential process based on successive layers of control. These are: (i) Frequency Containment Reserves ('FCR'), Frequency Restoration Reserves ('FRRs') and Replacement Reserves ('RR'). FRRs can be activated either manually (mFRR), e.g. by a phone call, or automatically by means of an automated system in which auctions are made using algorithms (aFRR). Frequency restoration processes are (jointly) operated by the TSO or TSOs operating in a LFC area.
8. The market players have a responsibility to balance the system through the balance responsibility of market participants, namely the Balance Responsible Parties (BRPs), who are financially responsible for keeping their own position (sum of injections, withdrawals and trades) balanced over a given timeframe (the imbalance settlement period or 'ISP'). In case of remaining positive and negative imbalances (deviations between generation, consumption and commercial transactions), BRPs need to pay an imbalance charge to the TSOs.
9. In a single EU Internal Electricity Market, the wide variety of balancing market designs existing in Europe is generally perceived as an important barrier for their integration and the cause of unnecessary complexities for cross-border trade³.

² See Article 3(19), (43) and (45) of the SO GL. A FRCE is a control error for the FRP which is equal to the Area Control Error ('ACE') of a LFC area or equal to the frequency deviation where the LFC area geographically corresponds to the synchronous area. ACE means the sum of the power control error (' ΔP '), that is the real-time difference between the measured actual real time power interchange value ('P') and the control program ('P0') of a specific LFC area or LFC block and the frequency control error (' $K \cdot \Delta f$ '), that is the product of the K-factor and the frequency deviation of that specific LFC area or LFC block, where the area control error equals $\Delta P + K \cdot \Delta f$. The 'K-factor of an LFC area or LFC block' means a value expressed in megawatts per hertz ('MW/Hz'), which is as close as practical to, or greater than the sum of the auto-control of generation, self-regulation of load and of the contribution of frequency containment reserve relative to the maximum steady-state frequency deviation. See Article 3(19), (43) and (45) of the SO GL.

³ Commission Staff Working Document, Impact Assessment of 23 November 2017, SWD(2017)383 final, p. 17

10. Regulation (EU) 2017/2195⁴ ('EB NC') establishes, therefore, an EU-wide standardised set of technical, operational and market rules to govern the functioning of electricity balancing markets⁵ in order to ensure an optimal management and coordinated operation of the European electricity transmission system, while supporting the achievement of the Union's targets for penetration of renewable generation, as well as providing benefits for customers. The EB NC, applicable to TSOs, Distribution System Operators ('DSOs'), BRPs and BSPs, seeks to give full shape to the Third Energy Package⁶.
11. The EB NC sets out rules for the procurement of balancing capacity, the activation of balancing energy and the financial settlement of BRPs. It also requires the development of harmonised methodologies for the allocation of cross-zonal transmission capacity for balancing purposes. Such rules are aimed at increasing the liquidity of short-term markets by allowing for more cross-border trade and allowing for a more efficient use of the existing grid for the purposes of balancing energy. As balancing energy bids will compete on EU-wide balancing platforms, it will also have positive effects on competition⁷.
12. The EB NC lays down a detailed guideline on electricity balancing including the establishment of common principles for the procurement and the financial settlement of FCR, FRR and RR and a common methodology for the activation of FRR and RR⁸.
13. In addition, to facilitate the integration of electricity balancing markets, the EB NC foresees the creation of common European platforms to enable the exchange of

⁴ Commission Regulation (EU) No 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing.

⁵ Recital 5 of the EB NC.

⁶ EU regulatory package 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. Composed of: (i) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC; (ii) Regulation (EC) No. 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity; (iii) Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC; (iv) Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005; (v) Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

⁷ Recital (5) of the EB NC.

⁸ Article 1(1) of the EB NC.

balancing energy from FRR and RR and to operate the INP⁹. The EB NC requires that All TSOs develop implementation frameworks for these platforms - the RR implementation framework ('RRIF'), the aFRR implementation framework ('aFRRIF'), the mFRR implementation framework ('mFRRIF') and the IN implementation framework ('INIF') - which are based on common governance principles and business processes¹⁰.

14. These common European Platform perform different functions: (i) with respect to the balancing reserve products, the activation optimisation function ('AOF'), which takes, *inter alia*, demands, the common merit order lists and cross-zonal capacities as input and determines the amount of energy exchange between LFC areas, aiming to ensure the activation of the most cost-efficient bids through an optimisation algorithm; and, with respect to the INP, the INP function ('INPF'), which essentially takes the aFRR demands and the IN balancing border capacity limits as input and aims to minimise the deviation from the IN target values, to maximise the satisfaction of the aFRR demand of individual LFC areas, to minimise the deviation from the proportional distribution of deviation from the target value and to minimise the absolute value of IN power interchange; (ii) the TSO-TSO settlement function ('TTSF'), which calculates the settlement between TSOs of intended energy exchanges as a result of the cross-border processes; and (iii) the capacity management function ('CMF'), which continuously updates cross-zonal capacities available for balancing energy exchanges on bidding zone borders and can be implemented in a decentralised or centralised way. The cross-zonal capacity calculation function ('CCCF'), which calculates the capacity across zones, may be added if deemed efficient when implementing the methodology for cross-zonal capacity calculation within the balancing timeframe in accordance with Article 37(3) of the EB NC.
15. As highlighted in the Annual Report of ACER and the Council of European Energy Regulators ('CEER') on the Results of Monitoring the Internal Electricity and Gas Markets in 2016¹¹, the core element of the EB NC is an efficient exchange of balancing

⁹ Recital (10) of the EB NC.

¹⁰ Articles 19(2), 20(2) and 21(2) and 22(2) of the EB NC.

¹¹ Annual Report of ACER and the Council of European Energy Regulators ('CEER') on the Results of Monitoring the Internal Electricity and Gas Markets in 2016, 6 October 2017, p. 49.

services, which will provide the legal framework for integrating national balancing markets. In an earlier Annual Report, ACER and CEER highlighted the benefits of EU integration of balancing markets through increasing the cross-border exchanges of balancing energy (including imbalance netting), “*which are estimated at several hundred million euros per year and may even be higher in view of the ambitious decarbonisation objective of the EU energy market.*”¹²

16. The EB NC seeks to foster cross-border trade in balancing energy within the EU. This integration of balancing markets is aimed at enhancing the efficiency of the European balancing markets, whilst creating a level-playing field.
17. Recital 2 of the EB NC states: “*The Energy Union aims to provide final customers – household and business – with safe, secure, sustainable, competitive and affordable energy. Historically, the electricity system was dominated by vertically integrated, often publicly owned, monopolies with large centralised nuclear or fossil fuel power plants. The internal market for electricity, which has been progressively implemented since 1999, aims to deliver a real choice for all consumers in the Union new business opportunities and more cross-border trade, so as to achieve efficiency gains, competitive prices and higher standards of service, and to contribute to security of supply and sustainability. The internal market for electricity has increased competition, in particular at the wholesale level, and cross-zonal trade. It remains the foundation of an efficient energy market.*”
18. Recital 3 of the EB NC reads: “*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 challenges for market participants. At the same time, technological developments allow for new forms of consumer participation and cross-border cooperation.*”
19. The integration of balancing markets at EU-level foreseen by the EB NC is a gradual, bottom-up process, in which, at different points in time, various stakeholders – in

¹² Annual Report of ACER and the Council of European Energy Regulators (‘CEER’) on the Results of Monitoring the Internal Electricity and Gas Markets in 2014, 30 November 2015, p. 16.

essence the TSOs, the national regulatory authorities ('NRAs') and the Agency - are required to take formal steps to attain certain goals set by the EB NC.

20. In the step-based integration process of the EB NC, pursuant to Articles 4(1) and 5(2) of the EB NC, All TSOs were required, within six months after the entry into force of the EB NC - i.e. by 18 June 2018 -, to develop a common proposals on the INIF in accordance with Article 22 of the EB NC¹³.
21. All TSOs' INIF proposal was submitted for approval to All NRAs, who were required by Article 5(6) of the EB NC to reach an agreement and take a decision on All TSOs' Proposal within six months after the receipt of the proposal by the last relevant NRA. According to Article 5(7) of the EB NC, when All NRAs fail to reach an agreement within the six months deadline, or upon the NRAs' joint request, the Agency shall adopt a decision on All TSOs' Proposals within six months from the end of the previous six months period or from the date of referral by the NRAs, acting under Article 6(10)(b) of Regulation (EU) 2019/942¹⁴ ('ACER Regulation').
22. Yet Article 6(1) of the EB NC also foresees that All NRAs can request an amendment to All TSOs' proposal and grants All TSOs two months as of this request for amendment ('RfA') to submit an amended All TSOs' Proposal to All NRAs. In this case, Article 6(1) of the EB NC requires All NRAs to reach an agreement and take a decision on All TSOs' Amended Proposal within two months following their submission. According to Article 6(2) of the EB NC, when All NRAs fail to reach an agreement within the two months deadline, or upon the NRAs' joint request, the Agency shall adopt a decision on All TSOs' Amended Proposal within six months from the end of the previous two months period or from the date of referral by the NRAs, acting under Article 6(10)(b) of the ACER Regulation.

¹³ Also, pursuant to Articles 4(1) and 5(2) of the EB NC, All TSOs were required, by one year after the entry into force of the EB NC - i.e. by 18 December 2018 -, to develop common proposals on (i) the methodology for pricing balancing energy and cross-zonal capacity used for the exchange of balancing energy or operating the IN process in accordance with Article 30(1) of the EB NC; (ii) the aFRRIF in accordance with Article 21 of the EB NC and (iii) the mFRRIF in accordance with Article 20 of the EB NC.

¹⁴ 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.

23. By virtue of Article 6(1) of the EB NC, All NRAs submitted a RfA to All TSOs, resulting in an amended All TSOs' Proposal. By virtue of Article 6(1) of the EB NC, All NRAs submitted a second RfA to All TSOs, resulting in a second amended All TSOs' Proposal.
24. By virtue of Article 6(2) of the EB NC, All NRAs jointly requested the Agency to adopt a decision in their stead on All TSOs' Amended Proposal in accordance with Article 6(10)(b) of the ACER Regulation.
25. Consequently, the Agency adopted a decision on All TSOs' INIF Proposal, namely Decision No. 13/2020 on the INIF, which is the Contested Decision¹⁵.
26. The Agency adopted the Contested Decision on the basis of Article 6(10)(b) of the ACER Regulation.
27. Article 6(10)(b) of the ACER Regulation states that the Agency shall be competent to adopt individual decisions on regulatory issues having effects on cross-border trade or cross-border system security which require a joint decision by at least two regulatory authorities, where such competences have been conferred on the regulatory authorities under certain legal acts - in the following situations (..) "*(b) on the basis of a joint request from the competent regulatory authorities*".
28. Article 6(11) of the ACER Regulation provides that, when preparing its decision pursuant to paragraph 10, the Agency shall consult the NRAs and TSOs concerned and shall be informed of the proposals and observations of all concerned TSOs.

¹⁵ By virtue of Article 5(7) of the EB NC, All NRAs jointly requested the Agency to adopt decisions in their stead on All TSOs' Amended Proposal on the (i) the methodology for pricing balancing energy and cross-zonal capacity used for the exchange of balancing energy or operating the IN; (ii) the aFRRIF and (iii) the mFRRIF in accordance with Article 6(10)(b) of the ACER Regulation. The Agency adopted three decisions on All TSOs' Proposals: (i) Decision No. 01/2020 on the methodology to determine prices for the balancing energy that results from the activation of balancing energy bids (https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Individual%20decisions/ACER%20Decision%2001-2020%20on%20the%20Methodology%20for%20pricing%20balancing%20energy.pdf); (ii) Decision No. 02/2020 on the aFRRIF (https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Individual%20decisions/ACER%20Decision%2002-2020%20on%20the%20Implementation%20framework%20for%20aFRR%20Platform.pdf, see also Annexes 4, 5 and 15 to the Appeal); and (iii) Decision No. 03/2020 on the mFRRIF (https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Individual%20decisions/ACER%20Decision%2003-2020%20on%20the%20Implementation%20framework%20for%20mFRR%20Platform.pdf, see also Annexes 11 and 16 to the Appeal).

29. Article 6(12)(a) of the ACER Regulation further states that “Where a case has been referred to ACER under paragraph 10, ACER: (a) shall issue a decision within six months of the date of referral, or within four months thereof in cases pursuant to Article 4(7) of this Regulation or point (c) of Article (59)(1) or point (f) of Article 62(1) of Directive (EU) 2019/944”.
30. The Contested Decision has to be in compliance with Article 22 of the EB NC entitled “European platform for imbalance netting process”.
31. Article 22 of the EB NC reads as follows:
- “1. By six months after entry into force of this Regulation, all TSOs shall develop a proposal for the implementation framework for a European platform for the imbalance netting process.*
- 2. The European platform for the imbalance netting process, operated by TSOs or by means of an entity the TSOs would create themselves, shall be based on common governance principles and business processes and shall consist of at least the imbalance netting process function and the TSO-TSO settlement function. The European platform shall apply a multilateral TSO-TSO model to perform the imbalance netting process.*
- 3. The proposal in paragraph 1 shall include at least:*
- (a) the high level design of the European platform;*
 - (b) the roadmap and timelines for the implementation of the European platform;*
 - (c) the definition of the functions required to operate the European platform;*
 - (d) the proposed rules concerning the governance and operation of the European platform, based on the principle of non-discrimination and ensuring equitable treatment of all member TSOs and that no TSO benefits from unjustified economic advantages through the participation in the functions of the European platform;*
 - (e) the proposed designation of the entity or entities that will perform the functions defined in the proposal. Where the TSOs propose to designate more than one entity, the proposal shall demonstrate and ensure:*

- (i) *a coherent allocation of the functions to the entities operating the European platform. The proposal shall take full account of the need to coordinate the different functions allocated to the entities operating the European platform;*
 - (ii) *that the proposed setup of the European platform and allocation of functions ensures efficient and effective governance, operation and regulatory oversight of the European platform as well as supports the objectives of this Regulation;*
 - (iii) *an effective coordination and decision making process to resolve any conflicting positions between entities operating the European platform;*
 - (f) *the framework for harmonisation of the terms and conditions related to balancing set up pursuant to Article 18;*
 - (g) *the detailed principles for sharing the common costs, including the detailed categorisation of common costs, in accordance with Article 23;*
 - (h) *the description of the algorithm for the operation of imbalance netting process function in accordance with Article 58.*
4. *By six months after the approval of the proposal for the implementation framework for European platform for the imbalance netting process, all TSOs shall designate the proposed entity or entities entrusted with operating the European platform pursuant to paragraph 3(e).*
 5. *By one year after the approval of the proposal for the implementation framework for a European platform for the imbalance netting process, all TSOs performing the automatic frequency restoration process pursuant to Part IV of Regulation (EU) 2017/1485 shall implement and make operational the European platform for the imbalance netting process. They shall use the European platform to perform the imbalance netting process, at least for the Continental Europe synchronous area”.*
32. Articles 36 and 37 of the EB NC list the requirements for using and updating the cross-zonal capacity for the exchange of balancing energy and for the INP. Specifically, Article 37(1) of the EB NC requires that, after the intraday-cross-zonal gate closure time, TSOs shall continuously update the availability of cross-zonal capacity for the exchange of balancing energy or for the INP, and that cross-zonal capacity shall be updated every

time a portion of cross-zonal capacity has been used or when cross-zonal capacity has been recalculated.

33. Additionally, Article 37(2) of the EB NC requires that TSOs use the cross-zonal capacities remaining after the intraday cross-zonal gate closure time until they have developed a methodology for cross-zonal capacity calculation pursuant to Article 37(3) of the EB NC.

Facts giving rise to the dispute

34. All TSOs organised a public consultation from 15 January 2018 until 15 March 2018 on “*All TSO’s Proposal for the Implementation Framework for a European Platform for the Imbalance Netting Process in accordance with Article 22 of the EB NC*” of 15 January 2018 (‘All TSOs’ 1st INIF Proposal’)¹⁶. All TSOs’ 1st INIF Proposal proposed that the current host TSO of the International Grid Control Cooperation pilot project (‘IGCC’)¹⁷ be designated to operate the INPF and TTSF. It foresaw that the IN-Platform would at least operate the INPF and the TTSF.
35. On 18 June 2018, All TSOs submitted to the NRAs an amended All TSOs INIF Proposal pursuant to the public consultation (‘All TSOs’ 2nd INIF Proposal’)¹⁸. All TSOs’ 2nd INIF Proposal proposed to designate a separate entity for the INPF and a separate entity for the TTSF. It foresaw that the IN-Platform would operate the INPF and the TTSF and foresaw the possibility of an additional cross-zonal capacity calculation function (‘CCCF’) if deemed efficient when implementing the cross-zonal capacity calculation (‘CCC’) methodology within the balancing timeframe.
36. On 9 November 2018, All NRAs submitted a first RfA (‘1st RfA’¹⁹) to All TSOs. All NRAs’ 1st RfA clarified that, in case multiple entities were designated, All TSOs’ Proposal had to demonstrate compliance with the additional requirements of Article 22(3)(e) of the EB NC. It also indicated that the TTSF entity of the IN-Platform could

¹⁶ Annex 13 to the Appeal.

¹⁷ IGCC is a voluntary pilot project for the INP that was launched in October 2010 as a regional project and has grown to cover 24 countries (27 TSOs) across continental Europe, see https://www.entsoe.eu/network_codes/eb/imbalance-netting/.

¹⁸ Annex 18 to the Appeal.

¹⁹ Annex 6 to the Appeal.

be used analogically in the other platforms: “*This would also enable the establishment of one settlement entity for all settlement functions of the different platforms, if this would be considered efficient during the development of the implementation frameworks of the other platforms.*” It stressed that All NRAs “*question the efficiency of creating a separate settlement entity for every platform*”. All NRAs’ 1st RfA did not enumerate the functions of the IN-Platform but highlighted that netting potential distribution had to take account of congestion.

37. On 23 January 2019, All TSOs submitted an amended All TSO’s INIF Proposal (‘All TSOs’ 3rd INIF Proposal’²⁰). All TSOs’ 3rd INIF Proposal proposed to designate a single entity for all functions that would either be a consortium of TSOs or a company owned by TSOs. It foresaw that the IN-Platform would operate the INPF and the TTSF and foresaw the possibility of an additional CCCF if deemed efficient when implementing the CCC methodology within the balancing timeframe.
38. On 17 May 2019, All NRAs requested an extension of the two-month period to reach an agreement on All TSOs’ 3rd INIF Proposal to the Agency²¹.
39. On 29 May 2019, the Agency adopted Decision No. 06/2019²², in which it conceded the requested extension until 19 July 2020 to All NRAs.
40. On 11 July 2020, All NRAs submitted a second RfA (‘2nd RfA’²³) to All TSOs. All NRAs’ 2nd RfA held that All TSO’s 3rd INIF Proposal contained two alternative choices (either a consortium of TSOs or a company owned by TSOs) and that All TSOs had to choose one of the options. It added that, if the option of a consortium was chosen, All TSOs would designate *de facto* multiple entities and would, therefore, have to demonstrate compliance with the additional requirements of Article 22(3)(e) of the EB NC. It also indicated that All TSOs had to explicitly define the IN-Platform functions and had to allocate these functions to an entity or entities in their Proposal.

²⁰ Annex 7 to the Appeal.

²¹ Annex 19 to the Appeal.

²² Annex 17 to the Appeal.

²³ Annex 10 to the Appeal.

41. On 10 September 2019, All TSOs submitted an amended All TSO's INIF Proposal ('All TSOs' 4th INIF Proposal'²⁴). All TSOs' 4th INIF Proposal proposed to designate one single entity for all functions, namely one single entity for the INPF and the TTSF. It foresaw that the IN-Platform would operate the INPF and the TTSF and foresaw the possibility of an additional CCCF if deemed efficient when implementing the CCC methodology within the balancing timeframe. The last NRA received All TSOs' 4th INIF Proposal on 28 October 2019. Therefore, the two-month deadline for the NRAs to reach an agreement was 28 December 2019.
42. In an email dated 16 January 2020, the Chair of the Energy Regulators' Forum, on behalf of All NRAs, informed the Agency that All NRAs had not been able to reach an agreement within the two-month deadline and requested that All TSOs' 4th INIF Proposal be considered referred to the Agency since 28 December 2019²⁵. The referral request set out that "*since the second amendment proposal on INIF has been submitted after the entry into force of the Commission Regulation (EU) 2019/942 of 5 June 2019, establishing a European Union agency for the Cooperation of Energy Regulators, some Regulatory Authorities consider that they are not competent to issue a decision*"²⁶.
43. All TSOs' 4th INIF Proposal was considered referred to ACER as of 28 December 2019 on the basis of Article 6(2) of the EB NC.
44. The Agency did not launch a public consultation on All TSOs' 4th INIF Proposal.
45. From January 2020 until May 2020, the Agency closely collaborated with All NRAs and TSOs and further consulted on All TSOs' 4th INIF Proposal during teleconferences, meetings and written exchanges²⁷.
46. On 22-23 January, 26-27 February and 17 March 2020, discussions were held with All NRAs in the framework of ACER's Electricity Balancing Taskforce.
47. On 10 February 2020, the Agency issued a 1st draft INIF to be discussed with All TSOs. The Agency's 1st draft INIF proposed (i) to designate one single entity for the INPF and

²⁴ Annex 8 to the Appeal.

²⁵ Annex 9 to the Appeal.

²⁶ Annex 9 to the Appeal. The email erroneously referred to Article 5(7) of the EB NC instead of Article 6(2) of the EB NC as a basis for the referral.

²⁷ Paras 12-13 of the Contested Decision. See also Annexes 7-17 to the Defence.

the TSSF, which could either be a single TSO or a company owned by TSOs; and (ii) to grant the TSOs two years to propose an INIF amendment that would designate the CMF entity/entities, clarify whether the latter would be a single entity or multiple entities and, if multiple entities were chosen, demonstrate compliance with the additional requirements of Article 22(3)(e) of the EB NC. It foresaw that the IN-Platform would operate the INPF, the TTSF and the CMF and foresaw the possibility of an additional CCCF if deemed efficient when implementing the CCC methodology within the balancing timeframe²⁸.

48. On 14 and 28 February 2020 and on 13 and 27 March 2020, teleconferences were held with All NRAs and TSOs.
49. On 28 February 2020, All TSOs sent their comments to the Agency's 1st draft INIF²⁹. Regarding the entity designation, the only comment of the TSOs was as follows: "*Either definition of 'aFRRIF' needed or refer to the article 6.4 of the methodology approved pursuant to EB 21.1*". Regarding the IN-Platform functions, the only comment of the TSOs was as follows: "*It should be understood that the IN algorithm and the aFRR algorithm will be executed within the same optimisation cycle in the same IT system. I.e. each optimisation result will be forwarded to the next optimisation run. In other words, the IN-AOF and the aFRR-AOF will share the IT interface to the CMF. The capacities after aFRR will not be sent to the CMF and back to IN as both algorithms will be implemented in the same IT system.*"
50. The Agency organised a hearing of ten working days from 6 April 2020 until 17 April 2020. On 6 April 2020, the Agency sent its written opinion on the IN-Platform functions and designation of entity³⁰ by email to ENTSO-E.
51. On 17 April 2020, ENTSO-E provided a written response to the Agency on behalf of All TSOs³¹. ENTSO-E alleged that the Agency's draft INIF imposed a single entity, contrary to the EB NC which allows for multiple entities. ENTSO-E also claimed that the process of updating cross-zonal capacities ('CZC') did not amount to a CMF but to

²⁸ Annex 2 to the Defence.

²⁹ Annex 2 to the Defence.

³⁰ Annex 6 to the Rejoinder. Para 70 of the Contested Decision.

³¹ Annex 12 to the Appeal and Annex 1 to the Defence.

a capacity management module. In ENTSO-E's opinion, given that this capacity management module was not a function, there was no need to designate an entity or entities to perform the said module. However, All TSOs did not submit a new, 5th INIF Proposal to ACER.

52. On 23 April 2020, discussions were held with All NRAs in the framework of ACER's Electricity Working Group.
53. On 13 May 2020, discussions were held with All NRAs at the meeting of the Agency's Board of Regulators³².
54. On 28 May 2020, the Board of Regulators gave its favourable opinion to the Agency's draft Contested Decision³³.
55. The Agency issued the Contested Decision on 24 June 2020. Annex I to the Contested Decision contains the INIF. Article 10 of the INIF - "*Designation of entity*" - allows for the designation of a single TSO or an a company owned by TSOs to perform the INPF and TTSF, whilst leaving the decision on the entity performing the CMF open but requiring the TSOs to develop a new Proposal on the issue and submit it for regulatory approval no later than 18 months before the deadline for the implementation of the CMF as a function of the aFRR-Platform in accordance with Article 6(4) of the aFRRIF of ACER Decision No. 02/2020³⁴ (this deadline being 2 years after the implementation of the aFRR-Platform). The proposed INIF amendment would designate the CMF entity, clarify whether the latter would be a single entity or multiple entities and, if multiple entities were chosen, demonstrate compliance with the additional requirements of Article 22(3)(e) of the EB NC³⁵. Article 6 of the INIF – "*Functions of the IN-Platform*" - foresaw that the IN-Platform would operate the INPF, the TTSF and the CMF and foresaw the possibility of an additional CCCF if deemed efficient when implementing the CCC methodology within the balancing timeframe.
56. Article 10 of the Contested Decision's INIF³⁶ reads as follows:

³² Annexes 3 and 4 to the Defence.

³³ Annex 5 to the Defence.

³⁴ Annex 4 to the Appeal.

³⁵ The INIF joined as Annex I to the Contested Decision contains a clerical error: it erroneously refers to Article 21(3)(e) of the EB NC instead of Article 22(3)(e) of the EB NC.

³⁶ Contested Decision, paras 67-84 and Annex I.

“1. Each member TSO of the IN-Platform is accountable towards its national regulatory authority and its market participants for the execution of the imbalance netting process in accordance with this INIF.

2. All TSOs shall appoint one entity being a single TSO or a company owned by TSOs that shall be entrusted to operate the imbalance netting process function and the TSO-TSO settlement function of the IN-Platform. No later than eighteen months before the deadline when the capacity management function shall be considered as a function required to operate the aFRR-Platform in accordance with Article 6(4) of the implementation framework adopted pursuant to the ACER Decision 02-20202 , all TSOs shall develop a proposal for amendment of this INIF, which shall designate the entity performing the capacity management function in accordance with Article 21(3)(e) of the EB Regulation and clarify whether the IN-Platform will be operated by a single entity or multiple entities.

3. The designation of the entity will be done in accordance with Article 22(4) of the EB Regulation.

4. The designated entity shall be acting on behalf of all member TSOs under the supervision of the steering committee of the IN-Platform, in accordance with Article 8(2)(a) and in accordance with the operational rules approved by the steering committee. 5. For the avoidance of doubt, the designated entity may contract third parties for executing supporting tasks, subject to the agreement of the steering committee.

57. In a Corrigendum, ACER rectified clerical error “*Article 21(3)(e) of the EB Regulation*” of Article 10(2) of the Contested Decision’s INI meaning “*Article 22(3)(e) of the EB Regulation*”³⁷.

Procedure

58. On 23 August 2020, the Appellant submitted an appeal to the Registry of the Board of Appeal against the Contested Decision in case A-008-2020.

³⁷ Corrigendum of 8/12/2020. Clerical error previously mentioned by ACER in its Defence of 29/9/2020.

59. On 25 August 2020, the announcement of appeal was published on the website of the Agency.
60. On 7 September 2020, the Registrar communicated the composition of the Board of Appeal to the Parties.
61. On 29 September 2020, ACER filed its Defence with the Registry requesting the BoA to dismiss the appeal.
62. On 2 October 2020, the Appellant requested an extension by four days of the deadline to file its Reply to the Defence (until 16 October 2020) and requested the celebration of an oral hearing.
63. On 5 October 2020, the Registrar granted both the requested extension of the deadline to file the Reply and the requested celebration of an oral hearing to the Appellant.
64. The Appellant requested the Board of Appeal, pursuant to Article 20(3)(d) of the Board of Appeal's Rules of Procedure, to require ACER to disclose to the Appellant (i) copies of materials (in unredacted form) recording the views of the Board of Regulators on the draft Decision and INIF prior to their adoption, more particularly (a) a copy of the Opinion of the Board of Regulators of 28 May 2020 cited in the preamble to the Decision; (b) a copy of the Agenda of the meeting(s) of the Board of Regulators and the background documents related to the items included in the agenda(s); (c) a copy of the minutes of the meeting(s) of the Board of Regulators; and (ii) a copy of the Agency's Legal Expert Network ('LEN') Recommendation referenced in the NRAs' Extension Request and to provide the Appellant with the right to make observations on the outcome of such disclosures. On 5 October 2020, the Chairperson acting on behalf of the Board of Appeal denied this disclosure request in a duly reasoned decision. In order to confirm its preliminary proportionality assessment *in camera*, the Board of Appeal requested the Defendant nonetheless to exclusively provide the Board of Appeal within three working days with unredacted copies of the deliberations within the Board of Regulators and the individual voting and the LEN Recommendation. Furthermore, in order to enable the Board of Appeal to carry out an in-depth analysis of the matter under Appeal, the Board of Appeal also required the Defendant *de officio* to exclusively provide the Board of Appeal within three working days with access to the documents, minutes and email exchanges related to the teleconferences, meetings and exchanges listed in Recital (13)

of the Contested Decision for the purposes of their analysis *in camera*. The Defendant provided the Board of Appeal with a copy of all requested documents on 8 October 2020.

65. On 6 October 2020, the Appellant proposed a confidentiality ring to the Board of Appeal.
66. On 12 October 2020 the Chairperson acting on behalf of the Board of Appeal dismissed the proposal in a duly motivated letter.
67. On 16 October 2020, the Appellant filed its Reply to the Defence with the Registry.
68. On 29 October 2020, the Agency requested an extension by 4 days of the deadline to file its Rejoinder to the Reply (until 2 November 2020).
69. On 29 October 2020, the Registrar granted the Agency with the requested extension of the deadline to file the Rejoinder.
70. On 2 November 2020 the Agency submitted its Rejoinder to the Registry.
71. On 6 November 2020, questions to prepare for the oral hearing were sent to the Parties in writing.
72. On 6 November 2020, the written part of the proceeding was closed.
73. The Board of Appeal held an oral hearing on 10 November 2020.
74. On 8 December 2020, ACER notified a corrigendum to the Contested Decision to the Appellant and notified the Board of Appeal on 9 December 2020.

Main arguments of the Parties

75. The claims by the Appellant can be summarized as follows:
 - *First Plea*: Infringement by ACER of Article 22 of the EB NC in the imposition and design of a single entity structure;
 - *Second Plea*: Infringement by ACER of Articles 21 and 22 of the EB NC by basing its decision in Article 10(2) of the INIF on the designation of the entity in the aFRR Platform;
 - *Third Plea*: Infringement by ACER of Article 22 of the EB NC in the introduction of the CMF as a required platform function to be operated by the designated entity;
 - *Fourth Plea*: Infringement by ACER of Articles 6(3), 10 and 22 of the EB NC by exceeding its competence in obliging the TSOs to submit a subsequent proposal for

amendment of the INIF no later than 18 months before the deadline when the CMF shall be considered as a function required to operate the aFRR-Platform;

- *Fifth Plea*: Infringement by ACER of Articles 16 and 52(1) of the Charter of Fundamental Rights of the EU (freedom to conduct a business) by requiring a single entity for all Platform functions despite the TSOs’ ability to fulfil the requirements of the EB NC outside of a single entity structure;
- *Sixth Plea*: Infringement by ACER of the principle of proportionality through the imposition of a single entity structure on the TSOs which is not justified by the scope and purpose of the EB NC, and which infringes the right of the TSOs to pursue an economic activity;
- *Seventh Plea*: Infringement by ACER of Article 14(6) of Regulation (EU) 2019/942, and of Article 41 of the Charter of Fundamental Rights of the EU (right to good administration) in failing to launch a public consultation on the TSOs’ proposal and failing to state reasons resulting in a lack of transparency in the Decision.

76. The Appellant requests the Board of Appeal to:

- a) annul Recitals 13, 14 and 16 of the section entitled ‘Whereas’, and Articles 3.3, 4.6, 6, 10(2), and 13.1(b) of the INIF;
- b) annul Article 1 of the Contested Decision;
- c) remit the Contested Decision and INIF to the competent body of ACER.

77. The Defendant requests the Board of Appeal to dismiss the Appeal in its entirety as unfounded.

II. Admissibility

Admissibility of the Appeal

Ratione temporis

78. 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”.

79. The Appeal was submitted on 23 August 2020, challenging ACER Decision No. 13/2020, which was published on its website on 25 August 2020.
80. The Appeal was received by the Registry *by e-mail* on 23 August 2020 and it contained the statement of grounds.
81. Therefore, the Appeal is admissible *ratione temporis*.

Ratione materiae

82. 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.
83. Decision No. 13/2020 was issued on the basis of Article 6(10)(b) of Regulation (EU) 2019/942, read in conjunction with Article 6(2) of Regulation (EU) 2017/2195, following a consultation with the concerned regulatory authorities ('NRAs') and transmission system operators ('TSOs').
84. Therefore, since the Appeal fulfils the criterion of Article 28(1) of Regulation (EU) 2019/942, the Appeal is admissible *ratione materiae*.

Ratione personae

85. 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.”
86. In accordance with Article 2 of the Contested Decision, the Appellant is an addressee of the Contested Decision.
87. The Appeal is therefore admissible *ratione personae*.

Merits

Remedies sought by the Appellant

88. The Appellant requests the Board of Appeal to (i) annul Article 1 of Decision No. 13/2020; (ii) annul Recitals 13, 14 and 16 of the section entitled ‘Whereas’, and Articles 3.3, 4.6, 6, 10(2), and 13.1(b) of the INIF joined as Annex I to Decision No. 13/2020

and (iii) remit the case to the competent Agency body to replace Decision No. 13/2020 by a new Decision.

Pleas and arguments of the Parties

Preliminary Observations.

89. The facts contained in paras 4-22 and 62-71 of the Contested Decision are not challenged by the Appellant.

First Plea - Infringement by ACER of Article 22 of the EB NC in the imposition and design of a single entity structure for the INIF.

90. In its First Plea, the Appellant claims that ACER has infringed Article 22 of the EB NC and has acted *ultra vires* in its imposition and design of a single entity structure for the INIF. The Appellant claims, more specifically that (i) ACER's restriction of the options available to TSOs for the designation of the entity under Article 10(2) of the INIF contravenes Article 22(2) of the EB NC and that (ii) ACER uses the creation of a new platform function, the CMF, and the related process of amendment to impose a single entity structure, a company owned by TSOs, in pursuit of an overarching policy goal for all European balancing platforms³⁸.

91. The Defence responds that the Appellant's claim is based on a wrong understanding of the Contested Decision and the INIF³⁹. It sets out that the Agency (i) did not impose a single entity structure and (ii) did not restrict the options available to the TSOs because it followed the only option suggested by the TSOs' Proposal with respect to the INPF and TTSP and because the TSOs' Proposal neither addressed the CMF - despite the fact that it is a required Platform function - nor the requirements of Article 22(3)(e) of the EB NC.

92. Article 6(10)(b) of Regulation (EU) 2019/942 states that the Agency shall be competent to adopt individual decisions as specified in the first subparagraph – which stipulates that ACER shall be competent to adopt individual decisions on regulatory issues having

³⁸ Paras 47-70 of the Appeal.

³⁹ Paras 31-44 of the Defence.

effects on cross-border trade or cross-border system security which require a joint decision by at least two regulatory authorities, where such competences have been conferred on the regulatory authorities under certain legal acts - “(b) on the basis of a joint request from the competent regulatory authorities”.

93. Article 6(11) of Regulation (EU) 2019/942 provides that, when preparing its decision pursuant to paragraph 10, the Agency shall consult the NRAs and TSOs concerned and shall be informed of the proposals and observations of all concerned TSOs.
94. Article 6(12)(a) of Regulation (EU) 2019/942 further states that “Where a case has been referred to ACER under paragraph 10, ACER: (a) shall issue a decision within six months of the date of referral, or within four months thereof in cases pursuant to Article 4(7) of this Regulation or point (c) of Article (59)(1) or point (f) of Article 62(1) of Directive (EU) 2019/944”.
95. Recital (19) of Regulation (EU) 2019/942 states that “(...) ACER’s role with regards to monitoring and contributing to the implementation of the network codes and guidelines has increased”. Recital (19) adds that “the effective monitoring of network codes and guidelines is a key function of ACER and is crucial to the implementation of internal market rules.” In so doing, ACER has the competence to “fill the regulatory gap at Union level and to contribute towards the effective functioning of the internal markets for electricity and natural gas” (Recital 10 of Regulation (EU) 2019/942) and, what is more, to coordinate and, where necessary, complete the NRAs’ regulatory functions (Recital 11 of Regulation (EU) 2019/942)⁴⁰.
96. Article 6(2) of the EB NC states that, “Where the relevant regulatory authorities have not been able to reach an agreement on terms and conditions or methodologies within the two-month deadline, or upon their joint request, the Agency shall adopt a decision concerning the amended terms and conditions or methodologies within six months, in accordance with Article 8(1) of Regulation (EC) No 713/2009”. Article 6(2) of the EB NC refers to Article 8(1) of Regulation (EC) 713/2009 (the former ACER Regulation),

⁴⁰ Recital 11 of Regulation (EU) 2019/942 stipulates that “ACER should ensure that regulatory functions performed by the regulatory authorities in accordance with Directive (EU) 2019/944 of the European Parliament and of the Council (10) and Directive 2009/73/EC of the European Parliament and of the Council (11) are properly coordinated and, where necessary, completed at Union level.”

which has been replaced by Article 6(10) of Regulation (EU) 2019/942, referred to above.

97. Article 22(1) of the EB NC mandates All TSOs to develop a proposal for an INIF. Article 22(3)(e) of the EB NC provides that the TSOs' proposal shall include the designation of *“an entity or entities that will perform the functions defined in the proposal”*. It adds that, *“where the TSOs propose to designate more than one entity”*, the guarantee of compliance with additional conditions has to be demonstrated in the proposal, namely *“(i) a coherent allocation of the functions to the entities operating the European platform. The proposal shall take full account of the need to coordinate the different functions allocated to the entities operating the European platform; (ii) that the proposed setup of the European platform and allocation of functions ensures efficient and effective governance, operation and regulatory oversight of the European platform as well as supports the objectives of this Regulation; (iii) an effective coordination and decision making process to resolve any conflicting positions between entities operating the European platform.”*
98. As a preliminary observation, the Appellant and the Agency agree on the following: All NRAs jointly requested the Agency to adopt a decision on All TSOs' 4th INIF Proposal and the Agency was competent by virtue of Article 6(2) of the EB NC to take its decision within a six-month deadline⁴¹.
99. The Appellant and the Agency agree on the fact that the approval of All TSOs' INIF Proposal qualifies as a regulatory matter within the competences of the NRAs that can jointly be referred by the NRAs to the Agency⁴². The Appellant does not dispute that the designation of an entity under Article 10 of the INIF joined as Annex I to the Contested Decision falls within the scope of the decision which could have been adopted by the NRAs but was jointly referred by the latter to the Agency. The Appellant does not dispute that, in such case, Article 6(10) of Regulation (EU) 2019/942 and Article 6(2) of the EB NC grant the Agency the competence to modify All TSOs' 4th INIF Proposal

⁴¹ Contested Decision, paras 3, 7, 14-16 and 18. Letter of the Chair of All Energy Regulators' Forum dated 16 January 2020, see Annex 5 of the Defence, Annex 9 to the Appeal.

⁴² *Ibidem*.

on a regulatory matter, in particular on the designation of an entity to perform the Platform functions.

100. The Appellant disputes, however, that the modification made by the Agency to All TSOs' 4th Proposal *in casu* with respect to the designation of the entity for the IN-Platform is in accordance with Article 22 of the EB NC.

1.1 ACER's restriction of the options available to TSOs for the designation of the entity under Article 10(2) of the INIF contravenes Article 22(2) of the EB NC.

101. Article 22(2) of the EB NC establishes that the operation of the IN Platform can either be carried out by TSOs or by an entity created by TSOs, should be based on common governance principles and business processes and should, at least, consist of the INPF and the TTTF. It reads as follows: *"The European platform for the imbalance netting process, operated by TSOs or by means of an entity the TSOs would create themselves, shall be based on common governance principles and business processes and shall consist of at least the imbalance netting process function and the TSO-TSO settlement function. The European platform shall apply a multilateral TSO-TSO model to perform the imbalance netting process."*

102. Article 22(3)(c) of the EB NC states that the TSOs' Proposal *"shall include at least: (...) (c) the definition of the functions required to operate the European platform."*

103. Article 22(3)(e) of the EB NC requires that the Proposal either designates a single entity to perform all functions of the IN-Platform, or that it designates multiple entities. If multiple entities are designated, the Proposal has to ensure and demonstrate compliance with additional requirements on the allocation of functions and coordination between these functions, on governance, operation and regulatory oversight in line with the EB NC's objectives and on conflict resolution, namely *"(i) a coherent allocation of the functions to the entities operating the European platform; the proposal shall take full account of the need to coordinate the different functions allocated to the entities operating the European platform; (ii) that the proposed setup of the European platform and allocation of functions ensures efficient and effective governance, operation and regulatory oversight of the European platform as well as supports the objectives of this Regulation; and (iii) an effective coordination and decision making process to resolve any conflicting positions between entities operating the European platform"*.

104. As a preliminary observation, both the Appellant and the Agency agree that the INIF joined as Annex I to the Contested Decision mandates All TSOs to designate a single entity to operate the INPF and the TTSF of the IN-Platform, notably “one entity being a single TSO or a company owned by TSOs”.
105. A comparison between the 4th All TSOs’ INIF Proposal⁴³ and the Contested Decision’s INIF is set out in the following table

Comparison of the Designation of the Entity/Entities to perform the functions of the IN Platform according to Article 22 of the EB NC

4th All TSOs’ INIF Proposal	Final INIF annexed to the Contested Decision
INPF and TTSF: Designation of a single TSO (INPF/TTSF TSO) by 24 December 2020.	INPF and TTSF: Designation of a single entity being a single TSO <u>or</u> a company owned by TSOs (INPF/TTSF TSO <u>or</u> TSO-owned INPF/TTSF entity) by 24 December 2020
CMF: Not mentioned.	CMF: Development of a proposal for amendment of the INIF to designate a CMF entity, <u>either</u> as (i) a single entity (the same entity as the INPF/TTSF TSO <u>or</u> TSO-owned INPF/TTSF entity) <u>or</u> (ii) multiple entities complying with the additional requirements of Art.22(3)(e) EB NC (different entity than the INPF/TTSF TSO <u>or</u> TSO-owned INPF/TTSF entity) by 24 January 2023.

Source: Agency’s Board of Appeal

106. Both the 4th All TSOs’ INIF Proposal and the Contested Decision’s INIF require the designation of a single TSO, enabling them to either designate a single TSO or a company owned by TSOs (INPF/TTSF TSO or TSO-owned INPF/TTSF entity). There is no contradiction between the 4th TSOs’ INIF Proposal and the Contested Decision’s

⁴³ Annex 8 to the Appeal.

INIF regarding the designation of an INPF/TTSF TSO or TSO-owned entity. With respect to this endorsement, the Contested Decision expressly states that the Agency “*accepted the part of the TSOs’ proposal*” designating a single entity for the INPF/TTSF⁴⁴.

107. Neither All TSOs’ 4th INIF Proposal nor All TSOs’ earlier INIF Proposals complied with Article 22 of the EB NC. None of these Proposals complied with the requirements for the designation of a single entity performing all IN-Platform functions, nor with the requirements for the designation of multiple entities performing all IN-Platform functions and providing the necessary guarantees on the allocation of functions and coordination between these functions, on governance, operation and regulatory oversight in line with the EB NC’s objectives and provisions on conflict resolution, as required by the second sentence of Article 22(3)(e) of the EB NC. This failure to comply with the legal requirements persisted despite extensive dialogue and debate and the opportunity being afforded to the TSOs to provide an appropriately modified Proposal.
108. Therefore, the Contested Decision cannot be regarded as having imposed a single entity structure for the IN-Platform. The Contested Decision’s INIF requires the TSOs to designate a single entity for the INPF/TTSF (leaving it at the discretion of the TSOs to propose its form and design), not only because this is what the TSOs requested in All TSOs’ 4th INIF Proposal but also because none of All TSOs’ earlier Proposals complied with Article 22(3)(e) of the EB NC in order to allow for a multiple entity structure. The Contested Decision’s INIF expressly allows that this single entity performing the INPF/TTSF be only of a temporary nature and could be converted in a multiple entity (complying with Article 22(3)(e) of the EB NC) when the CMF becomes mandatory (by 24 July 2024) given that the TSOs are given the opportunity to propose that either the same entity as the INPF/TTSF entity be designated for the CMF or that a different CMF entity be designated without further requirements, letting it up to the TSOs to define the entity’s form.
109. Furthermore, the Contested Decision did not restrict the possible entities by adding a second single entity option for the INPF and TTSF. Indeed, the Contested Decision’s

⁴⁴ Para 66 of the Contested Decision.

INIF literally reproduced All TSOs' 4th Proposal to designate a single TSO for the INPF and TTSF, merely adding an additional possibility to designate a company owned by TSOs for the INPF and TTSF. The Agency explained at the beginning of the hearing that it was of the opinion that an entity that TSOs would create themselves would be a more efficient entity to operate the Platform⁴⁵. In the sequence of the dialogue between the Agency and All TSOs, the Agency set out its view on the efficiencies of a single entity structure in a written opinion sent to ENTSO-E on 6 April 2020⁴⁶, at the beginning of the ten-day hearing phase, pursuant to which ENTSO-E TSOs submitted a written response to the Agency on behalf of All TSOs⁴⁷ alleging that the Agency's draft INIF imposed a single entity and that this imposition was contrary to the EB NC which allows for multiple entities. However, All TSOs did not submit a new, 5th INIF Proposal to ACER.

110. The Board of Appeal finds that the Agency did not impose a single entity structure in its Contested Decision nor in its dialogue with the TSOs leading up to the Contested Decision. During this dialogue, the Agency set out the advantages of a single entity structure but left the possibility to the TSOs open to choose a single entity structure or a multiple entity structure without any further requirement on its design (e.g. consortium or not). The only constant request of the Agency was that there be clarity as to whether All TSOs' Proposal designated a single entity or multiple entities (in which case compliance with the additional requirements of Article 22(3)(e) of the EB NC had to be ensured and demonstrated).
111. In addition, the Contested Decision did not restrict the TSOs' possibility to choose multiple entities. The Agency neither designated a single entity nor multiple entities, given the open-ended nature of the designation of the CMF entity. Indeed, it will only be possible to assert the single or multiple entity structure of the INIF once the TSOs will have designated the same or a different entity as the INPF/TTSF entity for the CMF. If there were any restriction, *quod non*, it would in any case stem from the TSOs themselves who submitted a proposal that did not designate a single entity for the INPF

⁴⁵ Para 70 of the Contested Decision.

⁴⁶ Annex 6 to the Rejoinder. Email from ACER to ENTSO-E of 6 April 2020, including ACER's reasoning document, containing a section entitled "*Reasoning on the designation of the entity*".

⁴⁷ Annex 12 to the Appeal and Annex 1 to the Defence.

and TTSF and did not address the supplementary governance requirements of Article 22(3)(e) of the EB NC in their 4th INIF Proposal to the Agency, rendering a multiple entity impossible. The TSOs could have designated multiple entities for the INPF and TTSF (e.g. a consortium) and could have inserted the necessary supplementary governance requirements in their proposal, imposed by Article 22(3)(e) of the EB NC in case of multiple entities⁴⁸. But they did not do so. They chose to designate a single entity for the INPF and TTSF. Instead of restricting this possibility, the Contested Decision reopened the possibility to choose multiple entities by allowing the TSOs to designate in future a different entity for the CMF than the INPF/TTSF entity, as will be set out below in the Third Plea.

112. Indeed, as the Appeal confirms, All TSOs' 4th Proposal neither mentioned the CMF nor designated an entity for the CMF⁴⁹. The Appellant erroneously alleges that it never submitted a proposal containing a multiple entities framework⁵⁰. However, the proposal foresaw the possibility of a multiple entities framework. Given that Article 22(3)(c) of the EB NC requires necessary functions for the operation of the Platform to be defined in the proposal, given that Article 22(3)(e) of the EB NC requires the proposal to designate an entity or entities for the operation of all Platform functions and given that the CMF is a required Platform function and consequently falls within the scope of Articles 22(2) and (3) of the EB NC, the Agency granted the TSOs a reasonable time (not later than 24 July 2023) to propose the designation for the operation of the CMF either (i) by the same entity as the INPF/TTSF TSO or TSO-owned entity– in which case, overall, a single entity will perform all functions of the IN-Platform - or (ii) by a different entity than the INPF/TTSF TSO or TSO-owned entity meeting the additional requirements of Article 22(3)(e) of the EB NC – in which case multiple entities will perform the functions of the IN-Platform.

⁴⁸ This was expressly confirmed at the Oral Hearing: “*All TSOs could have submitted a new All TSOs' INIF Proposal to the INIF during the hearing;*” and “*TSOs could have proposed a multiple entity structure as long as it complied with the additional governance requirements of Article 22(3)(e) of the EB Regulation*”, Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.20 (Question 4 to the Defendant).

⁴⁹ Para 56 of the Appeal.

⁵⁰ Paras 56, 89 and 117 of the Appeal. Para 59 of the Reply.

113. The EU's energy regulation follows a market-driven approach based on a complex, multipartite bottom-up decision-making processes, led by the market and ensuring multipart balances between a variety of national and EU stakeholders, implying a step-based involvement of, *inter alia*, TSOs and regulators (NRAs or the Agency in their stead). In this bottom-up decision-making process, the Agency took account of All TSOs' 4th INIF Proposal, the regulatory approval of which was referred to it by the NRAs.
114. The nature of this bottom-up decision-making process explains why the Contested Decision has been shaped in the way it was shaped. The Contested Decision did not impose a single entity through the introduction of the CMF. The Contested Decision's INIF requires the TSOs to develop a proposal to amend the INIF by 24 January 2023 in order to designate a CMF entity. This requirement upon the TSOs to designate a CMF entity in future still leaves both options - a single entity or multiple entities – open.
115. The Contested Decision does not require All TSOs to designate a single CMF entity. Neither does it require All TSOs to develop an INIF amendment proposal to designate a single CMF entity in future. On the contrary, the Agency leaves a margin to the TSOs to either designate the same entity as the INPF/TTSF TSO or TSO-owned entity – in which case, overall, a single entity will perform all functions of the IN-Platform - or a different entity than the INPF/TTSF TSO or TSO-owned entity meeting the additional requirements of Article 22(3)(e) of the EB NC – in which case multiple entities will perform the functions of the IN-Platform. It allows for a future bottom-up process on this aspect of the INIF.
116. The EB NC allows for the designation of a single entity or multiple entities complying with certain requirements to perform all Platform functions. Similarly, the Contested Decision allows for a single entity or multiple entities complying with certain requirements to perform all Platform functions. Hence, the Contested Decision does not impose a single entity structure.
117. The argument that ACER exceeds its powers when imposing a single entity structure is void because the Contested Decision did not impose a single entity structure.
118. The Board of Appeal finds that ACER did not infringe Article 22(2) of the EB NC in the imposition and design of a single entity structure for the INIF.

119. The Appellant's claim that the CMF is not a Platform function and the CMF should not be operated across Platforms will be dealt with in Sub-Plea 3.5 of the Third Plea below.

1.2 ACER uses the creation of a new platform function, the CMF, and the related process of amendment to impose a single entity structure, a company owned by TSOs, in pursuit of an overarching policy goal for all European balancing platforms

120. Sub-Plea 1.2 will be dealt with below as Sub-Plea 3.4 in the Third Plea.

Conclusion on the First Plea

121. It follows that Sub-Plea 1.1 of the First Plea must be dismissed as unfounded.

Second Plea - Infringement by ACER of Articles 21 and 22 of the EB NC by creating a link between the IN-Platform and aFRR-Platform

122. According to the Second Plea of the Appeal ACER has infringed Articles 21 and 22, of the EB NC by (i) creating an organisational link between the INIF and aFRR-IF in Article 10 of the INIF; (ii) seeking to justify its designation of the entity in Article 10 of the INIF by reference to its (autonomous) decision in Article 12 of the aFRR-IF; and (iii) by requiring the CMF to be implemented for other balancing platforms⁵¹.

123. The Defence responds that the (i) the Contested Decision's INIF does not create any new organisational link but merely a link in the implementation deadline for the introduction of the CMF and the designation of the CMF entity; (ii) the link in the implementation deadline was proposed by the TSOs in order for them to exploit synergies; (iii) the link that exists between the two platforms was proposed by the TSOs consulted upon by ACER with TSOs and NRAs, as mentioned in paragraph 129 of the ACER Decision No. 02/2020⁵², and was included in its aFRRIF, in a part that was not appealed by the TSOs; and (iv) the TSOs themselves announced to choose to designate the same entity for all the other entities of the two platforms (apart from the CMF)⁵³.

⁵¹ Paras 71-85 of the Appeal.

⁵² Annex 4 to the Appeal.

⁵³ Paras 45-58 of the Defence.

124. Article 3(2)(128) of the SO GL defines the INP as *“a process agreed between TSOs that allows avoiding the simultaneous activation of FRR in opposite directions, taking into account the respective FRCEs as well as the activated FRR and by correcting the input of the involved FRPs accordingly”*.
125. Article 146 of the SO GL, entitled *“Imbalance Netting Process”*, states, *inter alia*, that *“the control target of the imbalance netting process shall aim at reducing the amount of simultaneous counteracting FRR activations of the different participating LFC areas by imbalance netting power interchange.”* (146(1) of the SO GL). It adds that *“TSOs shall implement the imbalance netting power interchange of a LFC area in a way which does not exceed the actual amount of FRR activation necessary to regulate the FRCE of that LFC area to zero without imbalance netting power interchange.”* (146(6) of the SO GL).
126. Article 22(1) of the EB NC requests All TSOs to develop an INIF Proposal which, according to Article 58(2) of the EB NC, shall develop an algorithm for the INPF, defined Article 2(40) of the EB NC as *“the role to operate the algorithm applied for operating the imbalance netting process”*. Article 58(2) of the EB NC states that the INPF algorithm shall *“minimise the counter activation of balancing resources by performing the imbalance netting process pursuant to Part IV of Regulation (EU) 2017/1485”*.
127. Article 22 of the EB NC has been quoted in full above in paragraph 31.
128. Article 21 of the EB NC sets out the same requirements as Article 22 of the EB NC , *mutatis mutandis*, for the aFRRIF:
- “1. By one year after entry into force of this Regulation, all TSOs shall develop a proposal for the implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation.*
 - 2. The European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation, operated by TSOs or by means of an entity the TSOs would create themselves, shall be based on common governance principles and business processes and shall consist of at least the activation optimisation function and the TSO-TSO settlement function. This European platform shall apply a multilateral TSO-TSO model with common merit order lists to exchange all balancing energy bids from all standard products for frequency restoration*

reserves with automatic activation, except for unavailable bids pursuant to Article 29(14).

3. The proposal in paragraph 1 shall include at least:

- (a) the high level design of the European platform;*
- (b) the roadmap and timelines for the implementation of the European platform;*
- (c) the definition of the functions required to operate the European platform;*
- (d) the proposed rules concerning the governance and operation of the European platform, based on the principle of non-discrimination and ensuring equitable treatment of all member TSOs and that no TSO benefits from unjustified economic advantages through the participation in the functions of the European platform;*
- (e) the proposed designation of the entity or entities that will perform the functions defined in the proposal. Where the TSOs propose to designate more than one entity, the proposal shall demonstrate and ensure:*
 - (i) a coherent allocation of the functions to the entities operating the European platform. The proposal shall take full account of the need to coordinate the different functions allocated to the entities operating the European platform;*
 - (ii) that the proposed setup of the European platform and allocation of functions ensures efficient and effective governance, operation and regulatory oversight of the European platform as well as supports the objectives of this Regulation;*
 - (iii) an effective coordination and decision making process to resolve any conflicting positions between entities operating the European platform;*
- (f) the framework for harmonisation of the terms and conditions related to balancing set up pursuant to Article 18;*
- (g) the detailed principles for sharing the common costs, including the detailed categorisation of common costs, in accordance with Article 23;*

- (h) the balancing energy gate closure time for all standard products for frequency restoration reserves with automatic activation in accordance with Article 24;*
 - (i) the definition of standard products for balancing energy from frequency restoration reserves with automatic activation in accordance with Article 25;*
 - (j) the TSO energy bid submission gate closure time in accordance with Article 29(13);*
 - (k) the common merit order lists to be organised by the common activation optimisation function pursuant to Article 31;*
 - (l) the description of the algorithm for the operation of the activation optimisation function for the balancing energy bids from all standard products for frequency restoration reserves with automatic activation in accordance with Article 58.*
- 4. By six months after the approval of the proposal for the implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation, all TSOs shall designate the proposed entity or entities entrusted with operating the European platform pursuant to paragraph 3(e).*
- 5. By eighteen months after the approval of the proposal for the implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation, all TSOs may develop a proposal for modification of the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation pursuant to paragraph 1 and of the principles set in paragraph 2. Proposed modifications shall be supported by a cost-benefit analysis performed by the all TSOs pursuant to Article 61. The proposal shall be notified to the Commission.*
- 6. By thirty months from the approval of the proposal for the implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation, or where all TSOs submit a proposal for modification of the European platform pursuant to paragraph 5, by 12 months after the approval of the proposal for modification of the European platform, all TSOs performing the automatic frequency restoration process pursuant to Part IV of Regulation (EU) 2017/1485 shall implement and make operational the European*

platform for the exchange of balancing energy from frequency restoration reserves with automatic activation and they shall use the European platform to: (a) submit all balancing energy bids from all standard products for frequency restoration reserves with automatic activation; (b) exchange all balancing energy bids from all standard products for frequency restoration reserves with automatic activation, except for unavailable bids pursuant to Article 29(14); (c) strive to fulfil all their needs for balancing energy from the frequency restoration reserves with automatic activation.”

2.1 ACER infringed Articles 21 and 22 of the EB NC by creating an organisational link between the INIF and aFRRIF in Article 10 of the INIF

129. The INP is a process to minimise the amount of activated aFRR.
130. Technically, there is a link between the INP and the aFRR-process: aFRR-demand is an input of the INP. The INP cannot be carried out without the input of aFRR-demand of each participating TSO⁵⁴. The INP is based on an IN optimisation algorithm. The functions of the IN optimisation algorithm are to minimise deviations of the imbalance netting target value, based on the ratio [aFRR demand of a participating TSO/sum of all aFRR demands of all participating TSOs], to maximise the satisfaction of the aFRR-demand, to minimize the deviation from the proportional distribution of deviation from the target value; and to minimise the absolute value of IN power interchange⁵⁵. Without the input of aFRR-demands, the IN optimisation algorithm cannot carry out its functions⁵⁶. The process is explained and graphically depicted in the Appeal⁵⁷. In its written response to the Agency on behalf of All TSOs during the hearing, ENTSO-E explained that *“the aFRR-AOF will receive the inputs from the CMM, update the cross-zonal capacities with the results and pass them to the IN-process function”*⁵⁸.

⁵⁴ This was confirmed by the Parties at the Oral Hearing. See Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.12-16 (Questions 1 to 4 to both Parties).

⁵⁵ This was confirmed by the Parties at the Oral Hearing. *Ibidem*.

⁵⁶ This was confirmed by the Parties at the Oral Hearing. *Ibidem*.

⁵⁷ Paras 34-36 of the Appeal.

⁵⁸ Annex 12 to the Appeal and Annex 1 to the Defence, p. 3.

131. Hence, as stated in the INIF annexed to the Contested Decision, aFRR demand is an input of the INP⁵⁹ and the output of the INP is a correction to be taken into account in the input for the aFRR-Platform⁶⁰. Article 3(2)(128) of the SO GL foresees that the INP takes account of the respective FRCEs (inputs of the aFRR process according to Article 145(4) of the SO GL) and the activated FRR and that the INP corrects the input of the involved FRPs accordingly. The Agency explained that *“When there is a FRCE, the TSOs need to activate balancing energy from aFRR; hence the local FRCE corresponds to an aFRR-demand for each TSO, which would lead to the ‘activation of the required balancing energy’. The imbalance netting process performed by the European Platform pursuant to Article 22 of the EB Regulation should avoid the simultaneous activation of this balancing energy in opposite directions, thus it should receive as input the aFRR-demand of each TSO”*⁶¹.
132. The INP occurs prior to the aFRR process⁶². In an integrated balancing market, TSOs should first exploit the potential of netting aFRR demands in case they are in opposite directions before activating balancing energy reserves based on their individual aFRR demand. The aFRR process is only carried out if there remains a need for TSOs to exchange aFRR after TSOs have netted their imbalance, i.e. after the INP⁶³.
133. This technical link between the INP and aFRR is apparent in All TSOs’ 4th INIF Proposal which was referred to the Agency. As acknowledged by the Appeal⁶⁴, the Proposal states (i) that the IN will be operated by *“TSOs performing the automatic frequency restoration process pursuant to part IV of the SO GL, that will minimise the simultaneous counter-activation of aFRR”* (Article 3(1) of All TSOs’ 4th INIF Proposal); (ii) that the *“inputs*

⁵⁹ Article 3(4)(a) of the INIF: *“the inputs to the imbalance netting process function are: (a) the aFRR demand of every LFC area of each participating TSO being continuously reported to the IN-Platform by each participating TSO”*.

⁶⁰ Article 2(1)(p) of the INIF: *“‘usage of the platform’ means exchanging imbalance netting energy between two or more LFC areas via the IN-Platform in order to operate the imbalance netting process, meaning when the IN-Platform receives aFRR demand values and sends out correction values that will be used in the load-frequency control of each LFC area”*.

⁶¹ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.12-13 (Question 1 to both Parties).

⁶² This was confirmed by the Parties at the Oral Hearing. See Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.12-16 (Questions 1 to 4 to both Parties).

⁶³ This was confirmed by the Parties at the Oral Hearing. *Ibidem*.

⁶⁴ Paras 37 and 38 of the Appeal.

to the IN process function are: (a) the aFRR demand of every LFC area of each participating TSO being continuously reported to the IN-Platform by each participating TSO; (...)” (Article 3(4) of All TSOs’ 4th INIF Proposal) and (iii) that “the inputs to the algorithm for the operation of the IN process function are: (a) the aFRR demand (...)” (Article 13(1) of All TSOs’ 4th INIF Proposal)⁶⁵. The same wording was also present in All TSOs’ 2nd and 3rd INIF Proposals, referring to “aFRR demand”⁶⁶. It was also present in All TSOs’ 1st (initial) INIF Proposal, even though the wording “aFRR demand” was not expressly used⁶⁷. Similarly, the Explanatory Document to All TSOs’ 1st INIF Proposal defined the INP as “the process that aims to minimise the amount of activated aFRR, by avoiding a simultaneous counteractivation” and described the INPF algorithm starting each of the scenarios with the “aFRR Demand (MW)” of the LFC Block.

134. When the Appellant was asked by the Rapporteur at the Oral Hearing to explain how the absence of a link between the IN and the aFRR could be sustained in the light of these documents, the Appellant confirmed their operational link and merely invoked that the processes were regulated by different legal articles of the EBGL⁶⁸.
135. Moreover, as will be set out below, ENTSO-E and All TSOs explicitly linked the INIF and the aFRRIF when they expressed their intention to designate the same entity for INIF and aFRRIF during the consultations and hearing phase that preceded the Contested Decision from January till April 2020.
136. The Board of Appeal observes, in this regard, that, even though the Appellant appealed ACER Decision No.02/2020⁶⁹ on 23 March 2020 before the Board of Appeal, resulting in Board of Appeal Decision A-001-2020 of 16 July 2020⁷⁰, the Appellant neither appealed paras 128 and 129 of ACER Decision No. 02/2020 nor Article 11(8) of the aFRRIF annexed to that Decision, despite the fact that the decision highlighted a link

⁶⁵ Annex 8 to the Appeal.

⁶⁶ Respectively annexes 18 and 7 to the Appeal.

⁶⁷ Annex 13 to the Appeal. “Demand” in All TSOs’ 1st (initial) Proposal has to be understood as “aFRR demand”

⁶⁸ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.22 and 23 (Question 3 to the Appellant).

⁶⁹ Annex 4 to the Appeal.

⁷⁰https://acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Decisions/Case%20A-001-2020%20BoA%20decision.pdf

between the INP and the aFRR process: “given the close interaction between the INP and the aFRR process Article 11(6) of the Proposal describes the sequential processes in the context of the interaction between the aFRR Platform and the IN-Platform, under different geographical scopes. (..)”⁷¹ and “the Agency further clarified this interaction between the INP and the aFRR process (..)”⁷². Article 11(8) of the aFRRIF describes the optimisation algorithm as follows: “8. As long as there is at least one TSO participating in the IN-Platform who is not participating TSO, the optimisation algorithm shall run in each optimisation cycle the following optimisation sequence: (a) First step: Optimisation within the aFRR optimisation region in accordance with paragraphs 1 to 6 of this Article, i.e. optimisation of cross-border interchange of aFRR, including the implicit netting of aFRR demands; the result of this optimisation, namely the corrected aFRR demands of the TSOs of the aFRR optimisation region and the new CZCs within the aFRR optimisation region, shall be provided as input to the second step. (b) Second step: Optimisation among all TSOs that use the IN-Platform in accordance with the implementation framework for the IN-Platform, pursuant to Article 22(1) of the EB Regulation, i.e. netting of all remaining aFRR demands of the IN-Platform, under consideration of the remaining CZC after the first step; the result of this optimisation, namely the remaining aFRR demands of the participating TSOs that use the IN-Platform and the new CZCs between the LFC areas of these TSOs, shall be provided as input to the third step. (c) Third step: Optimisation in the LFC areas covered by all participating TSOs in accordance with paragraphs 1 to 6 of this Article, i.e. optimisation of the selected standard aFRR balancing energy product bids, considering the aFRR interchange and netting determined in the previous steps.”

137. Therefore, the Contested Decision did not err when stating that “the two platforms for imbalance netting and aFRR will be intertwined and interacting closely”⁷³.

138. As set out in the First Plea above, consistently with the bottom-up, market-based EU decision-making process characterising the electricity sector, ACER took due account

⁷¹ Para 128 of the Contested Decision.

⁷² Para 129 of the Contested Decision.

⁷³ Para 19 of the Contested Decision.

of All TSOs' 4th INIF Proposal, the regulatory approval of which was referred to it by the NRAs. Accordingly, the Agency replicated the references to the aFRR process and aFRRIF of All TSOs' 4th INIF Proposal in the Contested Decision's INIF⁷⁴.

139. Furthermore, ACER took also due account of All NRAs' guidance, in line with the principle of sincere cooperation between the Agency and the NRAs deriving from Articles 4(3) and (13) TEU and highlighted in Recitals (10), (16), (22), (23), (30) and 45 and Article 1 of Regulation (EU) 2019/942. The NRAs linked the INIF and the other Platform Implementation Frameworks foreseen by the EB NC in the "*Non-Paper of All Regulatory Authorities agreed at the Energy Regulators' Forum on All TSOs' Proposal for the Implementation Framework for the Exchange of Balancing Energy from Frequency Restoration Reserves with Manual Activation in accordance with Article 20 of the EB NC*" ('All NRAs' mFRRIF Non-Paper') dated 23 July 2019⁷⁵. In effect, All NRAs' mFRRIF Non-Paper made an express referral to All NRAs' 2nd INIF RfA, asking that All TSOs amend their proposed mFRRIF in line with the amendments that the NRAs had requested to the INIF. The NRAs thus expressly acknowledged a link between another Implementation Framework, the mFRRIF, and the INIF. In a similar vein, All NRA's 1st INIF RfA, which disapproved All TSOs' 2nd INIF Proposal, requested *inter alia* consistency between INIF, aFRRIF and mFRRIF when stating that "*the definition of borders should be made consistent between this Proposal and the proposals for aFRR and mFRR implementation frameworks*"⁷⁶. The Board of Appeal notes that the Contested Decision was taken following a favourable opinion of at least two-thirds of ACER's Board of Regulators, composed of NRAs⁷⁷.
140. During the process leading-up to ACER Decision No.02/2020 on the aFRRIF⁷⁸, All NRAs agreed that All TSOs' 1st aFRRIF Proposal had to be amended, *inter alia*, to take due account of the interaction between the aFRR-Platform and the IN-Platform⁷⁹.

⁷⁴ Annex I to the Contested Decision.

⁷⁵ See paras 29, 99-105, 162, 174-178, 185, 195, 197, 203-210, 218, 219 and 258 of Board of Appeal Decision A-002-2020.

⁷⁶ Annex 6 to the Appeal, All NRAs' 1st RfA, p.8 (Article 2 *in fine*).

⁷⁷ Last paragraph before the Introduction of the Contested Decision and Annex 5 to the Defence. See also Article 24 of Regulation (EU) 2019/942.

⁷⁸ Annex 4 to the Appeal.

⁷⁹ Para 16 of ACER Decision No.02/2020, Annex 4 to the Appeal.

141. Finally, the Appellant has confirmed the existence of a technical link between the INP and aFRR process both in its Appeal and at the Oral Hearing. The Appeal stipulates expressly that “*IGCC performs imbalance netting of automatic frequency restoration reserves (“aFRR”)*”⁸⁰. At the Oral Hearing, the technical link between the INP and the aFRR-process was confirmed by both Parties, in particular the fact that the INP cannot be carried out without the input of the aFRR demand⁸¹. The Appellant held that it was correct to state that the available CZC will be used for both the IN algorithm and the aFRR algorithm and that the process to update CZC will be performed by the same IT system⁸².
142. As set out by both Parties, the technical link does not imply an absence of differences between both processes⁸³.
143. In view of the technical link between the INP and the aFRR process, the Board of Appeal proceeds to analyse whether the reference in Article 10 of the INIF (Annex I to the Contested Decision) contains a reference to the aFRRIF and, if so, whether this reference created an organisational link between the two Platforms going beyond the technical link between the two Platforms, as claimed by the Appellant.
144. Article 10 of the INIF, fully quoted in paragraph 98 above, states that “(2) *all TSOs shall appoint one entity being a single TSO or a company owned by TSOs that shall be entrusted to operate the imbalance netting process function and the TSO-TSO settlement function of the IN-Platform. No later than eighteen months before the deadline when the*

⁸⁰ Para 34 of the Appeal.

⁸¹ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.12-16 (Questions 1 to 4 and additional sub-questions to both Parties).

⁸² Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.22 (Question 2 to the Appellant).

⁸³ Paras 8 and 9 of the Defence: “(8) *However, there are also some differences among the European platforms. The most important one (with respect to the algorithm) is that there are no balancing energy bids submitted to the IN-Platform, since, as it was explained in paragraph (5) above, this platform only nets the aFRR demands of the TSOs in opposite directions. Hence, there are no requirements related to the definition of standard products, or the gate closure times, or the common merit order lists. (9) Another difference, which is linked to the fact that this platform does not involve any bid submission, is the timeline for the submission of the proposal as well as its implementation.*” Para 46 of the Reply: “*There are, however, fundamental differences between the Platforms, which relate directly to each Platform’s distinct purpose. In short, the aFRR-Platform is designed to optimize the activation and exchange of aFRR bids. The IN-Platform will perform the netting of real time imbalances in an automatic way: this process does not involved the optimization of balancing energy bids.*”

capacity management function shall be considered as a function required to operate the aFRR-Platform in accordance with Article 6(4) of the implementation framework adopted pursuant to the ACER Decision 02-20202, all TSOs shall develop a proposal for amendment of this INIF, which shall designate the entity performing the capacity management function in accordance with Article 21(3)(e)⁸⁴ of the EB Regulation and clarify whether the IN-Platform will be operated by a single entity or multiple entities.” (emphasis added)

145. Article 10(2) of the Contested Decision’s INIF only contains an express reference to the aFRRIF in relation to the deadline to propose the designation of the CMF entity.

146. The reasoning for this reference is explained in detail in paragraphs 48 and 67 of the Contested Decision:

“(48) However, the ACER Decisions No 02/2020 and 03/2020 on the two other European-wide platforms actually include the same provision for a capacity management function, which makes the capacity management function a cross-platform function. TSOs explained during the hearing, that they intend to launch one project, including IT requirements that would deliver the capacity management function to all three European-wide platforms at the same point in time. The reasoning behind the timeline can be explained with the requirement to design a capacity management function that will deliver cross-zonal capacities on a cross-platform level. Therefore, the capacity management function should best be implemented for the relevant three platforms at the same point in time to make use of synergies and ensure a consistent cross-platform design. For this reason, ACER provided some additional years for implementing the capacity management function, i.e. two years after the deadline for implementation of the aFRR-Platform. This results in a delay for the capacity management function implementation compared to the implementation of the IN-Platform of approximately three years (the capacity management function

⁸⁴ The reference to Article 21(3)(e) of the EB NC amounts to a clerical mistake to be read as “Article 22(3)(e) of the EB NC”.

implementation for aFRR-Platform is required by 24.07.2024, pursuant to ACER Decision No 02/2020.” (emphasis added)

“(67) As described in Recital (48) ACER decided that by two years after the deadline for the implementation of the aFRR-Platform the capacity management function shall be considered as a function required for the operation of the IN-Platform. This means that the exact designation of the entity that will perform this function is not required in this Decision and can be postponed in order to give TSOs more time for discussion, analysis and identification of the most efficient solution for the designation of the entity for this function. Therefore, instead of defining the entity for the operation of the capacity management function, ACER provided an obligation on TSOs to develop a proposal for amendment of the INIF in which they should propose the designation of the entity that will perform the capacity management function in accordance with Article 22(3)(e) of the EB Regulation. This proposal for amendment needs to be submitted for regulatory approval no later than eighteen months before the deadline for the implementation of the capacity management function, which is two years after the implementation of the aFRR-Platform. However, in case TSOs intend to implement the capacity management function earlier, the TSOs should develop a proposal for the designated entity to operate this function sufficiently before the implementation date. The amendment process should follow the rules form Article 6 of the EB Regulation.” (emphasis added)

147. The reference to the aFRRIF contained in Article 10 of the INIF is expressly limited to maximum deadline by which the TSOs are requested to propose an amendment to the INIF in order to designate a CMF entity for the INIF. The reference merely aligns the maximum deadline to propose the designation of the CMF entity for the INIF and the aFRRIF. Nothing prevents All TSOs to propose the designation of the CMF entity for the INIF at an earlier stage than the maximum deadline of 24 January 2023. The alignment of maximum deadlines will, consequently, not necessarily trigger coincidence in the dates at which the designation of CMF entities will be proposed respectively for the INIF and the aFRRIF, unless the TSOs choose to submit the proposals for the designation of the CMF entities at the same time. As paragraph 67 of the Contested Decision expressly provides, “*however, in case TSOs intend to implement the capacity*

management function earlier, the TSOs should develop a proposal for the designated entity to operate this function sufficiently before the implementation date.”

148. The reference to the maximum deadline to propose the designation of a CMF entity for the aFRRIF does not result to an organisational link. It is merely a link regarding the deadline for the implementation of the CMF. It serves only for the calculation of a date, aligning the implementation deadline to propose the designation of the CMF in both Platforms. It does not in any way restrict or shape the options of the TSOs with respect to the contents of the INIF and is not aimed at integrating the two Platforms. As set out by the Agency in the Defence, *“if the TSOs wish to disentangle the implementation of the CMF for the different Platforms, they are free to do so”*⁸⁵. The Agency reiterated in its Rejoinder that *“even if the TSOs choose to separate the projects and implement the CMF for the IN-Platform earlier than the CMF for the aFRR-Platform, they still have the option to do so, because this link is only on the deadline of the implementation and designation”*⁸⁶.
149. Nor is this timing alignment required by the EB NC. In other terms, it would have been legally valid for the Agency not to align the maximum deadline to propose the designation of a CMF entity for the INIF and the aFRRIF.
150. In line with the bottom-up decision-making process in the electricity sector, the Agency based the alignment of the maximum timing to propose the designation of the CMF entity for the INIF and the aFRRIF on All TSOs’ request to have the same timeline for the implementation of the CMF across Platforms for reasons of efficiency. In effect, All TSOs considered the implementation of a single IT project for the CMF for all the Platforms more efficient. This is expressly reflected in paragraph 48 of the Contested Decision: *“TSOs explained during the hearing, that they intend to launch one project, including IT requirements that would deliver the capacity management function to all three European-wide platforms at the same point in time.”* Similarly, in ENTSO-E’s written reply of 17 April 2020 during the hearing, it held that *“(..) TSOs appreciate that ACER agrees that the CMM should be delivered as a common project for all Platforms*

⁸⁵ Para 17 of the Defence.

⁸⁶ Para 37 of the Rejoinder.

*and therefore have a common implementation timeline for all of them,(..)*⁸⁷. Even though ENTSO-E stressed that the capacity management process was a module and not a Platform function, it put forward the benefits of a common implementation timeline.

151. On 28 February 2020, when All TSOs sent their comments to the Agency’s 1st draft INIF of 10 February 2020, the TSOs’ only comment regarding the entity designation, was as follows: *“Either definition of ‘aFRRIF’ needed or refer to the article 6.4 of the methodology approved pursuant to EB 21.1”* and the TSOs’ only comment regarding the IN-Platform functions was as follows: *“It should be understood that the IN algorithm and the aFRR algorithm will be executed within the same optimisation cycle in the same IT system. I.e. each optimisation result will be forwarded to the next optimisation run. In other words, the IN-AOF and the aFRR-AOF will share the IT interface to the CMF. The capacities after aFRR will not be sent to the CMF and back to IN as both algorithms will be implemented in the same IT system.”*⁸⁸ Hence, the TSOs themselves proposed that the INIF and the aFRRIF use the same IT interface and advocated synergies of having one single IT product for operating the CMF for the aFRR and the IN. It was reiterated by ENTSO-E in its written response to the Agency during the hearing: *“the TSOs would like to remind that the aFRR-AOF and the IN-process function will merge in the same IT implementation and both optimisation algorithms will be executed sequentially but in the same single optimisation cycle in order to ensure the correct execution of both processes”*.⁸⁹
152. This has accordingly been reproduced by ACER in Recital (14) of the INIF: *“Under the current assumption, it should be understood that the IN algorithm and the aFRR algorithm will be executed within the same optimisation cycle in the same IT system, i.e. each optimisation result will be forwarded to the next optimisation run. In other words, the IN-AOF and the aFRR-AOF will share the IT interface to the CMF. Therefore, the capacities after aFRR might not need to be sent to the CMF and back to IN as both algorithms will be implemented in the same IT system, unless TSOs choose differently*

⁸⁷ Annex 12 to the Appeal, see also Annex 1 to the Defence, p.2, section 2, subpara “Capacity Management”.

⁸⁸ Annex 2 to the Defence. See also Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.20 and 21 (Question 2 to the Defendant and Question 5 to the Appellant).

⁸⁹ Annex 12 to the Appeal and Annex 1 to the Defence, p. 3.

during the implementation phase.”⁹⁰ (emphasis added). The Contested Decision’s INIF clearly stipulates that the TSOs are free to decide that the IN-AOF and the aFRR-AOF share the IT interface to the CMF. It leaves the choice on this organisation link entirely at their discretion.

153. In view of the above, the Contested Decision did not compel the TSOs to designate the same entity for the INIF and the aFRRIF. The alignment merely relates to the maximum timing for the proposal to designate the CMF entity, which has to be placed in the context of All TSOs’ proposal for a cross-platform capacity management process (see below, Third Plea, Sub-Plea 3.5). Given that the proposed alignment on timing was not prohibited by the EB NC, the Agency endorsed the requested procedural streamlining, in line with the bottom-up decision-making process characterising EU electricity regulation.
154. The fact that the TSOs chose to create an organisational link between the INIF and the aFRRIF beyond the timing for the proposal to designate the CMF and decided to designate the same entity for INIF and aFRRIF does not stem from the Contested Decision. It is a choice which the TSOs made and communicated to ACER during the consultation phase⁹¹. As set out by the Defendant in the Rejoinder “*the TSOs’ intention to designate the same entity for the operation of both the aFRR-Platform and the IN-Platform confirms that merging the two Platforms is the objective of the TSOs, and not of ACER.*”⁹² The Contested Decision does not include such restriction in the INIF. At the Oral Hearing, the Appellant confirmed that the TSOs had proposed to designate the host of IGCC pilot project - TransnetBW GmbH - as the entity operating the INPF and TTSF of the IN-Platform and that in July 2020, the TSOs had designated TransnetBW GmbH to operate the AOF and TTSF of the aFRR-Platform⁹³.
155. Moreover, the decision to align the maximum timing to propose the designation of the CMF entity for the INIF and the aFRRIF has to be placed in the context of the intertwined decision-making processes on the INIF, the aFRRIF and the mFRRIF.

⁹⁰ Annex 2 to the Appeal.

⁹¹ Para 52 of the Defence.

⁹² Para 45 of the Rejoinder.

⁹³ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.2 (Opening Statement of the Appellant) and p. 21 (Question 1 to the Appellant).

According to the EB NC, All TSOs' INIF Proposal had to be submitted 6 months before the submission of All TSOs' aFRRIF and mFRRIF Proposals and the INIF should have been implemented 24 months before the implementation of the aFRRIF and mFRRIF.

Theoretical timetable for INIF and aFRRIF/mFRRIF according to the EB NC.

Timing	INIF	aFRRIF/mFRRIF
Submission of initial All TSOs' IF Proposal	6 months after entry into force of the EB NC: 18 June 2018	1 year after entry into force EB: 18 December 2018
Implementation of IF	12 months after INIF approval	30 months after aFRRIF/mFRRIF approval
Total time of the process	18 months	42 months

Source: Agency's Board of Appeal

156. However, due to various reasons, *inter alia* the fact that the INIF went through a different decision-making process - NRAs' RfAs under Article 6(1) of the EB NC followed by a referral under Article 6(2) of the EB NC instead of NRAs' Non-Papers in the context of Article 5(6) of the EB NC followed by a referral under Article 5(7) of the EB NC - the adoption of the INIF was delayed and occurred after the adoption of the aFRRIF/mFRRIF, as shown in the table below:

Real-time timetable of INIF and aFRRIF/mFRRIF processes.

Timing	INIF	aFRRIF/mFRRIF
January 2018	All TSOs' 1 st Proposal	
June 2018	All TSOs' 2 nd Proposal	
November 2018	NRAs' 1 st RfA	
December 2018		All TSOs' 1 st Proposal
January 2019	All TSOs' 3 rd Proposal	
July 2019	NRAs' 2 nd RfA	NRAs' referral to ACER
September 2019	All TSOs' 4 th Proposal	

	All TSOs' 4 th Proposal	
November 2019		All TSOs' 2 nd Proposal
December 2019	NRAs' referral to ACER	All TSOs' 3 rd Proposal
January 2020		ACER Decisions No. 02/2020 and No. 03/2020
June 2020	ACER Decision 13/2020	
Total time of the process	42 months	18 months

157. The Appellant claims in its Reply⁹⁴ that the Contested Decision would not have had the same outcome had the INIF been decided upon before the aFFRIF and not after the aFRRIF, without any indication of how and why this would have altered the contents of the Contested Decision. When expressly asked the question at the Oral Hearing, no further substantiation was provided and the Appellant recognised that the outcome would not necessarily have been different⁹⁵.
158. Finally, even though it sets out the implementation frameworks for the mFRR, aFRR and IN-Platforms in separate provisions of the EB NC - respectively arts. 20, 21 and 22 EB NC - the EB NC needs to be interpreted taking account of the systematic or contextual interpretation (the logical interpretation of different pieces of the law among themselves and with the overall legal system), and teleological interpretation (the underlying objectives and rationale of the law), as supported by the consistent methodology applied by the Court of Justice of the European Union ('CJEU')⁹⁶. The EB

⁹⁴ Para 47 of the Reply.

⁹⁵ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.23 and 24 (Question 4 to the Defendant and Question 5 to the Appellant). When asked how this would be different, the Appellant held that "No, we're not saying that they necessarily would have been different."

⁹⁶ See para 112 of Board of Appeal Decision A-001-2020 and para 112 of Board of Appeal Decision A-002-3030. See also H.G. Schermes, D.F. Waelbroeck, "Judicial Protection in the European Union" (2001); N. Fennelly, "Legal Interpretation at the European Court of Justice", Fordham International Law Journal Volume 20, Issue 3 1996; A. Albers Llorens, "The European Court of Justice, More than a Teleological Court", Cambridge University Press, 2017;; Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1; Case 6/64 *Costa v. ENEL* ECLI:EU:C:1964:66; Case 26/69 *Stauder v Ulm*, ECLI:EU:C:1969:57; Case 55/87 *Moksel v. BALM*, ECLI:EU:C:1988:377; Case C-89/81 *Hong Kong Trade*, ECLI:EU:C:1982:121; Case C-101/01 *Lindqvist* ECLI:EU:C:2003:596; Case C-409/06 *Winner Wette* ECLI:EU:C:2010:503; Case C-402/07 *Sturgeon*

NC creates European electricity balancing Platforms to enable the exchange of balancing energy from FRR and RR and to operate the IN process in order to facilitate the integration of electricity balancing markets (Recital 10 EB NC). The EB NC requires that All TSOs develop implementation frameworks for these platforms - RRIF, mFRRIF, aFRRIF, and INIF - which are based on common governance principles and business processes⁹⁷. The wording of respectively Article 19 of the EB NC for the RRIF, Article 20 of the EB NC for the mFRRIF, Article 21 of the EB NC for the aFRRIF and Article 22 of the EB NC for the INIF is, *mutatis mutandis*, identical. From a legal, systemic and teleological perspective, these implementation frameworks are, therefore, intertwined and aim to attain the EB NC's objective of creating an internal electricity market, *inter alia* through an integration of balancing markets and promotion of balancing services exchanges, as set out by art. 3(1)(c) of the EB NC. When mandating the creation of EU-wide energy balancing Platforms, the EB NC's goal is to integrate electricity across all balancing zones in the EU. Hence, to the extent that the parallel timelines requested by All TSOs did not contravene the EB NC and enhanced integration of the electricity balancing markets, ACER neither exceeded its competences nor violated the EB NC when setting parallel timelines in the Contested Decision.

159. The Board of Appeal therefore concludes that the Contested Decision was taken on the basis of Article 22 of the EB NC and duly complied with the requirements of Article 22 of the EB NC. The Contested Decision was not taken on the basis of Article 21 of the EB NC.

160. In view of the above, the Board of Appeal finds that the Agency did not infringe Articles 21 and 22 of the EB NC when referring to the aFRRIF in Article 10(2) of the EB NC.

2.2 *ACER infringed Articles 21 and 22 of the EB NC by seeking to justify its designation of the entity in Article 10 of the INIF by reference to its (autonomous) decision in Article 12 of the aFRRIF*

and Others, ECLI:EU:C:2009:716; Case C-439/08 VEBIC ECLI:EU:C:2010:739; Case C-41/09 European Commission and Kingdom of the Netherlands, ECLI:EU:C:2011:108; Joined Cases C-188/10 and C-189/10 Melki and Abdeli ECLI:EU:C:2010:363; Case C-583/11 P Inuit Tapiriit Kanatami and Others, ECLI:EU:C:2013:625.

⁹⁷ Articles 19(2), 20(2) and 21(2) and 22(2) of the EB NC.

161. The Board of Appeal proceeds to analyse whether the Agency sought to justify its designation of the entity in Article 10 of the INIF (INPF/TTSF TSO or TSO-owned INPF/TTSF entity and future CMF entity) through a reference to Article 12 of the aFRRIF (AOF/TTSF TSO or TSO-owned AOF/TTSF entity and future CMF entity).
162. Overall, the Contested Decision in paras 19, 35, 37, 41, 43-44, 47-50, 53, 56, 65, 67, 70 and 82, as well as Recitals (3), (13), (14) and Articles 2, 3, 4, 10 and 13 of the INIF, contain various references to the aFRR process and aFRRIF relating to (i) the unavoidable technical link between both frameworks, (ii) the endorsement by ACER of the TSOs' choice to operate capacity management in a common, cross-platform fashion (see below, Sub-Plea 3.5 of the Third Plea) or (iii) an editorial alignment of the wording of the INIF with the wording of the aFRRIF for streamlining purposes.
163. The Contested Decision's designation of entity in Article 10 of the INIF is not based on any the afore-mentioned references.
164. As set out above in Sub-Plea 2.1, the reference to the aFRRIF in Article 10 of the INIF is limited to the maximum deadline for the proposal to designate a CMF entity. Article 10 of the INIF does not in any way state that a TSO or TSO-owned entity is designated for the INPF/TTSF because a TSO or TSO-owned entity was designated for the AOF/TTSF in the aFRRIF. Nor does Article 10 of the INIF state that the TSOs are required to designate a future CMF entity because the TSOs were required to designate a future CMF entity for the aFRRIF.
165. In effect, as set out above in the First Plea, given that decision-making in the electricity sector follows a market-driven, bottom-up approach the Contested Decision's INIF was based on All TSOs' 4th INIF Proposal to the extent that it complied with the EB NC. The Agency checked All TSOs' 4th INIF Proposal against the EB NC, in particular Article 22 of the EB NC. This also implies that, to the extent permitted by the EB NC, the Agency would have followed a different approach during the decision-making process leading-up to the INIF if All TSOs had submitted a proposal for the entity to operate the IN-Platform that was different from the one submitted for the aFRR-Platform.
166. Hence, given that All TSOs' 4th INIF Proposal proposed a single TSO for the INPF and TTSF and that this proposal was in compliance with the EB NC, the Agency proposed the designation of a single TSO for the INPF and TTSF and merely added an extra

possibility to designate a company owned by TSOs for the INPF and TTTF. However, given that All TSOs' 4th Proposal was not compliant with the EB NC as regards the obligation to propose to designate an entity for all required Platform functions, more specifically for the CMF, the Agency granted the TSOs reasonable time (no later than 24 July 2023) to either propose the designation of the same entity as the INPF/TTTF TSO or TSO-owned entity – in which case, overall, a single entity will perform all functions of the IN-Platform - or of a different entity than the INPF/TTTF TSO or TSO-owned entity meeting the additional requirements of Article 22(3)(e) of the EB NC – in which case multiple entities will perform the functions of the IN-Platform.

167. The designation of entity in Article 10 of the INIF was, consequently, not based on the fact that a similar structure had been designated for the aFRRIF but on All TSOs' 4th INIF Proposal and ACER's regulatory function to ensure compliance with the EB NC in the bottom-up, multipartite decision-making process.
168. As will be clarified below in the Seventh Plea, the Contested Decision contains a sufficient motivation of its own, which does not rely upon references to the aFRRIF.
169. The Board of Appeal therefore concludes that the Agency did not infringe Articles 21 and 22 of the EB NC by seeking to justify its designation of the entity in Article 10 of the INIF by reference to its (autonomous) decision in Article 12 of the aFRRIF.

2.3 ACER infringed Articles 21 and 22 of the EB NC through the requirement of the CMF to be implemented for other balancing platforms

170. Sub-Plea 2.3 will be dealt with below as Sub-Plea 3.5 in the Third Plea.

Conclusion on the Second Plea

171. It follows that Sub-Pleas 2.1 and 2.2 of the Second Plea must be dismissed as unfounded.

Third Plea - Infringement by ACER of Article 22 of the EB NC in the introduction of the CMF as a required Platform function to be operated by the designated INIF entity

172. In its Third Plea, the Appellant claims that ACER has infringed Article 22 of the EB NC and has acted *ultra vires* in obliging the TSOs to (i) add the capacity management module ('CMM') as an additional function, (ii) restrict the choice as to who can operate the functions to one single entity being either one TSO or a company set up by them and

(iii) submit a proposal for subsequent amendments. The Appellant claims that (i) the CMF is not a required Platform function, (ii) ACER's decision to assess the designation of the required Platform functions and to introduce the CMF as a required Platform function contravenes Article 22(2) of the EB NC and (iii) ACER's decision to introduce the CMF as a required Platform function resulted in the unlawful application of Article 22(3)(e) of the EB NC to the process of updating CZC and the required Platform functions⁹⁸.

173. The Defence responds that the CMF is a required Platform function, which should be included in the INIF pursuant to Article 22(3)(c) of the EB NC, that Article 22(2) of the EB NC allows for additional functions to the INPF and TTTF, that Article 22(3)(e) of the EB NC applies to all Platform functions, such as the CMF, that the Contested Decision did not contravene All NRAs' guidance and that All TSOs' 4th INIF Proposal did not rule out a multiple entity structure and therefore had to comply with the elements of Article 22(3)(e) of the EB NC⁹⁹.

3.1 ACER's decision to assess the designation of the required Platform function and introduce the CMF as a required Platform contravenes Article 22(2) of the EB NC

174. Article 22(2) of the EB NC establishes that the operation of the IN Platform can either be carried out by TSOs or by an entity created by TSOs, should be based on common governance principles and business processes and should, at least, consist of the INPF and the TTTF. It reads as follows: *“The European platform for the imbalance netting process, operated by TSOs or by means of an entity the TSOs would create themselves, shall be based on common governance principles and business processes and shall consist of at least the imbalance netting process function and the TSO-TSO settlement function. The European platform shall apply a multilateral TSO-TSO model to perform the imbalance netting process.”*

175. The EB NC does not exhaustively list all Platform functions because its gradual integration process is, as already mentioned, a bottom-up process based on a close

⁹⁸ Paras 86-122 of the Appeal.

⁹⁹ Paras 59-67 of the Defence.

cooperation between all stakeholders. Moreover, even though the EB NC does not exhaustively list all IN-Platform functions, Article 22(2) of the EB NC expressly stipulates that the INIF must designate an entity or entities to perform “*at least*” the INPF and TTTSF, implying that these functions are a minimum but that the IN-Platform is required to perform more functions. The expression “*at least*” means, according to the Oxford English Language Dictionary “*not less than, at the minimum*”. If the functions were limited to the INPF and TTTSF, as the Appellant suggests¹⁰⁰, the requirement by Article 22(3)(c) of the EB NC on the inclusion of a definition of the functions required to operate the Platforms would be obsolete.

176. The Board of Appeal observes, in this respect, that the different functions performed by the IN-Platform¹⁰¹ are as follows: (i) the INPF, which takes, among others, aFRR demands and IN balancing border capacities as input and determines the amount of IN power interchange between LFC areas, coordinating the INP of the participating TSOs; (ii) the TTTSF, which implements the settlement of intended energy exchanges as a result of the cross-border INP between the TSOs (calculating the settlement amount that each participating TSO has to bear for the intended exchange of energy from the INP; and (iii) the CMF, which continuously updates IN CZC for each of the relevant (set of) bidding zone borders and can be implemented in a decentralised or centralised way. The Cross-Zonal Capacity Calculation Function (‘CCCF’), which calculates the capacity across zones, may be added if deemed efficient when implementing methodology for cross-zonal capacity calculation within the balancing timeframe in accordance with Article 37(3) of the EB NC.

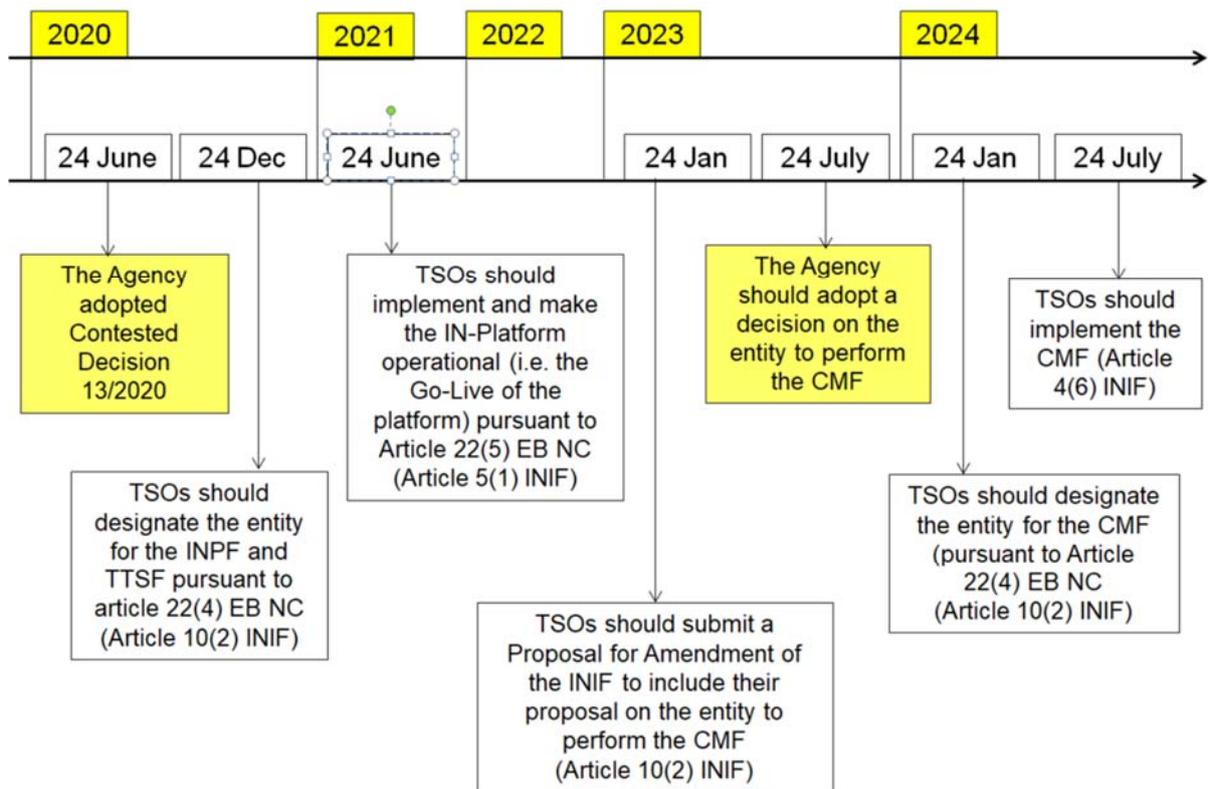
177. The CMF is situated as follows on the timeline of the INIF¹⁰²:

Table on the INIF Timeline

¹⁰⁰ para 103 of the Appeal.

¹⁰¹ Recital (13) and Article 6(1) of the INIF in Annex 1 to the Contested Decision.

¹⁰² See para 30 of the Defence.



Source: Board of Appeal

178. Article 4(6) of the Contested Decision’s INIF provides that the CMF shall be considered as a function required to operate the IN-Platform no later than two years after the deadline for the implementation of the aFRR-Platform in accordance with Article 5(3)(b) of the aFRRIF adopted pursuant to ACER Decision No. 02/2020, i.e. by 24 July 2024¹⁰³.
179. Article 4(2) of the Contested Decision’s INIF provides for a detailed definition of the underlying process of the CMF, which is the process of continuously updating the IN CZC for each of the relevant bidding zone borders or set of bidding zone borders. These capacities are needed as an input for the INPF.

¹⁰³ Annex 4 to the Appeal. See also Articles 3(3) and 6(5) of the INIF joined as Annex 1 to the Contested Decision.

180. As expressly acknowledged by the Appellant¹⁰⁴ and confirmed by the Defendant¹⁰⁵, even though Article 37 of the EB NC does not expressly mention the CMF, it defines its underlying process for the updating of CZC. Indeed, Article 37(1) of the EB NC reads as follows: “*After the intraday-cross-zonal gate closure time, TSOs shall continuously update the availability of cross-zonal capacity for the exchange of balancing energy or for operating the imbalance netting process. Cross-zonal capacity shall be updated every time a portion of cross-zonal capacity has been used or when cross-zonal capacity has been recalculated.*”
181. The underlying process of updating available CZC foreseen by Article 37 of the EB NC can be carried out in a decentralised way, whereby TSOs individually feed the Platform with available CZC, or in a centralised way, whereby a CZC is continuously updated in a centralised way. The Appellant confirmed at the Oral Hearing that the process can be done at each TSO or centrally or even both¹⁰⁶.
182. At the Oral Hearing, the Parties confirmed that, independently from the centralisation foreseen by the CMF in the Contested Decision, there is no difference in process between the process of updating available CZC foreseen in Article 37 of the EB NC and the CMF described by the Contested Decision¹⁰⁷.
183. Following the INIF’s implementation timeline, this process will be carried out in a decentralised way until 24 July 2024 and in a centralised way as of 24 July 2024, by means of the CMF. As will be set out below, the Appellant does not agree with the centralisation through a CMF because it claims that the process does not constitute a function but a module (capacity management module or ‘CMM’).
184. The Board of Appeal observes – similarly to what the Appellant states and the Contested Decision¹⁰⁸ confirms – that All TSOs’ 4th INIF Proposal did not expressly mention the

¹⁰⁴ Para 112 of the Appeal. At the Oral Hearing, the Appellant held that “*the process described in Article 37(1) and (2) EB GL corresponds to the process described in Article 4 of the INIF.*” Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.16 (Question 5 to the Appellant).

¹⁰⁵ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.16 (Question 5 to the Appellant)

¹⁰⁶ *Ibidem.*

¹⁰⁷ *Ibidem.*

¹⁰⁸ Para 51 of the Contested Decision.

CMF and that it did not designate any entity to perform the CMF or the CMF's underlying process of updating CZC. Article 22(3)(e) of the EB NC requires that the Proposal contains express provisions on the proposed entity or entities that would perform all functions. However, as stated in the Contested Decision, All TSOs' Proposal did "not sufficiently address" the Agency's concerns¹⁰⁹ and did "not make clear which function of the Platform will perform the process of updating cross-zonal capacities"¹¹⁰.

185. This is not contradicted by the NRAs' 1st and 2nd RfA to earlier versions of All TSOs' INIF Proposal.

186. Indeed, when disapproving TSOs' 2nd INIF Proposal, All NRAs' 1st RfA expressly stated that, in case multiple entities were designated, All TSOs' Proposal had to demonstrate compliance with the additional requirements of Article 22(3)(e) of the EB NC¹¹¹. All NRAs also stated that "The Proposal should give more than a mere repetition of the EBGL by referring to Article 37 of the EBGL under (5)(a). Article 37 of the EBGL does not describe how the cross zonal capacity is updated. What should be described here in the high-level design of the IN-platform is the way the available cross zonal capacity for the platform is defined. A common starting point should be defined for cross zonal capacity remaining after IDCZGCT (Intraday Cross-Zonal Gate Closure Time), preferably by referring to data/information generated on the basis of CACM GL² methodology, like IDCC (Intraday Capacity Calculation) for available cross zonal capacity and ID scheduled exchanges for the used portion of that cross zonal capacity, as reported by the CMM (capacity management module) of the intraday XBID platform. Furthermore, it should explicitly be included which prior processes could lead to a prior use of cross zonal capacity (e.g. other platforms, optimisation regions) or to – at a later point in time when required – a recalculation(s) of cross zonal capacity for balancing." As set out above, Article 37 of the EB NC contains the CMF's underlying process of updating CZC.

187. When disapproving All TSOs' 3rd INIF Proposal, All NRAs' 2nd RfA highlighted that clarity on the multiple entity structure of Article 22(3)(e) of the EB NC was needed and

¹⁰⁹ Para 69 of the Contested Decision.

¹¹⁰ Para 45 of the Contested Decision.

¹¹¹ Annex 6 to the Appeal.

that this implied “*a delineation of the various technical functions required to operate the platform, “(..) interpreted in such a way that when all the functions are performed by one or several entities, the relevant Platform is operated.*” They reminded TSOs that all functions had to be clearly defined in their Proposal, which “*should then clearly allocate those functions to the respective entity or entities (..)*”¹¹².

188. In this respect, the Appellant’s claim that the NRAs’ would allegedly have acknowledged that the TSOs are fully responsible for the definition of the IN-Platforms’ functions¹¹³ is not only factually incorrect¹¹⁴, but also omits that the EB NC requires regulatory approval. The NRAs merely stressed in their 2nd INIF RfA that the TSOs’ 3rd INIF Proposal could not remain silent as to whether they designated a single entity or multiple entities. Indeed, silence on this issue would have resulted in there being no decision at all, which would be contrary to the EB NC’s requirement that Platform proposals expressly have to delineate functions and designate an entity or entities for those functions and would implicitly leave up to the TSOs to decide on the issue, rendering the bottom-up decision-making process moot.
189. The Appellant’s reiterated statement at the Oral Hearing that “*at no point in time did the NRAs require the TSOs to include the CMF as a platform function*” is factually incorrect¹¹⁵.
190. Apart from the obligation for the TSOs to carry out the process of updating available CZC as per Article 37 of the EB NC, it was an obligation for the Agency to gain clarity on the functions to be performed given that Article 22(3)(c) of the EB NC expressly requires that the INIF includes the functions required to operate the IN-Platform.
191. The Appellant claims, in this regard, is that Article 22(3)(c) of the EB NC only imposes the inclusion of “*required*” functions, that the CMF is not “*required*” to operate the IN-

¹¹² Annex 10 to the Appeal, p. 8.

¹¹³ Paras 107-109 of the Appeal.

¹¹⁴ Annex 10 to the Appeal, p. 8. The sentences of All NRAs’ 2nd RfA quoted in the Appeal have to be interpreted in the sense that All TSOs’ INIF Proposal should expressly define all Platform functions and “*then clearly allocate those functions to the respective entity or entities (..)*”. Those quotations do not imply that the definition of Platform functions is at the discretion of All TSOs.

¹¹⁵ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.2 (Opening Statement of the Appellant) and p.5 and 6 (Main Statement of the Appellant).

Platform and that the Contested Decision erroneously “*created*” the CMF as a required IN-Platform function¹¹⁶.

192. The Board of Appeal finds that the Contested Decision neither introduced the CMF nor otherwise added the CMF as a new function of the IN-Platform that would not have been foreseen by the EB NC.
193. First, as set out above, from a legal perspective, the TSOs have the obligation to carry out the process of updating the availability of CZC under Article 37 of the EB NC. This process can be carried out individually by the TSOs or can be centralised. Whichever way, the process has to be carried out and is thus not a “new” process. The existing pilot project IGCC carries out the process in a decentralised way, i.e. TSOs feed the available CZC individually into the platform¹¹⁷.
194. Additionally, Article 22(3)(a) of the EB NC requires the INIF to include a high-level design of the IN-Platform, and Article 22(3)(c) of the EB NC requires the INIF to include a definition of the functions required to operate the IN-Platform.
195. Second, from a legal, systemic and teleological perspective, the CMF appears as a key asset to attain the EB NC’s objective of creating an internal electricity market, *inter alia* through an integration of balancing markets and promotion of balancing service exchanges, as set out by Article 3(1)(c) of the EB NC. When mandating the creation of EU-wide energy balancing Platforms, the EB NC’s goal is to integrate electricity balancing across all balancing zones in the EU. A cross-zonal function such as a centralised CMF falls within the objectives of the EB NC.
196. The Board of Appeal refers to Recital (5) of the EB NC, which states that the EB NC “*establishes an EU-wide set of technical, operational and market rules to govern the functioning of electricity balancing markets. It sets out rules for the procurement of balancing capacity, the activation of balancing energy and the financial settlement of balance responsible parties. It also requires the development of harmonised methodologies for the allocation of cross-zonal transmission capacity for balancing*

¹¹⁶ Paras 12, 50, 66, 67, 90, 100, 104 and 115 of the Appeal.

¹¹⁷ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.6 (Main Statement of the Appellant), p. 17 (Questions to both Parties), p. 25 (Question 8 to the Appellant) and p. 27 (Question 12 to the Appellant).

purposes. Such rules will increase the liquidity of short-term markets by allowing for more cross-border trade and for a more efficient use of the existing grid for the purposes of balancing energy. As balancing energy bids will compete on EU-wide balancing platforms, it will also have positive effects on competition.”

197. From a legal perspective, therefore, the CMF responds to the requirements of Article 37(1) and Article 22(3)(a) and (c) of the EB NC as well as a systemic and teleological interpretation of the EB NC. Contrary to the Appellant’s claim, the CMF has a legal basis¹¹⁸.
198. Third, an IN-Platform requires the performance of the underlying process of the CMF in accordance with Article 37(1) of the EB NC, irrespective of its centralised or decentralised nature, as appears from the Agency’s Defence¹¹⁹, All TSOs’ 4th INIF Proposal itself¹²⁰ and even All TSOs’ 1st INIF Proposal¹²¹, and that this process of continuously updating the availability of CZC will remain in place during the transition period until the implementation of the centralised CMF becomes mandatory on 24 July 2024 in accordance with Article 4(6) of the Contested Decision’s INIF (see Table on INIF Timeline above). This was also confirmed at the Oral Hearing¹²².

¹¹⁸ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p. 7 (Main Statement of the Appellant).

¹¹⁹ Paras 41, 60 and 69 of the Defence; see also paras 13 and 21 of the Rejoinder.

¹²⁰ Annex 8 to the Appeal: Article 4(2) of All TSOs’ 4th INIF Proposal of 10 September 2019 states “*second step: the imbalance netting cross-border capacity limits obtained in Article 4(2)(a) of this INIF are adjusted by the cross-border reserve replacement power interchange, the manual frequency restoration power interchange on each imbalance netting balancing border or set of imbalance netting balancing borders to which the given cross-border capacity limits are related to, in accordance with Article 37(1) of the EGBL (..)*” and “*third step: in accordance with Article 37(1) of the EGBL, the imbalance netting cross-border capacity limits shall be updated whenever remedial actions pursuant to Article 22 of SOGL leads to cross-border exchange on the imbalance netting balancing border or set of imbalance netting balancing borders to which imbalance netting cross-border capacity limits are related*”.

¹²¹ Annex 13 to the Appeal: Article 11 describes the algorithm for the operation of the INP on the basis of certain principles, inter alia, “(e) (..) *The participating TSOs shall define the limits according to the following rules: i. the limits between borders where a capacity allocation is performed shall be based upon the available cross-zonal capacity after cross border intraday market and be further updated according to Article 37 (1) of the GLEB;(..)*”.

¹²² *Ibidem*.

199. Currently, the pilot project IGCC does not have a centralised process in place but carries out the process in a decentralised manner, i.e. TSOs feed the available CZC individually into the Platform¹²³.
200. Consequently, the technical reality of electricity balancing Platforms suggests that they cannot operate without the underlying process of the CMF¹²⁴. In other words, the operation of the IN-Platform requires a constant updating of the CZC, regardless of whether this process is considered to be a function (CMF) or a module (CMM).
201. According to the Contested Decision's INIF, the TSOs are free to implement the process in the manner they deem appropriate until 2024. It is only after 24 July 2024 that the centralised CMF will have to be implemented. In other words, the CMF is not a "new" function that the Agency introduced but a function that is required to operate an electricity balancing Platform. What is new is its mandatory centralisation, which responds to a need for EU integration, at the core of the EB NC.
202. The Board of Appeal fails to identify any disagreement between the Appellant and the Defendant on the legal and technical requirement that a process to update available CZC shall be carried out on the IN-Platform.
203. On the decentralised or centralised nature of the process, the Board of Appeal also fails to identify any disagreement between the Appellant and the Defendant. Indeed, both agree on the suitability of the centralised nature of the process.
204. The Appeal states that "*ACER is wrong to say that the TSOs have proposed a decentralised capacity management process: in fact the process they have proposed is a centralised process*"¹²⁵. In its written response to the Agency on behalf of the TSOs during the hearing, ENTSO-E also foresaw a common process for all platforms: "(..) *this CMM may be performing a common service to all platforms, as it is intended by the TSOs*" and "*while TSOs appreciated that ACER agrees that the CMM should be*

¹²³ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.6 (Main Statement of the Appellant), p. 17 (Questions to both Partis), p. 25 (Question 8 to the Appellant) and p. 27 (Question 12 to the Appellant).

¹²⁴ Defence, paras 175 and 231.

¹²⁵ Para 95 of the Appeal.

delivered as a common project for all platforms and therefore have a common implementation deadline (..)”(see also figure 1: “*CMF – 1 entity for all Platforms*”)¹²⁶. The Appellant’s Reply, however, somehow qualifies the need for centralisation, describing it as “*coordinated action*” between the TSOs and adding that “*TSOs will be able to feed the IN-Platform with the available cross-zonal capacity individually, which means that the CMF is not necessary for the functioning of the IN-Platform.*”¹²⁷

205. In this respect, the Contested Decision states that the INPF requires continuously updated CZC, which is “*most efficiently done through a central function*”¹²⁸. The Contested Decision also states that “*the technical analysis of the process of updating cross-zonal capacities revealed that this process requires both intra-platform and inter-platform updating*” and that the Agency considers that it should be a “*central function that serves not only the IN-Platform but also other Platforms, which required the same process of updating cross-zonal capacities*”¹²⁹.

206. In view of the above, given that Article 22(2) of the EB NC requires the IN-Platform to perform a minimum of two functions – the INPF and the TTSP - and that the IN-Platform operation requires the process of constant updating CZC, which is most efficiently done in a centralised fashion, the Board of Appeal finds that the Contested Decision did not create the CMF but endorsed an existing required function, the central nature of which was requested by the TSOs, and did not contravene Article 22(2) of the EB NC when including this required function in the Contested Decision’s INIF.

3.2 *CMF is not a required Platform function*

207. Article 22(3)(c) of the EB NC states that the TSOs’ Proposal “*shall include at least: (..) (c) the definition of the functions required to operate the European platform.*”

208. Even though both the Appellant and the Defendant agree that operating the IN-Platform requires that available CZC be continuously updated and that a centralised process is the

¹²⁶ Annex 12 to the Appeal and Annex 1 to the Defence, p. 1- 3.

¹²⁷ Para 19 of the Reply.

¹²⁸ Para 65 of the Contested Decision.

¹²⁹ Para 47 of the Contested Decision.

most efficient process to carry out this process, the Appellant claims that the process of continuously updating CZC is a module and not a required Platform function¹³⁰, whereas the Agency finds that the CMF is “*an essential function*”¹³¹.

209. The centralised process to continuously update available CZC is called a capacity management “module” or CMM by All TSOs and a capacity management “function” or CMF by the Agency.

210. As set out above, that the Appellant and the Defendant neither disagree about the fact that the underlying process of the CMF is an indispensable input of the INPF nor about the fact that the INPF is a required function to operate the IN-Platform. At the Oral Hearing, the Appellant confirmed the correctness of the following sequence¹³²:

(1) a centralised process updates the available CZC

=> (2) this serves as an input for the INP or the AOF, depending on the Platform

=> (3) some of the outputs of the INP or AOF are used as input for the TTSF

211. However, the Appellant calls this process a module because it considers that it is a complementary feature¹³³ and not a Platform function. In other words, the Appellant does not contest the need for a centralised version of the underlying process to the CMF but contests the inclusion of the CMF as a Platform function. The Appeal states that “*this process operates as a capacity management module*” or “*CMM*”¹³⁴. Similarly, in its written response to the Agency on behalf of All TSOs during the hearing, ENTSO-E stated that “*the update of cross-zonal capacities (‘CZC’) is not to be understood as a function required to operate the balancing platforms but as an IT module (the ‘capacity management module’ or ‘CMM’) that will provide operational robustness and*

¹³⁰ Paras 93, 99 and 112 of the Appeal. See also Annex 12 to the Appeal and Annex 1 to the Defence, ENTSO-E’s written response to the Agency during the hearing, p.2 and 3: “*the IT module proposed by TSOs (the CMM) is obviously not a “function required to operate the European Platforms”.*

¹³¹ Para 65 of the Contested Decision.

¹³² Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.25 (Question 7 to the Appellant).

¹³³ Para 115 of the Appeal.

¹³⁴ Para 93 of the Appeal.

*transparency on the performance of such CZC updates”*¹³⁵ and that it is “*a separate cross-platform function added to improve coordination between platforms*”¹³⁶ However, ENTSO-E’s written response of 17 April 2020 calls the process “CMF” when depicting it graphically in Figure 1¹³⁷.

212. Even though the TSOs called the process a “module” far from considering it as a sub-feature of the optimisation function or settlement function, All TSO’s 4th INIF Proposal separates this process from the INPF and the TTSP. The Contested Decision similarly states that the INPF requires continuously updated cross-zonal capacities¹³⁸ and that this process *is clearly distinct from the other two functions of the IN-Platform, and yet necessary for the operation of the IN-Platform*”¹³⁹. Contrary to other complementary features that are cited in ENTSO-E’s written response of 17 April 2020 – e.g. common invoicing (billing) for all Platforms or co-owning of the relevant software and IPRs of the algorithms – All TSOs expressly included the process of updating available CZC in their INIF Proposal.

213. At the Oral Hearing, the question was posed to the Appellant why All TSOs included the text of Article 4(2) referring to the continuous updating of CZC in All TSOs’ 4th INIF Proposal, if they considered this updating not to be necessary for the Platform (and why the Appellant did not oppose the inclusion of this text in All TSOs’ 4th Proposal):

“Article 4(2):

Each TSO shall continuously calculate and provide the imbalance netting cross-border capacity limits to the optimisation algorithm for each of the relevant imbalance netting balancing border or set of imbalance netting balancing borders by applying the following process:

(a) First step:

¹³⁵ Annex 12 to the Appeal and Annex 1 to the Defence, p. 1-2. Also “*the CMM should be understood as an IT module supporting the provision of one of the inputs to the activation optimisation function (‘AOF’), and thus can be considered as ‘accommodated’ by the AOF of each platform, even when in practice this CMM may be performing a common service to all platforms, as it is intended by all TSOs.*”

¹³⁶ Annex 12 to the Appeal and Annex 1 to the Defence, p. 3.

¹³⁷ Annex 12 to the Appeal.

¹³⁸ Para 65 of the Contested Decision.

¹³⁹ Para 60 of the Contested Decision.

- i. *If the imbalance netting balancing border or set of imbalance netting balancing borders correspond to a bidding zone border or set of bidding zone borders, the imbalance netting cross-border capacity limits are equal to the cross-zonal capacity remaining after the intraday cross-zonal gate closure time in accordance with Article 37(2) of the EBGL. Once the methodology pursuant Article 37(3) of the EBGL is approved and implemented, the imbalance netting cross-border capacity limits shall be equal to the respective calculated values.*
- ii. *If the imbalance netting balancing border or set of imbalance netting balancing borders does not correspond to a bidding zone border or set of bidding zone borders and hence, no cross-zonal capacity between the respective LFC areas is defined, the cross-border capacity limits are equal to the respective technical IT limitation agreed by all member TSOs.*
- iii. *Bidding zone borders and the respective cross-zonal capacity limitations inside an LFC area are not considered by the optimisation algorithm”¹⁴⁰.*

214. The Appellant replied that the inclusion was made “*following discussions with the NRAs*”¹⁴¹.

215. Neither in the Appeal, nor in the Reply nor during the Oral Hearing has the Appellant brought forward any valid reasons why the CMF would not qualify as a required function in accordance with Article 22(3)(e) of the EB NC.

216. The Appellant confirmed that the process of updating CZC – which it qualifies as a module - generates indispensable input for the INPF. It also confirmed that the process is distinct from the INPF and the TTSP¹⁴². The Appellant confirmed that the process is necessary for the Platform to operate, i.e. its outcome is necessary as input for the Platforms¹⁴³.

¹⁴⁰ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.25 and 26 (Question 9 to the Appellant).

¹⁴¹ *Ibidem*.

¹⁴² Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.25 (Question 7 to the Appellant).

¹⁴³ *Ibidem*.

217. Qualifying the process of updating CZC needed to operate a Platform as a “module” does not justify that it be treated differently than other required Platform functions, such as the INPF and the TTSP. This is especially so if, as was confirmed at the Oral Hearing, there is no technical difference between the CMF and the CMM¹⁴⁴.
218. The Appellant’s allegation that the CMF is not a required function because the IGCC pilot project currently operates without the CMF¹⁴⁵ is moot. First, the IGCC does not operate a centralised process, the suitability of which is not disputed by the Appellant and the Defendant. The IGCC operates a decentralised process, i.e. each TSO feeds its available CZC individually into the Platform. Second, the bottom-up decision-making process foreseen in the EB NC gives all stakeholders the opportunity to take stock of the experience gained in pilot projects, such as the IGCC. This does, however, not allow the Applicant to challenge the regulatory approval of All TSOs’ 4th INIF Proposal.
219. Contrary to the Appellant’s argument¹⁴⁶, the fact that the Contested Decision grants All TSOs a transition period to implement the CMF and designate a CMF entity¹⁴⁷ does not imply that the CMF qualifies as a redundant Platform function. This argument is based on the reasoning that the IGCC pilot project is, at present, able to function without the CMF, which, as set out above, is an erroneous statement. Transition periods are standard occurrence in processes of gradual integration. Gradual integration processes – e.g. creating of a Euro-zone or a customs union – , just like gradual liberalisation processes, are characterised by transition periods, allowing all stakeholders to gradually adapt to the new situation. The Contested Decision’s INIF is part of the gradual integration process of balancing energy markets, foreseen by the EB NC. To avoid any misunderstanding, the Contested Decision mentions expressly that the transition period does not in any way affect the essential nature of the CMF¹⁴⁸. Furthermore, as already

¹⁴⁴ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.17 and 18 (Questions to both Parties).

¹⁴⁵ Para 6(b) of the Reply.

¹⁴⁶ Para 150 of the Appeal. See also paras 49 and 50 of the Contested Decision.

¹⁴⁷ Paras 46 and 67 of the Contested Decision.

¹⁴⁸ Contested Decision, para 46: “*This transition period aims to prevent any delays in the implementation of the platforms, since meeting the implementation deadline should have a higher priority than implementing this function in a centralised manner.*” See also footnote 20 in para 65.

mentioned, when opting for a timeframe to propose the designation of the CMF entity until 24 January 2023, the Agency endeavoured to align the INIF with the TSOs' request to harmonize the timing to propose the designation of the CMF entity for the INIF and the aFRRIF¹⁴⁹.

220. In view of the above, the Board of Appeal finds that the CMF is a required function to operate the IN-Platform in accordance with Article 22(3)(c) of the EB NC.

3.3 ACER's decision to introduce the CMF as a required Platform function resulted in the unlawful application of Article 22(3)(e) of the EB NC to (i) the process of updating cross-zonal capacities ; and (ii) the required Platform functions

221. The Appellant claims that the erroneous designation of the CMF as a required Platform function enabled the Contested Decision to unlawfully apply the additional requirements of Article 22(3)(e) of the EB NC to the Platform functions. The Appellant alleges that *"ACER's real intention is not to establish a CMF (where the CMM agreed by the TSOs would deliver exactly the same results) but to create a legal artifice to reopen the discussion on entities of the Platforms and ultimately ensure that this latter would also operate other European balancing platforms"*¹⁵⁰. ENTSO-E's written response to the Agency during the hearing contains exactly the same wording and adds that this is to *"justify ACER's desired obligation on TSOs to develop a proposal for amendments of the INIF and, in practice, give ACER the tool to impose the establishment of an entity being a company created by TSOs, once the TSOs have implemented the balancing energy platforms."*¹⁵¹

222. The Defendant responds that, since the CMF is considered a platform function, pursuant to Article 22(3)(e) of the EB Regulation, the proposed INIF had to include a proposed designation for the entity/ies that will perform this function, but that the TSOs only proposed in their Proposal the designation of an entity for the INPF and the TTSP¹⁵².

This transition period aims to prevent any delays in the implementation of the platforms, since meeting the implementation deadline should have a higher priority than implementing this function in a centralised manner.

¹⁴⁹ Annex 12 to the Appeal, see also Annex 1 to the Defence, p.2, section 2, subpara "Capacity Management".

¹⁵⁰ Para 100 of the Appeal.

¹⁵¹ Annex 12 to the Appeal, see also Annex 1 to the Defence, p.3.

¹⁵² Para 64 of the Defence.

223. The Board of Appeal refers to Sub-Pleas 3.1 and 3.2, where it finds that the Contested Decision did not introduce the CMF. The CMF, irrespective of its name, is not a new but an existing function, required to operate an IN-Platform in accordance with Article 22(3)(c) of the EB NC. Only its centralisation foreseen for 2024 is new. Moreover, All TSOs' 4th INIF Proposal, which the NRAs referred to the Agency for approval, contained the underlying process of the CMF – i.e. the continuous update of CZC – albeit in a decentralised fashion. Similarly, the IGCC pilot project works on the basis of a decentralised process to update available CZC¹⁵³.

224. The Board of Appeal also refers to Sub-Plea 1.1, where it was set out that All TSOs' 4th INIF Proposal the NRAs referred to the Agency for approval did not mention the CMF. All TSOs' mandate under Article 22(1) of the EB NC to develop an INIF Proposal necessarily requires a clear determination of the entity or entities that will perform all IN-Platform functions as transpires from a reading of Article 22(2), (3) and (4) of the EB NC. Indeed, it would be impossible for the NRAs (or ACER in its stead) to verify compliance of the Proposal with Article 22(2), (3) and (4) of the EB NC if the Proposal would not specify which entity or entities will perform which functions. This is precisely what All NRAs communicated to All TSOs in the 2nd INIF RfA pursuant to All TSOs' 3rd INIF Proposal. This information is essential to enable the regulatory authorities to verify that the Proposal complies with:

- Article 22(2) of the EB NC - requiring that the IN-Platform “*be operated by TSOs or by means of an entity the TSOs would create themselves*” and “*be based on common governance principles and business processes and shall consist of at least the activation optimisation function and the TSO-TSO settlement function*” -,
- Article 22(3) of the EB NC – requiring that the Proposal “*shall include at least (a) the high level design of the European platform; (b) the roadmap and timelines for the implementation of the European platform; (c) the definition of the functions required to operate the European platform; (d) the proposed rules concerning the governance and operation of the European platform, based on the principle of non-discrimination*”

¹⁵³ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.6 (Main Statement of the Appellant), p. 17 (Questions to both Partis), p. 25 (Question 8 to the Appellant) and p. 27 (Question 12 to the Appellant).

and ensuring equitable treatment of all member TSOs and that no TSO benefits from unjustified economic advantages through the participation in the functions of the European platform; (e) the proposed designation of the entity or entities that will perform the functions defined in the proposal. Where the TSOs propose to designate more than one entity, the proposal shall demonstrate and ensure: (i) a coherent allocation of the functions to the entities operating the European platform. The proposal shall take full account of the need to coordinate the different functions allocated to the entities operating the European platform; (ii) that the proposed setup of the European platform and allocation of functions ensures efficient and effective governance, operation and regulatory oversight of the European platform as well as supports the objectives of this Regulation and (iii) an effective coordination and decision making process to resolve any conflicting positions between entities operating the European platform"; and

- Article 22(4) of the EB NC stipulating that “*by six months after the approval of the proposal for the implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with manual activation, all TSOs shall designate the proposed entity or entities entrusted with operating the European platform pursuant to paragraph 3(e).*”

225. Even though the TSOs expressed an intention to designate a single entity, All TSOs’ 4th INIF Proposal limited the functions of that entity to the INPF and the TTSP (and a possible additional CCCF if deemed efficient). The Proposal neither mentioned the CMF nor the entity that would be designated for the CMF. Accordingly, the Proposal clearly left the possibility open of a performance of the INPF and TTSP by one entity and the performance of the CMF by another entity.

226. Therefore, the way the TSOs proposed the designation of entities in All TSOs’ 4th INIF Proposal *de facto* left the door open to the designation of multiple entities. This would not have been *per se* contrary to Article 22(3)(e) of the EB NC if All TSOs’ 4th INIF Proposal had provided the necessary guarantees on allocation of functions, coordination between these functions, governance, operation and regulatory oversight and conflict resolution, as required by Article 22(3)(e) of the EB NC. Yet, the Proposal did not contain sufficient guarantees in this respect.

227. In this context, the Appellant's argument that it was not given the opportunity to elaborate on All TSOs' 4th INIF Proposal's compliance with the additional requirements of Article 22(3)(e) of the EB NC is moot. All TSOs' INIF Proposal was sent back twice to All TSOs because of its lack of clarity on compliance with the additional requirements needed to designate a multiple entity, both in All NRAs' 1st RfA and 2nd RfA. All NRAs' 1st RfA stated that "*the Proposal does not explain how the setup of two entities ensure efficient and effective governance, operation and regulatory oversight of the European Platform as required by Article 22(3)(e)(ii) of the EBGL*"¹⁵⁴. All NRAs' 2nd RfA stated that "*Article 22(3)(e) points (i)-(iii) of EBGL explicitly require that the proposal itself demonstrate and ensure all the objectives listed. The proposal must not remain silent or vague on how these objectives will be ensured and therefore it must contain a sufficient amount of details as regards the operational rules ensuring the fulfilment of these objectives*"¹⁵⁵.
228. Moreover, All TSOs' 4th INIF Proposal's compliance with these additional requirements was at the heart of the dialogue between the Agency and All TSOs, including the Appellant, from the beginning of ACER's INIF decision-making process. Indeed, All TSOs' 4th INIF Proposal provided for a decentralised process to continuously update CZC¹⁵⁶. The referral of INIF's regulatory approval to the Agency occurred at the end of December 2019 and coincided with the end of the decision-making process leading-up to the adoption of Decisions No.02/2020 on the aFRRIF¹⁵⁷ and 03/2020 on mFRRIF¹⁵⁸ in January 2020, which had been preceded by an extensive dialogue on the CMF with the TSOs, including the Appellant. Finally, ENTSO-E's written response to the Agency

¹⁵⁴ Annex 6 to the Appeal.

¹⁵⁵ Annex 10 to the Appeal.

¹⁵⁶ Annex 8 to the Appeal: Article 4(2) of All TSOs' 4th INIF Proposal of 10 September 2019 states "*second step: the imbalance netting cross-border capacity limits obtained in Article 4(2)(a) of this INIF are adjusted by the cross-border reserve replacement power interchange, the manual frequency restoration power interchange on each imbalance netting balancing border or set of imbalance netting balancing borders to which the given cross-border capacity limits are related to, in accordance with Article 37(1) of the EBGL (..)*" and "*third step: in accordance with Article 37(1) of the EBGL, the imbalance netting cross-border capacity limits shall be updated whenever remedial actions pursuant to Article 22 of SOGL leads to cross-border exchange on the imbalance netting balancing border or set of imbalance netting balancing borders to which imbalance netting cross-border capacity limits are related*".

¹⁵⁷ Annex 4 to the Appeal.

¹⁵⁸ Annex 11 to the Appeal.

during the hearing dealt with the CMF in-depth¹⁵⁹, as referred to by the Contested Decision¹⁶⁰.

229. As set out above, the Agency had two options when it faced a lack of compliance of All TSOs' 4th INIF Proposal with the additional requirements of Article 22(3)(e) of the EB NC: either to specify itself the relevant entity/entities in the proposed INIF or instead to rely for the specification on the TSOs and ask them to propose the relevant entity/entities later, before the CMF would be operational. Instead of instructing TSOs on the designation of the CMF entity, the Agency left this issue up to the TSOs to make proposals in future at their discretion. In this respect, it is still left open to the TSOs to propose a single entity structure or multiple entity structure by 24 January 2023, rendering any imposition by the Agency irrelevant.
230. Finally, the Appellant's claims that it was not requested by the Agency to "volunteer" information on the additional requirements of Article 22(3)(e) of the EB NC or not sufficiently oriented by the Agency are equally immaterial. As set out above, the issue was at the heart of the dialogue between the Agency and All TSOs, including the Appellant, from the very beginning of ACER's INIF decision-making process. The Agency duly consulted and advised the TSOs from January until April 2020. Yet, following the referral to ACER, All TSOs did not submit a new, 5th INIF Proposal to ACER.
231. Given the contents of All TSOs' 4th INIF Proposal, which did not meet the EB NC requirements - hence putting due integration of the internal electricity market at risk – and given ENTSO-E's written response during the hearing, the Agency duly identified a misreading of the EB NC, which, if not remedied in the Contested Decision, could have created a barrier for further integration of the electricity balancing markets contrary to the EB NC's objectives set out in Article 3 of the EB NC.
232. As set out above, the Agency adopted a Contested Decision's INIF that was in line with All NRAs' RfAs. All NRAs jointly requested the Agency to adopt the Contested Decision and the referral occurred as per Article 6(2) of the EB NC. Furthermore, the

¹⁵⁹ Annex 12 to the Appeal, see also Annex 1 to the Defence, p.2, section 2, subpara "Capacity Management".

¹⁶⁰ Paras 44-51 of the Contested Decision.

Board of Regulators issued a favourable opinion to the draft Contested Decision, which demonstrates that at least two thirds of the NRAs was in agreement with the Contested Decision.

233. In view of the above, the Board of Appeal concludes that the Contested Decision does not contravene Article 22(3)(e) of the EB NC.

3.4 ACER uses the creation of a new platform function, the CMF, and the related process of amendment to impose a single entity structure, a company owned by TSOs, in pursuit of an overarching policy goal for all European balancing platforms

234. The Appellant claims that ACER's decision to create a new required platform function in the CMF (which it does not consider to be a required platform function) effectively obliges the TSOs to adopt a single entity structure for all platform functions. It adds that *"ACER utilises the creation of the CMF as an apparently legitimate construct to mandate a discretionary process of amendment with the aim of later reopening the discussion on the designation of the platform entity once the TSOs have implemented the IN-Platform and other balancing energy platforms"*¹⁶¹.

235. The Appellant bases this plea on the Contested Decision's statement that it is *"of the opinion that, in the long run, there are considerable arguments in favour of all the functions of the IN-Platform being operated by an entity that the TSOs would create themselves and that this entity would operate also other European balancing platforms"*¹⁶² and that this statement is also found in Decision No.02/2020 (aFRRIF)¹⁶³ and Decision No.03/2020 (mFRRIF)¹⁶⁴. It adds that the Agency reiterated the statement during the consultation and throughout the hearing phase.

236. The Appellant claims that ACER has unlawfully interpreted and applied Article 22(2) of the EB NC as requiring the designation of an entity with full legal capacity to operate an additional platform function, the CMF, and wrongfully asserted a right to impose a

¹⁶¹ Paras 66-70 of the Appeal.

¹⁶² Para 69 of the Contested Decision.

¹⁶³ Para 84 of Decision No. 02/2020, Annex 4 to the Appeal.

¹⁶⁴ Para 98 of Decision No. 03/2020, Annex 11 to the Appeal.

single entity structure, a company owned by TSOs, with the aim of furthering ACER's overarching policy goal for all European balancing platforms.

237. The Board of Appeal refers to Sub-Plea 1.1 above, in which it set out that the Contested Decision neither imposed the designation of a single entity nor the introduction of the CMF.
238. As to the alleged overarching policy goal of the Agency aimed at the “*integration of (at least) two of the European Platforms*”¹⁶⁵, the Board of Appeal refers to the Second Plea above, which concludes that any organisational link between the INIF and the aFRRIF beyond the implementation timing for the CMF is at the TSOs' discretion, and to Sub-Plea 3.5 below, which evidences that TSOs requested a cross-platform CMM.
239. The Board of Appeal also finds that the Agency neither amended nor otherwise supplemented the EB NC, rendering the Appellant's argument that the Agency has limited powers to implement the EB NC and was, hence, not allowed to amend or supplement the EB NC, equally moot¹⁶⁶. Indeed, there is no indication that the Agency went beyond its powers under the EB NC when taking the Contested Decision. The Agency duly assessed All TSO's INIF proposal against the applicable regulatory framework contained in the EB NC as required by the step-based bottom-up approach foreseen by the EB NC. Any disagreement of the Appellant with the applicable regulatory framework falls outside of the scope of this appeal.
240. With respect to Cases T-332/17 and T-333/17 that the Appellant quotes to demonstrate that the Agency cannot amend or supplement the EB NC, as this is reserved for the legislator¹⁶⁷, the Board of Appeal reiterates, firstly, that when adopting the Contested Decision, the Agency did not amend or supplement the EB NC but duly complied with its obligation of regulatory approval of All TSOs' Proposal and, secondly, that Cases T-332/17 and T-333/17 bear no relationship with the present case. In those cases, ACER was not competent to take a decision because there had been a NRA that had tabled a unilateral amendment. In the present case, ACER adopted the Contested Decision on the

¹⁶⁵ Para 25 of the Appeal. See also para 51 of the Appeal.

¹⁶⁶ Paras 27-32 of the Reply.

¹⁶⁷ Paras 31-32 of the Reply.

basis of Article 6(2) of the EB NC and Article 6(10) of the ACER Regulation, as confirmed by the NRAs' joint referral of 16 January 2020.

3.5 *ACER infringed Articles 21 and 22 of the EB NC through the requirement of the CMF to be implemented for other balancing platforms*

241. The Appellant claims that ACER infringed Articles 21 and 22 of the EB NC by requiring the CMF to be implemented for other balancing platforms. It claims that there is no requirement in the EB NC stipulating that any function required to operate a particular balancing platform should be the same (in terms of contents and/or the entity operating that function) across every balancing platform and adds that there is no legal basis for a cross-platform CMF¹⁶⁸.
242. The Defence responds that the TSOs proposed to link the platforms both during the decision-making process leading-up to Decisions No.02/2020¹⁶⁹ and 03/2020¹⁷⁰ and during the hearing for the Contested Decision¹⁷¹.
243. Article 4(6) of the INIF reads as follows: *“No later than two years after the deadline for the implementation of the aFRR-Platform in accordance with Article 5(3)(b) of the implementation framework adopted pursuant to ACER Decision 02-2020, all TSOs shall establish a CMF, which shall implement the continuous process described in paragraph 2. In case other balancing platforms have such function, the CMF shall be the same across these platforms, if the same obligation is imposed in the relevant implementation framework for these platforms”*.
244. Articles 19 (on the RRIF), 20 (on the mFRRIF), 21 (on the aFRRIF) and 22 (on the INIF) of the EB NC do not stipulate that the designation of entities for one balancing platform should be reflected in another balancing platform.
245. The EB NC does not prohibit a Platform function being the same across Platforms.

¹⁶⁸ Paras 26-28, 71, 76-77 of the Appeal.

¹⁶⁹ Annex 4 to the Appeal.

¹⁷⁰ Annex 11 to the Appeal.

¹⁷¹ Paras 51, 66 and 69 of the Defence. See also paras 28 to 31, 50 and 61 of the Rejoinder.

246. However, as has been noted above in the Second and Third Pleas, during the hearing, ENTSO-E expressly requested, on behalf of All TSOs, a common process to update CZC for all platforms, the CMM, in order to increase cost efficiency¹⁷². This is referred to in the Contested Decision¹⁷³.
247. The Board of Appeal refers to Sub-Plea 3.1 as regards the convenience to centralize the continuous updating of CZC both at intra-Platform and inter-Platform level.
248. Nevertheless, the Appellant argues that the CMM is a module and not a Platform function and that, consequently, the IN-Platform can function without a common process of updating CZC, given that each TSO update CZC individually as well. According to TSOs' view, the fact that the IGCC pilot project operates without a centralised system (CMM or CMF) but relies upon the individual process of updating available CZC provides proof that the CMF is not needed for the IN-Platform operation¹⁷⁴.
249. As set out in Sub-Plea 3.2, the Appellant recognises the need to update CZC in order to operate the IN-Platform as well as the efficiency of centralising this process but erroneously qualifies the process as a module as opposed to a required function in accordance with Article 22(3)(c) and (e) of the EB NC.
250. As phrased in the Rejoinder, "*it was upon the TSOs' own proposal that ACER had to consider the CMF to be the same for aFRR-Platform, mFRR-Platform and IN-Platform*"¹⁷⁵. In this respect, All TSOs' Proposal is the basis of the bottom-up decision-making process leading-up to the Contested Decision.
251. The Contested Decision sets out that the process of updating cross-zonal capacities entails the updating of cross-zonal capacities both at intra- and inter-Platform level:
- "(a) during the operation of the IN-Platform (intra-platform level): e.g. due to balancing energy exchanges determined by the IN-Platform or other cross-zonal exchanges or limitations occurring during the operation of the IN-Platform;*

¹⁷² Annex 12 to the Appeal, see also Annex 1 to the Defence, p.2, section 2, subpara "Capacity Management".

¹⁷³ Para 49 of the Contested Decision.

¹⁷⁴ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.6 (Main Statement of the Appellant), p. 17 (Questions to both Parties), p. 25 (Question 8 to the Appellant) and p. 27 (Question 12 to the Appellant).

¹⁷⁵ Para 39 of the Rejoinder.

(b) before the operation of the IN-Platform (inter-platform level): e.g. due to balancing energy exchanges determined by the platforms preceding the IN-Platform or other cross-zonal exchanges or limitations occurring before the operation of the IN-Platform.”¹⁷⁶

252. The Contested Decision confirms that “*the technical analysis of the process of updating cross-zonal capacities revealed that this process requires both intra-platform and inter-platform updating*” and that the Agency considers that it should be a “*central function that serves not only the IN-Platform but also other Platforms*”¹⁷⁷. It adds, with respect to the operation of cross-platform functions, that the technical analysis showed that the process of updating cross-zonal capacities is most efficiently facilitated by a CMF that is “*the same across different platforms*”¹⁷⁸. However, in order not to prejudice the other Platforms, the Agency made the obligation conditional upon a similar wording in the RRIF, aFRRIF and mFRRIF¹⁷⁹.
253. In ENTSO-E’s written response to the hearing of 17 April 2020, ENTSO-E proposed the single implementation of a CMM across all Platforms to ACER¹⁸⁰. This was confirmed at the Oral Hearing¹⁸¹.
254. ENTSO-E’s written opinion invokes efficiency to justify the implementation of the CMM across all Platforms in its written response to the hearing of 17 April 2020. The efficiency invoked by ENTSO-E is in accordance with the general objective set out in Article 3 of the EB NC, namely “*enhancing efficiency of balancing as well as efficiency of European and national balancing markets*”. In that respect, cross-platform implementation fosters integration of balancing markets, as provided by Article 3(1)(c) of the EB NC.

¹⁷⁶ Para 42 of the Contested Decision.

¹⁷⁷ Para 47 of the Contested Decision.

¹⁷⁸ Para 70 of the Contested Decision.

¹⁷⁹ Para 47 of the Contested Decision.

¹⁸⁰ Annex 12 to the Appeal.

¹⁸¹ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.28 (Question 14 to the Appellant). The Appellant held that “*the TSOs informed ACER about the CMM even months before. ACER was aware about the CMM I would say in October/November 2019*”. The Defendant held that “*regarding the CMM indeed the TSOs proposed this already during the previous discussions, that is why ACER took this into account when first sending the draft to the TSOs*”.

255. Considering the gradual process of the harmonisation of electricity balancing, the need for cross-platform operations is not a new need introduced by the Contested Decision, but that its appropriateness was discussed even before the adoption of the EB NC: “An integrated cross-border BM is intended to maximise the efficiency of balancing by using the most efficient balancing resources, while safeguarding operational security. The exchange of balancing services across borders may involve the cross-border trade of balancing energy (including imbalance netting) and of balancing capacity. The core element for the integration of EU BMs are the models for cross-border exchanges of balancing energy that should emerge in different geographical areas and gradually be integrated into a single European platform where all TSOs would have access to different types of balancing energy, subject to the availability of cross-border transmission capacity.”¹⁸²
256. Importantly, the Appellant does not indicate any difference in operating the CMF on the RR-, aFRR- or mFRR-Platforms that would impede its cross-platform operation, especially if one takes account of the fact that Article 4(6) of the aFRRIF of Decision No.02/2020¹⁸³ and Article 4(6) of the mFRRIF of Decision No.03/2020¹⁸⁴ provides for a similar cross-platform provision as Article 4(6) of the Contested Decision’s INIF. When asked at the Oral Hearing whether there was any technical difference when operating the CMF on the aFRR- Platform, mFRR- or the IN-Platform that would impede cross-platform operation of the CMF, the Appellant did not invoke any technical difference capable of impeding cross-platform operation of the centralised process of updating CZC (which it called a module instead of a function) but stressed that this process was the TSOs’ responsibility¹⁸⁵. When asked the same question, the Defendant held that “there are no technical differences relating to the processes and this is why it was described like that by the TSOs”¹⁸⁶.

¹⁸² Annual Report of ACER and the Council of European Energy Regulators (‘CEER’) on the Results of Monitoring the Internal Electricity and Gas Markets in 2014, 30 November 2015, p. 211-212.

¹⁸³ Annex 4 to the Appeal.

¹⁸⁴ Annex 11 to the Appeal.

¹⁸⁵ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.28 (Question 13 to the Appellant).

¹⁸⁶ *Ibidem*.

257. Finally, the Appellant’s argument that Article 22(3)(e) of the EB NC only imposes additional governance requirements when TSOs designate multiple entities for the same Platform function, but that additional governance requirements are not necessary when multiple entities are designated for different Platform functions¹⁸⁷, is inconsequential.
258. Article 22(3)(e) of the EB NC requires compliance with additional governance requirements when multiple entities are designated to operate the IN-Platform, regardless of whether they carry out the same or different Platforms functions. It reads “*Where the TSOs propose to designate more than one entity, the proposal shall demonstrate and ensure: (..)*”, without distinguishing between these multiple entities operating the same or distinct functions. This is supported by a reading in full of Article 22(3) of the EB NC, e.g. the first governance criterion consists of “*(i) a coherent allocation of the functions to the entities operating the European platform. The proposal shall take full account of the need to coordinate the different functions allocated to the entities operating the European platform*” (emphasis added). This criterion foresees a situation whereby different functions are allocated to multiple entities operating the IN-Platform. Similarly, the second criterion (ii) also refers to “*allocation of functions*” (emphasis added). The governance criteria would not refer to functions in plural if they would only apply to multiple entities performing a single function within the Platform.
259. This finding entails that, if by 24 January 2023 All TSOs propose to designate a CMF entity that is different from the entity operating the INPF or the TTSF, additional governance requirements will need to be demonstrated.
260. In view of the above, the Contested Decision did not contravene the EB NC when it made a similar request on the designation of the CMF entity across balancing platforms.

Conclusion on the Third Plea

261. The Board of Appeal finds that ACER did not infringe Articles 21 and 22 of the EB NC in its request to the TSOs to develop a proposal for amendment of the INIF to designate a CMF entity by 24 January 2023.

¹⁸⁷ Paras 28 and 120 of the Appeal. Para 60 of the Rejoinder.

262. It follows that the Third Plea, as well as Sub-Plea 1.2 of the First Plea and Sub-Plea 2.3 of the Second Plea, must be dismissed as unfounded.

Fourth Plea - Infringement by ACER of Articles 6(3), 10 and 22 of the EB NC

263. According to the Fourth Plea, the Agency infringed Articles 6(3), 10 and 22 of the EB NC “by exceeding its competence in obliging the TSOs to submit a proposal for amendment of the INIF”¹⁸⁸. The Appellant argues that, according to Article 6(3) of the EB NC, TSOs are free to submit or not to submit a proposal for modification, at their own discretion. It claims that the Agency does not have the competence to convert this into a mandatory process of modification. It adds that ACER attempted to shield this breach of Article 6(3) of the EB NC by linking its request to TSOs to modify the INIF to the aFRRIF. It also argues that the Agency infringed Article 10 of the EB NC and exceeded its competences by seeking to initiate a consultation procedure on the amendment of Article 10 INIF. It claims that the Agency has no right to mandate the initiation of a consultation process but that this is a prerogative of TSOs.

264. The Agency argues that All TSOs’ 4th INIF Proposal *de facto* proposed the designation of multiple entities, given that one TSO would operate the INPF and TTSF and there was a possibility that another TSO would operate the CMF. It therefore argues that All TSOs’ Proposal did not comply with the additional requirements of Article 22(3)(e) of the EB NC, applicable when multiple entities are designated to operate the INIF-Platform. It claims that it was, therefore, necessary to require the TSOs to submit an amendment of the INIF to ensure compliance with those additional requirements. The Agency further refers to Board of Appeal Decision A-001-2020 which dealt with the similar issue of compliance of the aFRRIF with Articles 10 and 21(5) of the EB NC¹⁸⁹.

265. Article 6(3) of the EB NC reads as follows: “3. *TSOs responsible for developing a proposal for terms and conditions or methodologies or regulatory authorities responsible for their adoption in accordance with paragraphs 2, 3 and 4 of Article 5 may request amendments of those terms and conditions or methodologies. The proposals*

¹⁸⁸ Paras 123-132 of the Appeal.

¹⁸⁹ Paras 68-71 of the Defence.

for amendments to the terms and conditions or methodologies shall be submitted to consultation in accordance with the procedure set out in Article 10 and approved in accordance with the procedure set out in Article 4 and Article 5.”

266. Article 10 of the EB NC reads as follows:

- “1. TSOs responsible for submitting proposals for terms and conditions or methodologies or their amendments in accordance with this Regulation shall consult stakeholders, including the relevant authorities of each Member State, on the draft proposals for terms and conditions or methodologies and other implementing measures for a period of not less than one month.*
- 2. The consultation shall last for a period of not less than one month, except for the draft proposals pursuant to points (a), (b), (c), (d), (e), (f), (g), (h) and (j) of Article 5(2) that shall be consulted for a period of not less than two months.*
- 3. At least the proposals pursuant to points (a), (b), (c), (d), (e), (f), (g), (h) and (j) of Article 5(2) shall be subject to public consultation at European level.*
- 4. At least the proposals pursuant to points (a), (b), (c), (d), (e), (f), (g), (h), (i), (n), and (o) of Article 5(3) shall be subject to public consultation at the concerned regional level.*
- 5. At least the proposals pursuant to points (a), (b), (c), (d), (e), (f), (g) and (i) of Article 5(4) shall be subject to public consultation in each concerned Member State.*
- 6. TSOs responsible for the proposal for terms and conditions or methodologies shall duly consider the views of stakeholders resulting from the consultations undertaken in accordance with paragraphs 2 to 5, prior to its submission for regulatory approval. In all cases, a sound justification for including or not including the views resulting from the consultation shall be provided together with the submission and published in a timely manner before or simultaneously with the publication of the proposal for terms and conditions or methodologies.”*

267. Article 10(2) and (3) of the Contested Decision’s INIF reads as follows:

- “2. All TSOs shall appoint one entity being a single TSO or a company owned by TSOs that shall be entrusted to operate the imbalance netting process function and the TSO-*

TSO settlement function of the IN-Platform. No later than eighteen months before the deadline when the capacity management function shall be considered as a function required to operate the aFRR-Platform in accordance with Article 6(4) of the implementation framework adopted pursuant to the ACER Decision 02-20202, all TSOs shall develop a proposal for amendment of this INIF, which shall designate the entity performing the capacity management function in accordance with Article 21(3)(e) of the EB Regulation and clarify whether the IN-Platform will be operated by a single entity or multiple entities.

3. The designation of the entity will be done in accordance with Article 22(4) of the EB Regulation.”

268. First, it follows from Article 10(2) and (3) of the Contested Decision’s INIF, read in conjunction with Article 5 of the Contested Decision’s INIF that, no later than 24 January 2023 (eighteen months before the deadline when the CMF becomes a mandatory function pursuant to Article 6(4) of the aFRRIF), the TSOs should make a proposal relating to the designation of the CMF entity. In other words, TSOs are asked to submit a proposal for an INIF amendment on the CMF.
269. Second, Article 6(3) of the EB NC does not apply to the Contested Decision’s INIF. The Agency has adopted the Contested Decision’s INIF on the basis of Article 6(10)(b) of Regulation (EU) 2019/942, read in conjunction with Article 6(2) of the EB NC, and in accordance with Article 22 of the EB NC. It has not adopted the Contested Decision’s INIF on the basis of Article 6(3) of the EB NC.
270. In this regard, the Contested Decision created the INIF. Article 6(3) of the EB NC does not cover the creation but the modification of an Implementation Framework. One cannot modify something that has not yet been created. A modification of an Implementation Framework can only be tabled once there is an Implementation Framework. Making EB NC rules to modify the framework applicable to the EB NC’s regulated process for the creation of the framework is, hence, contrary to the EB NC.
271. Within the boundaries of its competence of Regulation (EU) 2019/942, ACER was competent to amend All TSOs’ INIF Proposal. In this regard, the Contested Decision covers issues that are strictly related to the purposes for which ACER was established, namely technical and regulatory issues requiring regional coordination, in particular the

implementation of the EB NC, in accordance with Recitals 16 and 29 of Regulation (EU) 2019/942¹⁹⁰.

272. In this respect, as stated in the Rejoinder, ACER was competent to grant a full approval of All TSOs' 4th INIF Proposal in accordance with Article 6(10)(b) of Regulation (EU) 2019/942 read in conjunction with Article 6(2) of the EB NC, and that it was, therefore, *ad maiore ad minus*, also competent to grant less than a full approval, *in casu* a conditional approval, as it did in the Contested Decision's INIF¹⁹¹.
273. The Contested Decision's INIF represents the conditional regulatory approval of the Agency. It does not amount to an amendment by virtue of Article 6(3) of the EB NC. The Contested Decision's INIF represents "*those terms and conditions or methodologies regulatory approval*" referred to in Article 6(3) of the EB NC, used as a starting point for any subsequent amendment in accordance with Article 6(3) of the EB NC. This means that, after the regulatory approval, i.e. the Contested Decision of 24 June 2020, TSOs are allowed to submit amendment proposals to the Contested Decision's INIF, including its request to TSOs to propose the designation of a CMF entity in future. However, Article 6(3) of the EB NC foresees that TSOs will need to hold a new public consultation on the issue in accordance with Article 10 of the EB NC.
274. The Appellant also errs when stating that the Contested Decision's INIF is based on Decision No. 02/2020 instead of the EB NC. The Board of Appeal refers to the Second Plea above with respect to the link between the INIF and the aFRRIF which the Appellant reiterates in this plea.
275. The above finding is not altered by the fact that there is no regulatory possibility for an amendment of the INIF to guarantee the technical Go-Live of the IN-platform similar to

¹⁹⁰ Recital (16) of Regulation (EU) 2019/942 states: "*As regards situations concerning more than one Member State, ACER has been granted the power to adopt individual decisions. That power should, under clearly specified conditions, cover technical and regulatory issues which require regional coordination, in particular those concerning the implementation of network codes and guidelines, (...)*". Recital (29) of Regulation (EU) 2019/942 states on ACER's individual decisions is that they are adopted "*on issues that are strictly related to the purposes for which ACER was established*".

¹⁹¹ Para 62 of the Rejoinder.

respectively Article 21(5) and 20(5) of the EB NC for the aFRRIF and the mFRRIF 18 months after their approval¹⁹².

276. Third, when asking the TSOs in Article 10(2) of the Contested Decision's INIF to submit a Proposal to amend the Contested Decision's INIF in order to designate a CMF entity limited the exercise of its discretionary margin within the scope of its competences to what was strictly necessary, in accordance with the principle of proportionality, and provided the necessary leeway to the TSOs when designating the CMF entity. In effect, given the lack of compliance of All TSOs' 4th INIF Proposal with the requirement to either clearly state whether it proposed to designate, on the one hand, the same entity as the INPF/TTSF entity for the CMF or, on the other hand, a different CMF entity, ensuring and demonstrating compliance with the additional requirements of Article 22(3)(e) of the EB NC, the Agency inserted the obligation upon the TSOs to designate a CMF entity within a reasonable period of 2 and a half years, leaving it up to the TSOs to decide whether this entity would be identical to the INPF/TTSF entity or different from the INPF/TTSF entity, as long as compliance with the additional requirements of Article 22(3)(e) of the EB NC was ensured and demonstrated if multiple entities were designated. In so doing, the Agency refrained from either setting additional conditions to bring All TSOs' 4th INIF Proposal in line with Article 22(3)(e) of the EB NC as regards the CMF or from designating the CMF entity itself. Instead, it allowed the TSOs to arrive at a solution they deemed most adequate, within the confines of the legal requirements, without adding any further conditions as to the entity to operate the CMF function. This is expressly set out in the Contested Decision: "*ACER evaluated that it cannot amend the proposal from TSOs to provide the requirements of the second sentence of Article 22(3)(e) of the EB Regulation, because such amendments would require significant revision and additions to the Proposal (..)*"¹⁹³ and "*Therefore, instead of defining the entity for the operation of the capacity management function, ACER provided an obligation on TSOs to develop a proposal for amendment of the INIF*

¹⁹² Board of Appeal Decision A-001-2020, paras 143 and 148; and Board of Appeal Decision A-002-2020, paras 144 and 149.

¹⁹³ Para 73 of the Contested Decision.

in which they should propose the designation of the entity that will perform the capacity management function in accordance with Article 22(3)(e) of the EB Regulation”¹⁹⁴.

277. Had the Agency not inserted the TSOs’ task to propose the designation of a single entity or multiple entities fulfilling the requirements of Article 22(3)(e) of the EB NC for the CMF, this would have been contrary to the EB NC. In this context, the designation of a CMF entity is inextricably linked to the question whether the Agency was competent to require that the IN-Platform operates the CMF. As set out in the Third Plea, this requirement was lawful. Hence, the Agency was entirely within its right, and indeed followed the most prudent course of action, when it required the TSOs to modify the Contested Decision’s INIF in order to designate the CMF entity within a reasonable timeframe.
278. Once more, in so doing, the Contested Decision fits within the objectives of the EB NC listed in its Article 3, namely enhanced efficiency and EU-wide integration in the balancing markets in the long term. It furthermore complies with the EU’s market-driven energy regulation ensuring multipart balances between a variety of national and EU stakeholders.
279. Fourth, with respect to Article 10 of the EB NC, it contains indeed a possibility for TSOs to take the initiative to develop proposals and hold EU-wide public consultations on these draft proposals or amendment proposals in order to duly consider the stakeholders’ views prior to submitting their proposals for regulatory approval, providing a sound justification for including or not including these views. The TSOs duly held this public consultation from 15 January 2018 until 15 March 2018 prior to submitting their draft Proposal for regulatory approval on 18 June 2018¹⁹⁵.
280. Contrary to what the Appellant alleges, when the Contested Decision’s INIF mandates All TSOs to develop a proposal for amendment of the INIF in order to designate a CMF entity, the Agency exercises its competence under Article 6(10)(b) of Regulation (EU) 2019/942 read in conjunction with Article 6(2) of the EB NC and does not by any means

¹⁹⁴ Para 67 of the Contested Decision.

¹⁹⁵ Paras 5 and 6 of the Contested Decision.

usurp the TSOs' competence to take initiatives to develop proposals and hold consultations under Article 10 of the EB NC.

281. In the light of the above, by adopting the Contested Decision, the Agency properly steered the TSOs, without exceeding its competencies, in a direction of an efficient cross-border operation of the IN-Platform, which is indispensable for an EU-wide integration pursued by the EB NC, and required them to revise the proposal in such a way that would ensure compliance with the applicable legal framework.

Conclusion on the Fourth Plea

282. The Board of Appeal concludes that the Agency did not infringe Articles 6(3), 10 or 22 of the EB NC.

283. It follows that the Fourth Plea must be dismissed as unfounded.

Fifth Plea - Infringement by ACER of Articles 16 and 52(1) of the EU Charter of Fundamental Rights

284. In its Fifth Plea the Appellant claims that, even if the Agency were to have discretion to impose a single entity structure in Article 10(2) of the Contested Decision's INIF, it exercised that discretion in a manner which infringed Articles 16 and 52(1) of the EU Charter of Fundamental Rights ('the Charter'). They argue that the Contested Decision fails to take account of the NRAs' position and of pilot project IGCC, which is already operational and successful (referring also to pilot project TERRE), leads to unnecessary expenditure in infrastructure, disregards the ability to exercise cross-platform functions as TSOs (in particular, the CMM) as well as the TSOs' proven expertise in coordinating projects of a similar nature (e.g. balancing in a multi-TSO environment) and triggers operational risks deriving from the centralization of all functions in a single entity¹⁹⁶.

285. The Agency responds that the Contested Decision did not infringe Articles 16 and 52(1) of the Charter. The Defence states that the Contested Decision does not impose a single entity structure, refers to Board of Appeal Decision A-001-2020 on the aFRRIF and

¹⁹⁶ Paras 133-142 of the Appeal.

stresses that the NRAs referred the decision to the Agency and that the NRAs 2nd RfA did not deal with the discussion on the CMF¹⁹⁷.

286. Article 16 of the Charter provides that “*the freedom to conduct a business in accordance with Union law and national laws and practices is recognised*”.
287. Article 52(1) of the Charter states that “*any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms or others*”.
288. First, this Plea rests on the interpretation, which the Board of Appeal does not subscribe - as set out in detail in the First and Third Pleas - that the Contested Decision “imposed a single entity structure” for the IN-Platform. The Board of Appeal also refers to its Third Plea as regards the Contested Decision’s compliance with All NRAs’ 2nd RfA.
289. Subsidiarily, as set out in earlier decision-making¹⁹⁸, the Appellant is a TSO, as created and defined by Article 2(35) of Recast Electricity Directive, i.e. “*a natural or legal person who is responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity*”¹⁹⁹. In accordance with the Electricity Directive and its ownership unbundling principle, TSOs are regulated, certified and independent entities whose main task is to operate, maintain and develop a transmission grid under the supervision of the NRAs and ACER and are members of the European Network of Transmission System Operators (‘ENTSO-E’). In return for providing access to the transmission grid, TSOs receive network access tariffs from users.
290. Consequently, the Appellant’s right to conduct its business is constrained by EU Law, and bound to abide by it. As expressly provided for by its Article 52(1) of the Charter,

¹⁹⁷ Paras 72-77 of the Defence.

¹⁹⁸ Board of Appeal Decisions A-004-2019 (paras 312-313), A-001-2020 (para 233) and A-002-2020 (para 234).

¹⁹⁹ Recast Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU.

the rights of the Charter may be subject to limitations. Given that the Appellant is a regulated entity under Article 2(35) of Recast Electricity Directive, its right to conduct its business is constrained by EU regulation. If the applicable sector regulation provides that NRAs shall approve All TSOs' INIF Proposals, and that the Agency substitutes the NRAs in case they jointly request so, a TSO is, in its quality of regulated entity, bound by these regulatory requirements. While granting TSOs monopolistic rights to certain infrastructure, the electricity regulatory framework is concerned with preventing these entities from exploiting those rights in an uncontrolled fashion, under the pretext of a right to conduct business. TSOs have a right to conduct their business, but within the boundaries of the regulated framework they operate in. The Appellant is therefore bound by the EB NC, which provides that, in case All NRAs make a joint request in this sense, the Agency decides in their stead²⁰⁰. The fact that voluntary pilot projects – e.g. IGCC or TERRE – are successful is not able to alter the fact that the TSOs are bound by the applicable regulatory framework, in particular the EB NC. The bottom-up decision-making process foreseen in the EB NC gives all stakeholders the opportunity to take stock of the experience gained in pilot projects.

Conclusion on the Fifth Plea

291. It follows that the Fifth Plea must be dismissed as unfounded.

Sixth Plea - Infringement by ACER of the principle of proportionality

292. According to the Sixth Plea of the Appeal²⁰¹, the Agency infringed the principle of proportionality in adopting the Contested Decision's INIF. The Appellant argues that by taking a decision which fundamentally transforms the nature of the TSOs' balancing activities, in particular in the context of the already established IGCC project, the Contested Decision is manifestly disproportionate as a means to achieve the objectives of the EB NC; that the Contested Decision is neither suitable (it chooses a less efficient solution, places operational security at risk, triggers delays in delivery, etc.) nor

²⁰⁰ See, by analogy, Board of Appeal Decisions A-004-2019 (paras 312-313), A-001-2020 (paras 233-234) and A-002-2020 (paras 234-235).

²⁰¹ Paras 143-152 of the Appeal.

necessary (other successful platforms such as TERRE operate successfully) to achieve the objectives pursued and imposes a burden on the Appellant that is excessive in relation to the desired objective.

293. The Agency's Defence²⁰² primarily argues that the Contested Decision does not impose a single entity structure and, subsidiarily, that the Contested Decision did not infringe the principle of proportionality. It alleges that All TSOs' 4th INIF Proposal did not comply with the EB NC and that the Contested Decision could not remain silent on the CMF because leaving this issue at the discretion of the TSOs would have been contrary to the EB NC. It also refers to Board of Appeal decision A-001-2020 on the aFRRIF.
294. The principle of proportionality is a general principle of EU law. Article 5(4) TEU provides that "*under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*" The principle is expressly mentioned in Article 3(2)(a) of the EB NC ("*When applying this Regulation, Member States, relevant regulatory authorities, and system operators shall (a) apply the principles of proportionality and non-discrimination*") and Recital (45) of Regulation (EU) 2019/942 ("*In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.*").
295. This Plea is void because it is based on the erroneous interpretation that the Contested Decision imposed a single entity structure on the TSOs and introduced the CMF, set out at length in the First and Third Pleas. The Board of Appeal also refers to its Third Plea as regards the Contested Decision's compliance with All NRAs' 2nd RfA.
296. Subsidiarily, in the Board of Appeal's consistent decision-making practice, it has been confirmed that the Agency enjoys a certain margin of discretion in the assessment of complex technical issues, but the discretionary power granted to the Agency in respect of a decision such as the Contested Decision is not unlimited. It is circumscribed by various conditions and criteria which limit the Agency's discretion, which include the

²⁰² Paras 78-81 of the Defence.

requirements specifically set out in the relevant legal framework and the general principles of EU Law, including the principle of proportionality²⁰³.

297. The main objective of the EB NC is the integration of electricity balancing markets to enhance the efficiency of European balancing processes²⁰⁴. In this context, the Contested Decision's INIF was adopted upon joint request of the NRAs confirming their failure to reach an agreement pursuant to Article 6(2) of the EB NC and is a result of the gradual integration foreseen by the EB NC. It also goes without saying that this EB NC's objective of integration cannot be achieved if TSOs apply rules for the performance of the IN-Platform functions that diverge from the integrated framework provided for by the EB NC. As set out in the First and Third Pleas above, the Contested Decision's INIF does not exceed what is necessary to achieve the objective of the EB NC and is suitable to achieve that objective. Indeed, the Contested Decision's INIF could not have ensured compliance with the EB NC in the absence of a demonstration by All TSOs' INIF Proposal that the proposed multiple entities complied with the EB NC. Likewise, the Contested Decision's INIF could not have been silent on the CMF and leave it up to the TSOs to decide on the issue as this would have been contrary to the EB NC. As set out above, the EB NC sets out a bottom-up decision-making process whereby market-based proposals are tested on their compliance with the regulatory framework by regulatory authorities (NRAs or, in their stead, ACER) taking stock of the experience gained in the voluntary, dynamic and evolving balancing pilot projects and EU initiatives (e.g IGCC with respect to IN, which was actively taken into account by ENTSO-E when drafting All TSOs' 1st INIF Proposal, it being noteworthy that All TSOs designated IGCC to be converted into the IN-Platform²⁰⁵).

298. As to the Appellant's insistence on IGCC being suitable or sufficient²⁰⁶, the binding regulatory framework set out in the EB NC prevails over voluntary pilot projects. When the legislator adopted the EB NC in 2017, it duly took account of pilot projects, such as

²⁰³ Board of Appeal Decisions A-001-2017, paras 69 and 114; A-002-2018, para 59; A-001-2019, paras 43, 56, 233-239; A-003-2019, para 149; A-006-2019, paras 41 and 47; A-001-2020, paras 240, 252 and 263; A-002-2020, paras 241, 253 and 264; A-003-2020, para 206 and 235 and A-007-2020, paras 66 and 99.

²⁰⁴ Article 3 of the EB NC.

²⁰⁵ Annex 14 to the Appeal, ENTSO-E's Explanatory Document to All TSOs' 1st INIF Proposal.

²⁰⁶ See also para 6(c) of the Reply.

IGCC, a pilot project that TSOs had launched in 2010. The Appellant's claim that the *status quo* of IGCC be maintained is moot, especially when taking account of the fact that the objective of the EB NC to take integration of electricity balancing markets a step further than pilot projects. Reasoning otherwise would imply that any integration, harmonisation or innovation would breach the principle of proportionality *per se* by not maintaining the *status quo ante*.

299. Hence, the Contested Decision was necessary and suitable and, hence, proportionate to attain the objective of integrating the European electricity balancing markets provided by the EB NC.

300. Moreover, the fact that the TSOs did not include in their Proposal a proposed designation for the CMF entity left ACER with two alternative solutions: it could either specify itself the CMF entity or request TSOs to propose a CMF entity at a later stage, prior to the CMF's implementation. The Agency's choice of the latter solution reinforces the proportionate nature of the Contested Decision.

301. Finally, the Appellant's argument according to which the 2-year transition period would endorse the non-essential nature of the CMF is immaterial. As set out above in the Third Plea, gradual integration processes are characterised by transition periods, allowing all stakeholders to gradually adapt to the new, centralised process. The Contested Decision's INIF is part of the gradual integration process of balancing energy markets, foreseen by the EB NC.

302. It follows that the Sixth Plea must be dismissed as unfounded.

Seventh Plea - Infringement by ACER of Article 14(6) of Regulation (EU) 2019/942 and Article 41 of the EU Charter of Fundamental Rights

303. According to the Seventh Plea²⁰⁷, the Agency infringed 14(6) of Regulation (EU) 2019/942 and Article 41 of the Charter because ACER failed to conduct a public consultation on All TSOs' 4th INIF Proposal and because ACER failed to state reasons resulting in a lack of transparency in the Contested Decision. The Appellant also

²⁰⁷ Paras 153 to 172 of the Appeal.

reiterates its request for access to certain documentation in the light of the procedural deficiencies that it alleges in the Seventh Plea.

304. In its Defence, the Agency argues that ACER complied with Article 14(6) of Regulation (EU) 2019/942 even though it did not launch a public consultation on All TSOs' 4th INIF Proposal because it sufficiently consulted with the TSOs and NRAs and held a hearing phase. It adds sections 6.2.3.1 and 6.2.7 of the Contested Decision provide sufficient explanations of ACER's reasoning, highlighting, in particular paragraph 70 of the Contested Decision²⁰⁸.
305. Article 6(11) of Regulation (EU) 2019/942 requires the Agency, prior to adopting a decision under Article 6(10) of the same Regulation, to consult with NRAs and TSOs concerned.
306. Article 14(6) of Regulation (EU) 2019/942 requires the Agency to inform any party concerned of its intention to adopt a decision, prior to that adoption, and to afford those parties a chance to express their views on the matter.
307. Article 14(7) of Regulation (EU) 2019/942 requires individual decisions of the Agency to state the reasons on which they are based for the purpose of allowing an appeal on the merits.
308. Article 41(a) of the Charter foresees the fundamental right to be heard before an individual measure affecting one is taken.
309. Article 41(c) of the Charter foresees the obligation for due reasoning of decisions.
310. In line with its earlier decision-making practice²⁰⁹, 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 and the principles of transparency and good administration contained in Article 15 of the TFEU. In its earlier decision-making practice, the Board of Appeal set out that the Charter codifies some of the fundamental rights governing EU procedural law, in particular Article 41 of the Charter establishing

²⁰⁸ Paras 18, 19 and 82 to 93 of the Defence.

²⁰⁹ 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 240, 252 and 263; A-002-2020, paras 241, 253 and 264; A-003-2020, paras 206 and 235 and A-007-2020, paras 66 and 99.

the right to good administration. 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 steps²¹⁰.

311. 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 law²¹¹.

7.1 Transfer of decision-making to ACER from the NRAs should have triggered a separate public consultation

312. The Contested Decision states that *"the Agency decided not to launch a public consultation because the current Decision would only have a direct impact on regulatory authorities and TSOs and not on other stakeholders. During the European consultation by TSOs stakeholders expressed limited interest in the Proposal and the issues mentioned during that consultation were taken into account by TSOs for the final submission for approval. After the initial submission by all TSOs, two sequential requests for amendment were made by all regulatory authorities and TSOs took them into account for resubmitting the Proposal"*²¹².

313. First, there is no legal obligation on ACER to hold a public consultation.

314. Article 14(6) of Regulation (EU) 2019/942 only contains a *"duty to inform parties concerned"* and to let them *"express their views"* within a certain deadline, *"taking account of the urgency, the complexity and the potential consequences"*. It does not contain a duty to hold a public consultation. Article 6(11) of Regulation (EU) 2019/942

²¹⁰ 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

²¹¹ Board of Appeal Decisions A-001-2017, para 124; A-001-2020, para 253; A-002-2020, para 254 and A-007-2020, paras 67 and 101.

²¹² Para 20 of the Contested Decision.

states that, when preparing its decision pursuant to Article 6(10) of Regulation (EU) 2019/942, ACER “shall consult the regulatory authorities and transmission system operators concerned and shall be informed of the proposals and observations of all the transmission system operators concerned”. The requirement is to consult with NRAs and TSOs but not to hold a public consultation. The Board of Appeal has confirmed this duty in its earlier decision-making²¹³.

315. In addition, neither Article 6(2) nor 22 of the EB NC contain an obligation for ACER to hold a public consultation.
316. Second, even though it is correct that the Agency carried out a public consultation prior to taking Decisions No.02/2020 on the aFRRIF²¹⁴ and No.03/2020 on the mFRRIF²¹⁵, it was under no legal obligation to do so as long as it complied with its above-mentioned obligations under Articles 6(11) and 14(6) of Regulation (EU) 2019/942. The public consultation held for the aFRRIF and the mFRRIF explicitly states that it was carried out to enable ACER “to take an informed decision”²¹⁶.
317. Third, neither the NRAs nor the TSOs, and in particular the Appellant, requested a public consultation or otherwise adduced that a public consultation should have been held during their discussions with the Agency leading-up to the Contested Decision between January 2020 and June 2020.
318. Fourth, in the absence of a legal obligation to carry out a public consultation, the Agency’s choice not to hold a public consultation but, instead, to extensively consult with the NRAs and TSOs, was in line with its obligations under Articles 6(11) and 14(6) of Regulation (EU) 2019/942.
319. The Contested Decision sets out that ACER extensively consulted with the NRAs and TSOs. In so doing, it consulted ACER’s Electricity Balancing Taskforce (“EBTF”) and ACER’s Electricity Working Group (“AEWG”). ACER also held a hearing phase of 10 working days in April 2020 with the NRAs and TSOs in paragraphs 12, 13, 19, 21, 22,

²¹³ Board of Appeal Decision A-007-2020, para 98.

²¹⁴ Annex 4 to the Appeal.

²¹⁵ Annex 11 to the Appeal.

²¹⁶ Annex 15 to the Appeal containing Annex II to Decision No.02/2020 on the aFRRIF and Annex 16 to the Appeal containing Annex II to Decision No.03/2020 on the mFRRIF.

49, 70 and 71, with an in-depth analysis of the issue challenged by the present appeal, i.e. the single entity structure and the functions to be performed by the IN-Platform. The Appellant does not challenge these paragraphs of the Contested Decision.

320. The Board of Appeal quotes the Contested Decision:

“(12) On 10 February 2020, ACER started the consultation phase on the Proposal, inviting parties concerned, here all TSOs and all regulatory authorities, to send their comments on the Proposal. ACER did not launch a public consultation on the Proposal because the directly concerned stakeholders were TSOs and regulatory authorities and they have been already consulted”.

“(13) ACER cooperated closely with all regulatory authorities and TSOs and further consulted on the amendments to the Proposal during teleconferences, meetings and through exchanges of draft amendments to the Proposals suggested by ACER. In particular, the following procedural steps were taken and, in general, before each interaction, ACER shared with the regulatory authorities and TSOs a new version of amendments proposed by ACER to the Proposal:

- 22 and 23 January 2020: discussion with all regulatory authorities in the framework of ACER’s Electricity Balancing Taskforce (‘EB TF’);*
- 14 February 2020: teleconference with all regulatory authorities and TSOs;*
- 26 and 27 February 2020: discussion with all regulatory authorities in the framework of the Agency’s Electricity Balancing Taskforce (‘EB TF’);*
- 28 February 2020: teleconference with all regulatory authorities and TSOs;*
- 13 March 2020: telephone conference call with all regulatory authorities and TSOs;*
- 17 March 2020: discussion with all regulatory authorities in the framework of the EB TF;*
- 27 March 2020: teleconference with all regulatory authorities and TSOs;*
- 23 April 2020: discussion with all regulatory authorities in the framework of ACER’s Electricity Working Group (‘AEWG’);*

- *13 May 2020: discussion with all regulatory authorities at the Board of Regulators' meeting.*

“(19) ACER, in close cooperation and consultation with all regulatory authorities and TSOs as detailed in Recital (13) above: a) discussed the alignment of the Proposal with the implementation framework for an aFRR-Platform adopted pursuant to ACER Decision No 02/2020 because the two platforms for imbalance netting and aFRR will be intertwined and interacting closely; b) with respect to updating cross-zonal capacities, further discussed the whole process, the possible efficient design of such a process and the responsibilities of the parties involved, as well as the evolution of this process to a capacity management function; c) regarding the interaction with the aFRR process, clarified the process and the sequence of the optimisation steps; d) regarding the proposed designation of a single entity to perform the functions of the IN-Platform, ensured the legal compliance with the EB Regulation.”

“(21) ACER initiated a hearing phase on 6 April 2020 by providing all TSOs and all regulatory authorities with a near final draft of Annex I to this Decision, as well as the reasoning for the introduced changes to the Proposal. The hearing phase lasted until 17 April 2020. During this time, ACER received a written response from ENTSO-E, on behalf of all TSOs.”

“(22) ENTSO-E disagrees with the ACER proposal on two major points. The first point is, that ENTSO-E does not see the capacity management function as a function needed for the operation of the IN-Platform and that ACER has no competence to define such a function. Secondly, ENTSO-E does not agree with the changes on the entity designation in Article 12 and argues that a company owned by TSOs would not be more efficient as the designated entity to operate the IN-Platform. ACER has no legal competence to restrict TSOs' choice to a single entity because the EB Regulation allows also several entities for the designation. To support the above arguments, ENTSO-E mentions that regulatory authorities have not asked ACER to make changes in Article 12 on the entity designation. ENTSO-E expressed also concerns that ACER has requested TSOs to submit an amendment to the Proposal if TSOs change the single entity approach and go for the option with several entities that shall perform the functions of the IN-Platform.”

321. Technically, the INP only directly involves TSOs, and hence only directly affects TSOs and NRAs. It is a process that takes place prior to the exchange of electricity balancing reserves (e.g. aFRR or mFRR) and does not involve the submission of bids. Hence, from a technical perspective, the INP does not directly involve other stakeholders than NRAs and TSOs, even though its result may indirectly have a bearing on the subsequent balancing energy reserve processes involving other stakeholders than NRAs and TSOs. In this sense, the Contested Decision correctly states that, whereas the aFRRIF and mFRRIF affect NRAs, TSOs and other stakeholders directly, the INIF only affects NRAs and TSOs directly. It is noted that the Appellant neither demonstrates in the Appeal nor in the Reply how other stakeholders than TSOs and NRAs would be adversely affected by the Contested Decision.
322. Furthermore, the referral of INIF's regulatory approval to the Agency occurred at the end of December 2019 and coincided with the end of the decision-making process leading-up to the adoption of Decisions No.02/2020 and 03/2020 on aFRRIF and mFRRIF in January 2020, which had been preceded by an extensive dialogue between the Agency and the TSOs, including the Appellant, on the key issues of the present appeal, i.e. the designation of entity and required functions of the electricity balancing Platforms. The Agency duly took stock of these consultations. As set out in the Contested Decision²¹⁷, ACER took account of the results of All TSOs' and ACER's public consultations on the aFRRIF in order to take account of any potential effect of the INIF that could possibly indirectly affect stakeholders in any subsequent balancing energy reserve process.
323. In addition, contrary to the dialogue between ACER, the NRAs and the TSOs on the aFRRIF and mFRRIF, the dialogue between ACER, the NRAs and the TSOs on the INIF had been preceded by a lengthy preliminary process in which All TSOs had not only held a public consultation, but had also submitted three earlier Proposals to the NRAs, which had issued two RfAs.

²¹⁷ Paras 65 of the Contested Decision, footnote 21.

324. As set out above in the Third Plea, the Contested Decision duly took account of All NRAs' position expressed in their 1st RfA and 2nd RfA.
325. ACER also correctly took account of the results of the public consultation that had already been carried out by All TSOs on their 1st, original INIF proposal from 15 January 2018 until 15 March 2018²¹⁸. ACER duly verified whether the latter consultation met the required standard of Article 10(1) of the EB NC²¹⁹. The Appellant states that the outcome of the TSO's public consultation was irrelevant given that All TSOs' proposals significantly evolved during the preliminary process with the NRAs. A hearing by ACER with All TSOs (including the Appellant) on their 4th INIF Proposal assisted in clarifying all topics and, in particular the key topics challenged in the present Appeal, namely the designation of entity and the CMF. Article 14(6) of Regulation (EU) 2019/942 allowed ACER to take account of "*the urgency, the complexity and the potential consequences*" when consulting and recalls in this respect that, even though the INIF adoption and implementation, scheduled by the EB NC with a precise timing should have occurred prior to and not after the aFRRIF/mFRRIF's adoption and implementation, timing had been reversed due to a lengthy INIF decision-making process (see Sub-Plea 3.1, Table on the INIF Timeline).
326. As to the Appellant's criticism that the hearing was as a "*novel process, applied for the first time in the context of the Contested Decision*"²²⁰, this contradicts ENTSO-E's statement, in which it "*welcomed*" the hearing "*which enables TSOs to give a formal opinion to ACER's proposed amendment to the TSOs' proposal before the final proposal for a methodology is submitted to ACER's Board of Regulators for approval.*"²²¹ ENTSO-E added that "*the hearing is thus an adequate complement to the weekly interactions that serve to reach a common understanding between TSOs and regulatory authorities on the different points of the proposal.*" and that "*TSOs would have welcomed having had a similar opportunity during the approval process of the aFRRIF, mFRRIF and PP.*"²²² The Board of Appeal finds, in line with these statements, that a

²¹⁸ Paras 5 and 20 of the Contested Decision.

²¹⁹ Paras 83 and 84 of the Contested Decision.

²²⁰ Para 164 of the Appeal.

²²¹ Annex 12 to the Appeal.

²²² Annex 12 to the Appeal.

hearing phase, especially in a situation in which ACER decides not to hold a public consultation, was useful to understand the NRAs' and TSOs' stances, especially in a bottom-up decision-making process.

327. At the beginning of the hearing, on 6 April 2020, the Agency sent an email to ENTSO-E with ACER's written opinion on the designation of entity and Platform functions, in which it suggested a dedicated call between ACER and ENTSO-E/All TSOs²²³. However, as confirmed at the Oral Hearing²²⁴, neither ENTSO-E, nor the Appellant, nor any other TSO requested a dedicated call during the hearing.
328. In this respect, the Appellant invokes its impossibility to duly react because the hearing "*lasted only seven days*" and "*took place during the height of the COVID-19 crisis*"²²⁵.
329. However, neither ENTSO-E nor any TSO, and in particular not the Appellant, asked for an extension of the hearing phase, asked for an extension of the deadline to provide its comments to the hearing or invoked difficulties related to the pandemic, as confirmed at the Oral Hearing²²⁶.
330. In view of the above, the Agency neither contravened Regulation (EU) 2019/942 nor the Charter when it decided not to hold a public consultation in the decision-making process leading-up to the Contested Decision.

7.2 Lack of transparency and failure to provide reasons for its Decision

331. The Appellant claims that the Contested Decision lacks transparency and does not sufficiently state its reasoning.
332. The parties agree that the Agency has a duty to duly reason its decisions. This obligation is specifically foreseen in Article 14(7) of Regulation (EU) 2019/942 and also derives from Article 296 TFEU and the general principles of EU Law, including Article 41(2)(c)

²²³Annex 6 to the Rejoinder. Para 70 of the Contested Decision. Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.19 (Question 3 to the Defendant).

²²⁴. Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.19 (Question 3 to the Defendant).

²²⁵ Para164 of the Appeal.

²²⁶. Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.24 (Question 6 to the Appellant).

of the Charter and has been confirmed by consistent case-law of European Courts²²⁷. 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 its power to review the lawfulness of the measure²²⁸.

333. The discord of the parties is whether the Agency complied with this duty.
334. As noted above in paragraph 311, this 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 decision²²⁹. 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.
335. The Appellant considers that the Contested Decision not to be sufficiently reasoned, whereas they bear the burden of proof.
336. First, the Contested Decision contains a detailed explanation in Section 6.2.7 entitled “*Assessment of the requirements for the proposed designation of the entity*” justifying in detail the underlying reasons to Article 10 of the Contested Decision’s INIF. Far from being succinct, the explanation of Section 6.2.7 covers 4 pages of the decision (p. 14-18). In addition, section 6.2.3.1 entitled “*Updating of cross-zonal capacities*” justifies the necessity of the CMF, covering 4 pages of the decision (p.9-13). Section 6.2.4 clarifies the Agency’s assessment of the requirements for the roadmap and timelines for implementation in detail (p.13) and Section 6.2.5 sets out the Agency’s assessment of the requirements for the functions of the IN-Platform in detail (p.14). The explanations in Sections 6.2.7, 6.2.3.1, 6.2.4 and 6.2.5 also provide details on the consultative

²²⁷ Case T-700/14 *TVI v Commission* EU:T:2017:447, para 79.

²²⁸ 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.

²²⁹ Board of Appeal Decisions A-001-2017, para 126; A-007-2020, paras 64, 67 and 101.

dialogue prior to the Agency's decision-making process. The Board of Appeal finds that any similarity with the reasoning of ACER Decisions No.02/2020 and 03/2020 stems from the similarity between the issues tackled by those Decisions and the issues tackled by the Contested Decision, in particular the designation of entity and required functions to operate electricity balancing Platforms. All these issues related to compliance with Chapter II "*European Platforms for the Exchange of Balancing Energy*" of Title II "*Electricity Balancing Market*" of the EB NC.

337. Taking account of the fact that the addressees of the Contested Decision are TSOs, which are sufficiently acquainted with the technicalities of electricity balancing markets and their related processes, the Contested Decision's reasoning was adequate in relation to the reference to the timing of the aFRRIF (as set out in the Second Plea above), in particular paragraphs 19, 43-51 and 62-70.
338. Taking account of the fact that there was no legal obligation upon ACER to hold a public consultation, the Contested Decision sufficiently reasoned why ACER did not hold a public consultation but opted for an extensive consultation and hearing with NRAs and TSOs, in particular in paragraphs 12, 13, 19-22, 71-72, 83-84.
339. Second, the Agency did not have to amend All TSOs' 4th INIF Proposal with respect to the single entity structure for the INPF/TTSF given that this Proposal already contained this structure²³⁰ (see Sub-Plea 1.1 above). On the CMF, the Board of Appeal notes that ENTSO-E proposed a capacity management process in its written response to the Agency's hearing, the only difference being that it qualified the process as a module instead of a Platform function²³¹ (see Sub-Plea 3.2 above).
340. Third, the Contested Decision not only explains in great detail the choice made in its INIF, but also observes that the INIF is joined as Annex I to the Contested Decision together with a marked-up version of All TSOs' 4th INIF Proposal (Annex Ia).
341. Fourth, whilst it notes that the Contested Decision is of a complex technical nature, the Appellant is a regulated entity under Article 2(35) of Recast Electricity Directive (see

²³⁰ Annex 8 to the Appeal.

²³¹ Annex 12 to the Appeal and Annex 1 to the Defence.

Fifth Plea) and possess, consequently, sufficient knowledge on the functioning of imbalance netting and electricity balancing reserves.

342. Fifth, as to the Appellant's claim that "*ACER has never explained how the TSOs could demonstrate compliance with an alternative structure permitted by Article 22(2), namely operation "by TSOs" in a consortium structure*" despite the fact that "*it was incumbent on ACER to do so*"²³², there was no obligation upon the Agency to analyse potential scenarios that All TSOs could possibly propose, in particular in the absence of All TSOs to submit a 5th INIF Proposal. All TSOs could have submitted a 5th INIF Proposal in which they could have proposed the designation of a consortium for all IN-Platform functions. This was confirmed by the Defendant at the Oral Hearing and not contested by the Appellant²³³. However, All TSOs did not submit any new proposal after their 4th INIF Proposal.
343. The Board of Appeal concludes that the Agency did not fail to adequately state reasons in its Contested Decision.

7.3 Request for disclosure of documents

344. The Appellant requested the Board of Appeal, pursuant to Article 20(3)(d) of the Board of Appeal's Rules of Procedure, to require ACER to disclose certain documents "*in the light of the procedural deficiencies set out in the seventh plea*"²³⁴.
345. First, the Board of Appeal concluded in Sub-Pleas 7.1 and 7.2 that there were no procedural deficiencies.
346. Second, the Appellant submits that there was an overriding public interest in the present case to gain access to certain documents because, in the absence of a public consultation, "*the only interested stakeholders who were able to express views and ensure ACER was sufficiently informed were the TSOs and the NRAs*"²³⁵. The Appellant therefore

²³² Para 63 of the Reply.

²³³ Summary Minutes of the Oral Hearing of 10/11/2020 by teleconference held in case A-008-2020, p.20 (Question 4 to the Defendant).

²³⁴ Para 167 of the Appeal.

²³⁵ Para 169 of the Appeal.

expressly acknowledges it had been able to express views and ensure ACER was sufficiently informed in its quality of TSO.

347. Third, on the Appellant's reference to Board of Appeal case A-007-2020, no analogy can be drawn. The case was sent back to the Agency's Director due to a failure to duly state reasons and access to documents was granted to the Appellant "*in the specific circumstances of this case*"²³⁶.
348. Fourth, the Chairperson acting on behalf of the Board of Appeal denied the requested disclosure in a duly reasoned decision in accordance with Article 20(1) of the Board of Appeal's Rules of Procedure²³⁷ on 5 October 2020 (the 'Disclosure Decision')²³⁸. On 6 October 2020, the Appellant proposed a confidentiality ring²³⁹ to the Board of Appeal, which was dismissed by the Chairperson acting on behalf of the Board of Appeal in a duly motivated letter of 12 October 2020²⁴⁰.
349. In its Disclosure Decision, the Chairperson of the Board of Appeal set out that, according to the applicable legal provisions, it might grants access to documents following the adversarial principle, the rights of defence and the principle of transparency. However, it has also an obligation to refuse access to documents where their disclosure would infringe any legal provisions requiring the protection of the confidential nature of information. In line with settled case law, the Board of Appeal must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to it by the parties. The Board of Appeal explained that it follows from the settled case-law of the Court of Justice of the European Union that the Board of Appeal "*must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration. It is for that body to decide to what extent*

²³⁶ Board of Appeal decision A-007-2020, para 36.

²³⁷ Decision of the Board of Appeal (BoA) of the Agency for the Cooperation of Energy Regulators (ACER) No 1-2011 as amended on 5 October 2019 laying down the rules of organisation and procedure of the Board of Appeal of the Agency for the Cooperation of Energy Regulators

²³⁸ Annex R1 to the Reply.

²³⁹ Annex R2 to the Reply.

²⁴⁰ Annex R3 to the Reply.

*and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, so as to ensure that the proceedings as a whole accord with the right to a fair trial”.*²⁴¹ As the European Court of Human Rights noted, it might be necessary in some cases to withhold certain evidence from the defence to preserve the fundamental rights of another individual or to safeguard an important public interest.²⁴²

350. The Disclosure Decision clarified that it is for the Board of Appeal to ensure that the rights of both parties are safeguarded, including the ability of a party to have sufficient time to prepare its defence²⁴³. According to the General Court, the principle of respect for the rights of the defence requires that the entity concerned is informed of the evidence adduced against it to justify the measure adversely affecting it and it should also be given the opportunity effectively to make known its view on that evidence.²⁴⁴ Therefore, the Disclosure Decision had to be made prior to the final decision.

351. In its Disclosure Decision, Chairperson of the Board of Appeal found that, in this case, the Appellant had sought an order for disclosure of the following documents: (i) copies of materials (in unredacted form) recording the views of the Board of Regulators on the draft Decision and INIF prior to their adoption, more particularly (a) a copy of the Opinion of the Board of Regulators of 28 May 2020 cited in the preamble to the Decision; (b) a copy of the Agenda of the meeting(s) of the Board of Regulators and the background documents related to the items included in the agenda(s); (c) a copy of the minutes of the meeting(s) of the Board of Regulators; and (ii) a copy of the Agency’s Legal Expert Network Recommendation (“LEN”) referenced in the NRAs’ Extension Request.

²⁴¹ See by analogy Judgment of the Court of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, para 55.

²⁴² See Judgment of the European Court of Human Rights of 16 February 2000, *Rowe and Davis v The United Kingdom* [GC] no 28901/95, para 61 and Judgment of the European Court of Human Rights of 24 April 2007, *V v Finland*, no 40412/98, para 75.

²⁴³ See Judgment of the Court of 8 November 2005, *Leffler*, C-443/03, EU:C:2005:665, para 52.

²⁴⁴ See Judgment of the General Court of 6 September 2013, *Bank Melli Iran v Council*, T 35/10 and T 7/11, EU:T:2013:397, para 82.

352. The Chairperson of the Board of Appeal found that, to the extent that their nature was perceivable from the Appellant's request, both groups of documents in question fell under the category of documents "*drawn up by an institution [EU agency] for internal use or received by an institution [EU agency], which relates to a matter where the decision has not been taken by the institution*", or of documents "*containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned*". As set out in Article 4(3) of the Regulation on access to documents held by EU Institutions²⁴⁵, access to documents with this nature shall be refused, even after the decision has been taken, if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
353. The Chairperson of the Board of Appeal considered that, given that the Appellant invoked an overriding public interest in disclosure of the requested documents, namely to remedy the alleged failure to consult, lack of transparency and failure to duly state reasons and fully exercise its rights under Article 41 of the Charter, whilst the Defendant claimed that disclosure would seriously undermine its decision-making process, it was for the Board of Appeal to carry out the proportionality assessment of the conflicting interests.
354. With respect to materials recording the views of the Board of Regulators on the draft Decision and INIF, the Board of Appeal found that, apart from the deliberations within the Board of Regulators and the individual voting, the rest of the documents - i.e. the agenda and minutes of the meeting of the Board of Regulators of 13 May 2020 and the minutes of the meeting of the Board of Regulators of 17 June 2020 - are public and can be found on the website of ACER (www.acer.europe.eu). The Board of Appeal also found that, for ease of use, the Defendant has attached these already public documents as Annexes 3, 4 and 5 to its Defence. Regarding the deliberations within the Board of Regulators and the individual voting, the Board of Appeal observed, as a preliminary point, that the Appeal's Seventh Plea was fully articulated and contains a wide range of arguments, none of which seemed to be dependent on access to the requested documents.

²⁴⁵ Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43)

355. The Board of Appeal found that the Defendant did not hold a public consultation of all interested stakeholders but held a consultation of All NRAs and All TSOs and also held a 10-day hearing phase involving All NRAs and All TSOs. The Board of Appeal also clarified that the Agency's Board of Regulators is composed of All NRAs.
356. In the light of the above, the Board of Appeal failed to understand how access to materials recording the views of the Board of Regulators would remedy the Defendant's alleged failure to hold a public consultation of other interested stakeholders than the NRAs and TSOs, which were duly consulted. In effect, there is no connection between the Defendant's alleged failure to consult other interested stakeholders and the Defendant's alleged reliance upon an earlier public consultation on a different TSOs' proposal, on the one hand, and access to unredacted materials recording the NRAs' views in the Board of Regulators, on the other hand, in particular given that the NRAs were duly consulted. In other terms, access to the materials leading-up to the two-thirds favourable votes of the NRAs within the Board of Regulators is not capable of remedying any alleged failure to consult other stakeholders than the NRAs.
357. The Board of Appeal found that the requested access was not of sufficient relevance to discuss the Agency's alleged duty to consult prior to its decision-making. In other words, access to these documents was not necessary to allow the Appellant to adequately exercise its rights of defence in the present case. The Board of Appeal observed, moreover, that the Appeal did not adduce any other ground of appeal for which the said access would be of relevance.
358. Having carried out a preliminary proportionality assessment of the conflicting interests, the Board of Appeal found that, in the specific circumstances of this case, the Appellant had to be denied access to any materials recording the views of the Board of Regulators (in an unredacted form), which have not yet been publicly disclosed.
359. With respect to the Defendant's LEN Recommendation, the Board of Appeal also observed that the Appeal's Seventh Plea was fully articulated and contained a wide range of arguments, none of which seemed to be dependent on access to the requested recommendation. The Board of Appeal observed that the Contested Decision does not contain any reference to LEN's Recommendation. Consequently, the Board of Appeal did not find the Agency's LEN Recommendation to be a critical component of the Contested Decision. LEN's Recommendation amounted to an input to the NRAs' 2nd

RfA²⁴⁶, pursuant to the NRAs' Extension Request submitted on 17 May 2019 to ACER. The Board of Appeal observed that the LEN Recommendation is exclusively mentioned in ACER's Decision 06/2019 of 29 May 2019²⁴⁷. In Decision 06/2019, the Defendant granted an extension of the period for reaching an agreement on the amended proposal for INIF to All NRAs on the basis of the latter's alleged need for a recommendation from the Agency's LEN with respect to the entity that operates the functions of the imbalance netting platform, to enable them to conclude their discussions and decide on All TSOs' amended proposal.

360. In the light of the above, the Board of Appeal concluded that it had not been sufficiently explained how access to the LEN Recommendation would remedy the Defendant's alleged failure to duly reason the Contested Decision. The Board of Appeals considered that, being an input to all NRA's 2nd RfA and not an input to the Contested Decision, the LEN Recommendation constituted the reasoning of All NRAs' 2nd RfA and not the reasoning of the Contested Decision. Therefore, access to the LEN Recommendation would clarify the reasoning of All NRAs' 2nd RfA but not clarify or otherwise remedy an alleged failure to state reasons of the Contested Decision. Given the composition of the LEN and the nature of its function, the Board of Appeal also considered that its Recommendation was likely to be covered by legal privilege.
361. The Board of Appeal found that the requested access was not of sufficient relevance to discuss the Agency's alleged duty to state reasons for the Contested Decision. In other words, access to these documents was not necessary to allow the Appellant to adequately exercise its rights of defence in the present case. The Board of Appeal observed, moreover, that the Appeal does not adduce any other ground of appeal for which the said access would be of relevance.
362. Having carried out a preliminary proportionality assessment of the conflicting interests, the Board of Appeal found that, in the specific circumstances of this case, the Appellant had to be denied access to LEN Recommendation.
363. The Board of Appeal refers to its Disclosure Decision.

²⁴⁶ Annex 10 to the Appeal.

²⁴⁷ Annex 17 to the Appeal.

Conclusion on the Seventh Plea

It follows that the Seventh Plea must be dismissed as unfounded.

DECISION

On those grounds,

THE BOARD OF APPEAL

Hereby confirms the Contested Decision and dismisses the Appeal for annulment.

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

Ronja LINßEN

Chair of the Board of Appeal

Acting Registrar of the Board of Appeal