ACER
European Union Agency for the Cooperation of Energy Regulators

A-009-2022

DECISION

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

of 29 June 2023

Case number:	A-009-2022
Language of the case:	English
Appellant:	*Swissgrid AG* ("Swissgrid" or "the Appellant")
	Represented by: P. DE BAERE, P. L´ECLUSE, V. LEFEVER, K. T´SYEN and V. ION (Van Bael & Bellis srl/bv)
Defendant:	*European Union Agency for the Cooperation of Energy Regulators ("ACER"* or "the Defendant"*)*
	Represented by: C. ZINGLERSEN and its legal representatives B. CREVE (Kromann Reumert)
Application for:	Remittal to the competent body of ACER of Decision No 16/2022 of the European Union Agency for the Cooperation of Energy Regulators of 30 September 2022 on the Amendment to the Implementation framework for a European platform for the imbalance netting process, insofar as it amends Article 2(1)(j) of the Implementation framework for the European platform for imbalance netting process as approved by ACER Decision No 13/2020 of 24 June 2020.[1]
Board composition:	A. BIONDI (Rapporteur), M. SUPPONEN (Technical Rapporteur), K. WIDEGREN, K. SARDI, P.EECKHOUT and M. PREK (Chair)

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

HAS ADOPTED THIS DECISION:

I. Procedural steps following the Contested Decision

1. On 30 September 2022, ACER adopted Decision No 16/2022 of the European Union Agency for the Cooperation of Energy Regulators on the Amendment to the Implementation framework for a European platform for the imbalance netting process (hereinafter "the Contested Decision").

2. On 30 November 2022, the Appellant lodged an appeal with the Registry of the Board of Appeal (hereinafter "the Registry") against the Contested Decision, requesting the Board of Appeal (hereinafter "the BoA") to remit the case to the competent body of ACER for the adoption of a new decision.

[1] Decision No 13/2020 of the European Union Agency for the Cooperation of Energy Regulators of 24 June 2020 on the Implementation framework for the European platform for the imbalance netting process.

3. On 16 December 2022, an announcement of appeal was published on ACER´s website[2] and the Notice of Appeal was served to the Defendant.

4. On 22 December 2022, the parties were notified of the composition of the Board of Appeal hearing the appeal case.

5. On 19 January 2023, ACER submitted its Defence requesting the BoA to dismiss the appeal.

6. On 7 February 2023, the Registry acknowledged receipt of the Appellant´s request of 3 February 2023 for leave to submit a reply to ACER´s Defence.

7. On 7 February 2023, the Registry notified a request by the Chair to the Appellant in accordance with Article 20 of the Rules of Organisation and Procedure of the Board of Appeal[3] (hereinafter "the BoA Rules of Organisation and Procedure") inviting the Appellant to provide its views on the consequences of the order of the General Court of the European Union of 21 December 2022, *Swissgrid AG v European Commission* (T-127/21, EU: T: 2022:868) (hereinafter "GCEU Order", currently under appeal), if any, on the present case, by 28 February 2023.

8. On 10 February 2023, the Appellant requested an extension of the time limit to address the procedural measure until 14 March 2023. On 14 February 2023, an extension of the time limit until 14 March 2023 was granted to the Appellant, by way of exception, considering the justifications provided and without this constituting a precedent to be relied upon for future cases.

9. On 14 March 2023, the Appellant submitted its Observations in response to the Chair´s request of 7 February 2023.

10. On 12 April 2023, the parties were summoned to attend the oral hearing to be held on 10 May 2023.

11. Organisational requirements compelled the Board of Appeal to reschedule the oral hearing to 5 May 2023.

12. On 21 April 2023, the parties were summoned to attend the rescheduled oral hearing of 5 May 2023.

13. On 24 April 2023, the announcement of the hearing was published on ACER's website[4].

II. Forms of order sought by the Parties

14. In its Notice of Appeal, the Appellant requests the BoA to declare the appeal admissible and well-founded and to find that the following provisions of the Contested Decision are illegal and, therefore, to remit them to the competent body of ACER: the part of Article 1(b) of Annex I to the Contested Decision that amends the definition of "member TSO" (formerly Article 2(1)(j) of Annex I to ACER Decision No 13/2020); Recital 134 of the Contested Decision, to the extent it refers to amending the definition of "member TSO" in Article 1(b) of Annex I to the Contested Decision (formerly Article 2(1)(j) of Annex

[2] https://www.acer.europa.eu/sites/default/files/documents/en/The_agency/Organisation/Board_of_Appeal/Annoucements%20of%20Appeal/A-009-2022-SwissgridIIIvACER-AnnouncementAppeal.pdf
[3] Decision BoA No 1-2011 laying down the rules of organisation and procedure of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators, as amended last on 5 October 2019.
[4] https://extranet.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Annoucements%20of%20Appeal/A-001-2022%20-%20PSE%20v%20ACER%20-%20Announcement%20-%20hearing.pdf

I to ACER Decision No 13/2020); and any other recital of the Contested Decision referring to the amendment to the definition of "member TSO".

15. The Appellant also requests the BoA to provide to the competent body of ACER, sufficient reasoning, direction and explanation as to the correct application and interpretation of the relevant provisions of the applicable legislation to enable it to issue a new and valid decision.

16. The Defendant requests the BoA to dismiss the appeal in its entirety as unfounded.

III. Pleas in law

17. The Appellant challenges the Contested Decision insofar as it amends Article 2(1)(j) of the Implementation framework for the European platform for the imbalance netting process (hereinafter "INIF") as approved by ACER Decision No 13/2020 of 24 June 2020.

18. The Appellant sets out five pleas on the basis of which it contests the relevant elements of the Contested Decision.

19. In its first plea, the Appellant alleges that the Contested Decision infringes Article 22 of Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing (hereinafter the "EB Regulation") [5] as ACER lacks the competence to exclude the Appellant from being a member of, and a participant in, the platform for the imbalance netting process (hereinafter the 'IN Platform').

20. In its second plea, the Appellant alleges that the Contested Decision infringes Article 5(6) of Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (hereinafter the "ACER Regulation")[6] and Article 5(1) of the EB Regulation. In particular:

    (a) the Appellant claims that the Defendant lacks the competence to approve an amendment to the definition of "member TSO" in the INIF in the absence of a proposal from the TSOs to this effect;

    (b) the Appellant claims that the Defendant unlawfully exercised its power to revise all TSOs' proposals of 31 March 2022 for amendments to the INIF (hereinafter "all TSOs´ proposals") because it failed to consider whether introducing an amendment to the definition of "member TSO" meets the standard of necessity imposed by Articles 5(6) of the ACER Regulation and 5(1) of the EB Regulation;

    (c) the Appellant claims that the Defendant acted outside its competence to "revise" by supplementing all TSOs´ proposals with an element that is not related to the subject-matter of all TSOs´ proposals.

21. In its third plea, the Appellant claims that the Contested Decision is vitiated by the Defendant's failure to afford the Appellant the right to be heard pursuant to Article 14(6) ACER Regulation and Article 41(2)(a) of the Charter of Fundamental Rights of the EU (hereinafter "Charter of Fundamental Rights").

22. In its fourth plea, the Appellant alleges that the Contested Decision infringes Article 14(7) of the ACER Regulation, Article 296 of the Treaty on the Functioning of the

[5] L 312, 28.11.2017, p. 6.
[6] OJ L 158, 14.06.2019, p. 22.

European Union [7] (hereinafter "TFEU") and Article 41(2)(c) of the Charter of Fundamental Rights by failing to provide an adequate statement of reasons.

23. In its fifth plea, the Appellant claims that the Contested Decision contravenes the principle of protection of legitimate expectations as it constitutes the retroactive withdrawal of a measure which had conferred individual rights or similar benefits on the Appellant.

IV. Admissibility

24. The BoA needs to examine *ex officio* whether an appeal is admissible *ratione temporis*, *ratione personae* and *ratione materiae* in accordance with Article 28(1) and (2) of the ACER Regulation.

25. Admissibility *ratione personae* is regulated by Article 28(1) of the ACER Regulation which provides that "*any natural or legal person, including the regulatory authorities, may appeal against a decision referred to in point (d) of Article 2 which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person*".

26. Further, Article 15(1) of the BoA Rules of Organisation and Procedure provides that "*[T]he grounds on which an appeal shall be ruled inadmissible shall include the following:* […] *(d) the appellant is neither an addressee of the decision contested by the appeal nor able to establish direct and individual concern according to Article 28(1) of Regulation (EU) 2019/942"*.

27. As far as admissibility *ratione materiae*, Article 28(2) of the ACER Regulation provides that the appeal shall include a statement of the grounds for appeal and that it is for the BoA to decide upon the appeal.

28. In the present case, the Contested Decision is not addressed to the Appellant. Article 2 of the Contested Decision establishes that the addressees are all the EU TSOs. The Contested Decision is not addressed to the Appellant.

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

Arguments of the Parties

30. The Appellant alleges that the appeal against the Contested Decision is admissible because the Contested Decision is an individual decision within the meaning of Article 2(d) of the ACER Regulation and it is of direct and individual concern to the Appellant in accordance with Article 28(1) of the ACER Regulation. In the Appellant´s view, the Appellant is directly and individually concerned by the Contested Decision because of the following: (i) the Contested Decision directly affects the legal situation of the Appellant through the amendment of the definition of "member TSO", excluding the Appellant from membership and from participating in the IN Platform; (ii) the Contested Decision applies automatically without leaving any discretion to the addressee TSOs with respect to the Appellant´s loss of membership; iii) the Contested Decision is of individual concern to the Appellant given that the novel condition for membership of the

[7] OJ C 326/47, 26.10.2012, p. 47.

IN Platform is satisfied by all member TSOs except for the Appellant, by virtue of its place of establishment.

31. The Defendant argues that the appeal should be declared inadmissible. Its main argument relies on the GCEU Order. In more details, the case was brought by the Appellant against a European Commission letter of 17 December 2020 that contained the European Commission's position on the possible participation of the Appellant in another energy balancing platform, the RR Platform (Terre). The European Commission maintained that participation was dependent on a specific decision of the European Commission itself on whether the criteria listed in Article 1(6) and (7) of the EB Regulation had been satisfied.

32. The above-mentioned provisions of the EB Regulation are hereby reproduced: Article 1(6) of the EB Regulation: *"The European platforms for the exchange of standard products for balancing energy may be opened to TSOs operating in Switzerland on the condition that its national law implements the main provisions of Union electricity market legislation and that there is an intergovernmental agreement on electricity cooperation between the Union and Switzerland, or if the exclusion of Switzerland may lead to unscheduled physical power flows via Switzerland endangering the system security of the region".* Article 1(7*)* of the AB Regulation: *"Subject to the conditions of paragraph 6, the participation of Switzerland in the European platforms for the exchange of standard products for balancing energy shall be decided by the Commission based on an opinion given by the Agency and all TSOs. The rights and responsibilities of Swiss TSOs shall be consistent with the rights and responsibilities of TSOs operating in the Union, allowing for a smooth functioning of balancing market at Union level and a level-playing field for all stakeholders".*

33. According to the European Commission *for as long as no such decision is adopted, Switzerland may not participate. No such decision was adopted by the Commission* (European Commission letter of 17 December 2020).

34. The Appellant challenged the lawfulness of the European Commission letter before the General Court. In the GCEU Order, the General Court held that the European Commission letter could not be classified as an act capable of having legal effects, and therefore, the action for annulment under Article 263 of the TFEU had to be held inadmissible. The General Court further specified that under Article 1(7) of the EB Regulation, the European Commission is still entitled to refuse that participation, even if the conditions of Article 1(6) of that Regulation, which justify such authorisation, were to be satisfied (at paragraph 25). Therefore, compliance with the two conditions of Article 1(6) of the EB Regulation merely enables the European Commission to adopt a position on the question whether such participation should be authorised, but does not impose on it to authorise that participation. According to the General Court "*the adoption of a decision authorising Switzerland and, therefore, the TSOs established there to participate in European balancing platforms depends solely on the choice made by the Commission, which has a discretion in that regard*" (paragraph 29).

35. According to the Defendant, the GCEU Order unequivocally confirms that the participation of a Swiss TSO, such as the Appellant, in a European platform for the exchange of standard products for balancing energy is only possible if the European Commission first authorises Switzerland and thereby the Swiss TSO to participate in the platform.

36. This finding applies *a fortiori* also as far as participation into the IN Platform is concerned. Since the exception provided in Article 1(6) and (7) of the EB Regulation is explicitly limited to European balancing platforms for the exchange of standard products

for balancing energy, outside such a specific exception, the general rule contained in Article 1 of the EB Regulation applies.

37. The Defendant further relies on a letter of 24 November 2021 (Annex 22 of the present Appeal) by the Chair of the ACER Electricity Working Group, a group composed by all National Regulatory Authorities and set up on the basis of Article 30(1) of the ACER Regulation to support the regulatory work of ACER Director and of the Board of Regulators (hereinafter 'BoR'). In that letter, participation of the Appellant in the IN Platform was explicitly excluded as the participation of the Appellant in the IN platform could have entailed legal risks, especially with respect to enforcement and conflict resolution, due to the fact that the establishment and operation of the IN platform was governed by the European regulatory framework.

38. Thus, according to the Defendant, the appeal is inadmissible *ratione personae,* because the Appellant has not established direct and individual concern in accordance with Article 28(1) of the ACER Regulation and Article 15(1) of the BoA Rules of Organization and Procedure.

39. In the Defendant´s opinion, the Appellant is not directly concerned by the Contested Decision because that decision does not affect the legal situation of the Appellant regarding the Platform concerned. The Defendant claims that, since the entry into force of the EB Regulation on 18 December 2017, the Appellant´s legal situation is determined only by Article 1 of the EB Regulation.

40. The Defendant also claims that the Appellant is not individually concerned by the Contested Decision because that decision only affects TSOs to which the EB Regulation applies, i.e. EU TSOs, whereas the Appellant is a non-EU TSO. The Defendant adds that the Appellant is, in its view, not treated differently from other non-EU TSOs as regards the definition of "member TSO" of the Contested Decision. Finally, the Defendant alleges that, even if successful, the appeal is not liable to procure any advantage for the Appellant.

41. In its Observations, pursuant to the BoA Chair´s procedural measure inviting the Appellant to provide its views on the consequences of the GCEU Order, the Appellant states that the GCEU Order has no implications on the admissibility of the present appeal as that Order concerns the Appellant's participation in platforms for the exchange of standard products for balancing energy and not the Appellant's participation in the IN Platform.

42. The Appellant maintains that the GCEU Order does not have any bearings on its plea that the Contested Decision infringed Article 22(5) of the EB Regulation. In the Applicant's view, such a provision provides a different pathway for the participation in the IN Platform, clearly distinguishable from the one provided under Article 1(6) and (7) of the EB Regulation.

43. The Appellant also reiterates that the GCEU Order has no implications on its direct and individual concern in the appeal.

44. As for the direct concern requirement, the Appellant argues that the Contested Decision has plainly altered the Appellant's legal position by unlawfully modifying the conditions for participation in the IN Platform set out in Article 22(5) of the EB Regulation. Further, according to the Appellant, its legal situation is modified by the Contested Decision due to the linkage between the INIF and the TSOs' contractual framework. The INIF, in the Appellant's view, is effectively incorporated by reference in the contractual agreements which govern the IN Platform, to which the Appellant is a party. Therefore, amending

the definition of "member TSO" in the INIF has a direct impact on the content and extent of the Appellant's contractual rights.

45. As regards the Appellant's individual concern, the Appellant states that its participation in various forms in the IN Platform since its inception clearly distinguishes its position from any other non-EU TSOs. Further, the Contested Decision´s clarification of the definition of member TSO is exclusively directed to the Appellant and not to other non-EU TSOs.

46. Finally, the Appellant alleges that it maintains an interest in the appeal notwithstanding the GCEU Order as the latter does not identify any other statutory barrier to the Appellant's participation in the IN Platform, other than the definition of "member TSO" in the INIF as amended through the Contested Decision.

Assessment

47. The analysis of admissibility of appeals needs to be carried out by the BoA in line with its duties and prerogatives "*in a manner which ensures respect for the principle of procedural economy, that is, the need to conclude proceedings swiftly so as to create legal certainty, while at the same time guaranteeing the effective protection of the rights of the parties and compliance with the panoply of the right to good administration"* (Decision of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators of 9 December 2022, paragraph 31).

48. Further, in order to decide whether the Appeal is to be considered admissible, the case law on admissibility of actions for annulment against acts brought by natural or legal persons under Article 263 of the TFEU must be used by the BoA as a compass when discharging its duties (BoA Decision A-002-2022, cit. above, paragraph 35).

49. As such, the case law provides that an action lies only if the binding legal effects of the act challenged are capable of affecting the interests of the applicant by bringing about a distinct change in his or her legal position (judgment of the Court of 13 October 2011, *Deutsche Post AG and Federal Republic of Germany* v *European Commission*, C-463/10 P and C-475/10 P, EU: C: 2011:656, paragraph 37 and the case-law cited).

50. In order to determine if the above test is satisfied in the present case, it is necessary to conduct an initial analysis of the provisions of the EB Regulation, on which the Contested Decision is based.

51. Any EU legislative text must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part (judgment of the Curt of 1 March 2016, *Kreis Warendorf and Osso,* C-443/14 and C-444/14, EU: C: 2016:127, paragraph 27 and judgement of the Court of 15 February 2023, *Austrian Power Grid AG and Others v ACER,* EU: T: 2023:65 paragraph 39) and to its wording (judgment of the Court of 1 December 2005, *Italian Republic* v *Commission of the European Communities*, C-301/03, EU: C: 2005:727, paragraphs 21 to 24).

52. The EB Regulation should therefore be examined by reference to its regulatory aim and framework.

53. The main aim of the EB Regulation, as confirmed in the *Austrian Power Grid AG and Others v ACER* judgement (cit. above, paragraphs 107 to 109), is to contribute to "*a fully functioning and interconnected internal energy market*" (Recital 1), by maintaining security of energy supply, increasing competitiveness and ensuring that all consumers can purchase energy at affordable prices. Further, Article 3(1)(c) of the EB Regulation

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

54. The wording of the EB Regulation also clearly delimits its scope of application because, pursuant to Article 1(3), the EB Regulation applies to all transmission systems and interconnections in the EU. The only exception for participation in the European platforms for the exchange of standard products for balancing energy concerns TSOs operating in Switzerland, subject to the conditions listed in Article 1(6) and (7) of the same Regulation.

55. The BoA considers that the EB Regulation should also be inserted into its wider context. The EU regulatory process has gradually resulted in a complex EU legal regulatory framework composed of both primary legislation and "*various network codes established by means of Commission regulations*" (judgment of the Court of 2 September 2021, *European Commission v Federal Republic of Germany*, C-718/18, EU: C: 2021:662, paragraph 122 and BoA Decision of 29 April 2021, A-013-2021, paragraph 61).

56. The nature, extent, manner, and therefore the legal position, in which the Swiss TSOs can participate in the European balancing platform framework must therefore be determined with reference to the specific provisions laid down in the EB Regulation and read in the light of the context set out above (see by analogy judgment of the court of 17 January 2023, Case C-632/20 P, *Kingdom of Spain v European Commission*, EU: C: 2023:28 paragraph 112).

57. As stated above at paragraph 54, the participation of Swiss TSOs is dependent on the content and procedure laid down in Article 1(6) and (7) of the EB Regulation. It is indeed true that Article 1(6) and (7) applies only to participation in platforms for the exchange of standard products for balancing energy. This, nonetheless, simply confirms that, outside the specific exception provided in Article 1(6) and (7) of the EB Regulation, TSOs which are not subject to EU law are, in principle, not allowed to become a member of a regulated EU Balancing Platform, including the IN Platform.

58. The Contested Decision simply applies Article 1 of the EB Regulation and reflects the state and progress of the regulation of the EU's energy balancing platforms market. Contrary to the Appellant submissions, Article 22(5) of the EB Regulation does not concern itself with the possible participation of TSOs not subject to EU law, but simply prescribes the deadline for the TSOs to implement and make operational the IN Platform.

59. Therefore, the Appellant´s situation is not determined by the Contested Decision but by the EB Regulation, as a result of its direct application, and not as a result of the Contested Decision which merely implements the EB Regulation.

60. Further, the EB Regulation has been applicable since 18 December 2017 and Article 1 of the same Regulation has not been amended since its entry into force. It follows that under the previous ACER Decision No 13/2020, the Appellant was in exactly the same position as it is currently.

61. Indeed, contrary to the Appellant's arguments, there was no change in its legal status brought about by the Contested Decision. The Appellant has never been admitted as a member TSO to the IN Platform by the Defendant.

62. Article 2 of ACER Decision No 13/2020 was addressed to all TSOs listed as: "50Hertz Transmission GmbH, Amprion GmbH, AS Augstsprieguma tĪkls, Austrian Power Grid AG, BritNed Development Limited (NL), BritNed Development Limited (UK), C.N.T.E.E. Transelectrica S.A., ČEPS a.s, Creos Luxembourg S.A., EirGrid Interconnector DAC, EirGrid plc, Elektroenergien Sistemen Operator EAD, Elering AS, ELES, d.o.o, Elia System Operator SA, Elia System Operator NV/SA, Energinet Electricity System Operator, Fingrid Oyj, HOPS d.o.o., Hrvatski operator prijenosnog sustava, Independent Power Transmission Operator S.A., Kraftnät Åland Ab, Litgrid ABMAVIR ZRt, Moyle Interconnector Limited, National Grid Electricity Interconnector Limited, National Grid Electricity System Operator, Nemo Link Limited, Polskie Sieci Elektroenergetyczne, Red Eléctrica de España S.A., Rede Eléctrica Nacional, S.A., Réseau de Transport d'Electricité,Slovenská elektrizačná prenosová sústava, a.s., Svenska kraftnät, System Operator for Northern Ireland Ltd, TenneT TSO B.V., TenneT TSO GmbH, Terna Rete Elettrica Nazionale S.p.A., TransnetBW GmbH and VÜEN-Vorarlberger Übertragungsnetz GmbH".

63. Swissgrid was not one of the afore listed addressees. Following the amendments introduced by the Contested Decision, it cannot be maintained that the Appellant could by consequence lose its membership of the IN Platform. If this were the case, then its direct and individual concern could have been established.

64. Likewise, historical participation in platform projects or contractual arrangements cannot be relied upon in a way which undermines the specific provisions laid down in the EB Regulation, read in light of the context set out above.

65. It follows that the Contested Decision cannot be considered an act capable of affecting the interests of the Appellant by bringing about a distinct change in its legal position. As this requirement overlaps with the locus standi criteria, there is no further need to examine whether the Appellant is directly and individually concerned by the Contested Decision (order of the Court of 15 April 2021, C-622/20 P, *Validity Foundation and Center for Independent Living Association v European Commission,* EU: C: 2021:310, paragraph 39).

V. Conclusion

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

Done at Ljubljana, 29 June 2023

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