

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

– 25th Annual Meeting –

Wednesday, 27 September 2023, 09:00 — 17:30

Cours Saint-Michel 30a, 1040 Bruxelles – Belgium

I. LIST OF ATTENDEES

The following Members and Alternates of the Board of Appeal were present at the meeting:

Mr Miro PREK,	<i>Chair</i>	Mr Piet EECKHOUT,	<i>Vice-Chair</i>
Mr Andrea BIONDI,	<i>Vice-Chair</i>	Ms Karin WIDEGREN,	<i>Member</i>
Ms Katerina SARDI,	<i>Member</i>	Mr Matti SUPPONEN,	<i>Member</i>
Ms Chiara PETRUZZO,	<i>Alternate</i>	Ms Keelin O'BRIEN,	<i>Alternate</i>
Mr Timo PARTANEN,	<i>Alternate</i>	Mr Gabor SZÖRENYI,	<i>Alternate</i>

Mr Matti SUPPONEN attended online.

Mr Paul MARTINET, *Team Leader of ACER Legal Services*, attended the meeting.

Mr Oliver KOCH, *European Commission*, attended as speaker the session “Legislative Developments and ACER Board of Appeal”.

Mr Christophe GENGE-CREUX, *Head of the Electricity Department of ACER*, attended as speaker the session “Recent Developments in the Energy Markets and ACER”.

Ms Evelyne AMEYE, Mr Bart CREVE and Mr Pierre GOFFINET, *external experts*, attended as speakers the session “Litigation before the Court of Justice”.

The secretariat was provided by the Registrar.

II. OPENING

The 25th Annual meeting of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators was convened on 27 September 2023.

Upon invitation of the Chair to the present Members and Alternates of the Board to declare any actual or potential interest that could be considered prejudicial to their independence with respect to the items on the agenda, no actual or potential interest was declared nor reported.

In this context, Ms PETRUZZO and Mr SZÖRENYI informed the Board of Appeal of a change in their professional activities for which they submitted a revised annual declaration of interest. The Board of Appeal took note of their indications. As regards Mr SZÖRENYI the Chair informed the Board the Review Panel was in the process of assessing the revised annual declaration of interest pursuant to the applicable rules on the prevention and management of conflict of interest.

III. APPROVAL OF THE AGENDA

The Agenda of the 23rd meeting of the Board of Appeal was approved as follows:

REGISTRATION	09:00 - 09:15	Registration of Participants <i>Welcome Coffee</i>
OPENING	09:15 - 09:20	Opening of the Annual Meeting <i>Adoption of the Agenda and Declaration of Interests – M. PREK</i>
REPORTING	09:20 - 09:35	Report on the activities of the Board of Appeal <i>Presentation by M. PREK</i>
	09:35 - 09:45	Report on the latest BoA Decisions and the Activity at the Registry <i>Presentation by S. VAONA</i>
STRATEGIC DISCUSSION	09:45 - 10:20	Amendment to the Rules of Organisation and Procedure 09:45 – 09:55 <i>Presentation by M. PREK and S. VAONA</i> 09:55 – 10:10 <i>Presentation by C. Petruzzo on the Right of Good Administration and Fair Trial</i> 10:10 – 10:20 <i>Roundtable Discussion</i>
	10:20 - 10:35	<i>Coffee Break</i>
	10:35 - 10:50	Adoption of Conflict of Interest Rules for the Registry 10:35 – 10:40 <i>Presentation by S. VAONA</i> 10:40 – 10:50 <i>Roundtable Discussion</i> <i>Adoption</i>
	10:50 - 11:15	Appointment of Deputy Registrar 10:50 – 10:55 <i>Presentation by S. VAONA</i> 10:55 - 11:00 <i>Introduction of J. NORDSTROM</i> 11:00 – 11:15 <i>Roundtable Discussion</i> <i>Appointment</i>
INFORMATION	11:15 - 12:00	Recent Developments in the Energy Markets and ACER 11:15 – 11:30 <i>Presentation by C. GENCE-CREUX, Head of ACER Electricity Department</i> 11:30 – 11:45 <i>Presentation by A. MARIEN</i> 11:45 – 12:00 <i>Q&A</i>
	12:00 - 12:30	Legislative Developments and ACER Board of Appeal 12:00 – 12:15 <i>Presentation by O. KOCH, European Commission</i> 12:15 – 12:30 <i>Q&A</i>
	12:30 - 13:15	<i>Buffet Lunch</i>

INFORMATION 13:15 - 14:40 **Analysis of recent decisions and experience from Rapporteurs**13:15 – 13:30 *Initial Remarks by M. PREK*13:30 – 14:00 *Panel Discussion with K. WIDEGREN, K. SARDI, A. BIONDI, P. EECKHOUT, and M. SUPPONEN.*14:00 – 14:40 *Roundtable Discussion*14:40 - 15:40 **Litigation before the Court of Justice**14:40 – 14:50 *Initial Remarks by M. PREK*14:50 – 15:25 *Panel Discussion with P. MARTINET (Head of ACER Legal Services), E. AMEYE (attorney at law), P. GOFFINET (attorney at law), B. CREVE (attorney at law).*15:25 – 15:40 *Roundtable Discussion*15:40 - 17:00 **Functioning of the Board Appeal***The Aquind ruling and Recent Case-Law.*

CLOSURE 17:00 - 17:15 **AOB****SECTION II – REPORTING****IV. REPORT ON THE ACTIVITIES OF THE BOARD OF APPEAL**

The Chair provided to the Board of Appeal an outlook of the activities of the Board since the last annual meeting, both with regard to the aspects concerning to the overall organization of the Board and the decisions adopted in the course of the year 2022-2023. In particular, the Chair reported about the outcome of the Conflict of Interest assessment for the year 2023 indicating that no conflict of interest was detected as reported in the minutes published on ACER Website. The Chair further indicated the effort put in the development of a friendly and efficient appeal management platform in the course of the year.

The Chair finally indicated to the Board the difficulties faced, from an administrative perspective, in the management of appeals due to the lack of sufficient administrative support. He reported about the improvements made in terms of legal and administrative support though indicating the shortage of human resources limiting business continuity in the Registry.

The Board of Appeal took note of the report and maintained the need for adequate human resources to be assigned on a permanent basis to the Registry of the Board to ensure that the Board can rely on a well-structured organization.

V. REPORT ON THE LATEST BOA DECISIONS AND THE ACTIVITY AT THE REGISTRY

The Registrar provided a report to the Board of Appeal on the activities performed in the year 2022-2023. In particular, he reported about the effort put in the design of the new appeal management platform to be developed in the year 2024. He indicated the desire to put in place a platform which will be designed to minimise communications via e-mail, including the submissions of procedural acts, and ensure a collaborative platform to the benefit of all users involved. He also indicated the effort put in

finding a working solution to ensure legal and administrative support to the Board of Appeal in the handling of cases.

Finally, the Registrar provided an overview of the decisions adopted by the Board of Appeal since the last meeting of the Board as follows:

Date of Adoption	Case Number	Case Title
18 July 2022	A-001-2022	<i>PSE v ACER</i>
19 December 2022	A-002-2022	<i>RWE v ACER</i>
19 December 2022	A-003-2022	<i>Uniper v ACER</i>
26 July 2023	A-003-2019 R	<i>BNetzA v ACER</i>
19 July 2023	A-004-2019	<i>MEKH and FGSZ v ACER</i>
19 July 2023	A-007-2022	<i>Swissgrid (I) v ACER</i>
19 July 2023	A-008-2022	<i>Swissgrid (II) v ACER</i>
19 July 2023	A-008-2022	<i>Swissgrid (III) v ACER</i>

The Registrar indicated that all decisions were adopted by unanimity and they have been published on ACER website¹.

VI. AMENDMENT TO THE RULES OF ORGANISATION AND PROCEDURE

The Chair invited the Board to discuss the proposed amendments to the Rules of Procedure of the Board of Appeal. The Chair indicated that the amendments based on the experience gathered in the latest years and they are limited to: i) correct a current vacuum, namely the procedure to be followed after a decision of the Board of Appeal has been annulled by the EU Courts; and ii) provide the necessary means to the Board of Appeal to stay proceedings whenever a need arise and for justified reasons.

The Registrar therefore provided an overview of the draft amendments.

After discussion, the Board of Appeal proposed editorial changes and it endorsed the draft, inviting the Registrar to launch a written procedure for the adoption of the amendments.

Following the discussion, Mr PETRUZZO provided a presentation on the right of good administration and fair trial in administrative proceedings, favoring a discussion on its implications for appeal proceedings before the Board of Appeal.

VII. ADOPTION OF CONFLICT OF INTEREST RULES FOR THE REGISTRY

The Registrar informed the Board of Appeal of the proposal to expand to the staff working in the Registry the same rules on conflict of interest applicable to the Board of Appeal at the time of declaring the individual availability to take part in an appeal proceeding.

The Registrar recalled that once a notice of appeal is entered, according to the Rules of Procedure of the Board of Appeal, each member shall declare any interest that may impact upon her/his independence and impartiality in handling the submitted appeal. At the same time, the parties to the appeal proceeding may request a member to be excluded from the appeal for reasons related to conflict of interest.

¹ <https://acer.europa.eu/the-agency/organisation-and-bodies/board-of-appeal/boa-decisions>.

The Registrar further indicated that the staff working in the Registry are subject to the Staff Regulations of the Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community. According to Article 11 of the Staff Regulations, an official shall carry out his duties and conduct himself solely with the interests of the Union in mind. He shall neither seek nor take instructions from any government, authority, organisation or person outside his institution. He shall carry out the duties assigned to him objectively, impartially and in keeping with his duty of loyalty to the Union.

The staff working in the Registry is not involved in the decision-making process and provides administrative support to the Board. However, the limited number of human resources impacts upon the possibility to ensure full-time business continuity. In the attempt to find a working solution, the Agency is assigns an additional part-time staff to the Registry of the Board in order to ensure business-continuity and provide a back-up to the Registrar with a similar level of seniority.

In light of the above, and considering that the staff working in the Registry is not assigned to it on a full-time basis, the Registrar indicated that it is recommendable to extend the rules applicable to the Board of Appeal even to the staff working in the Registry, in the interest of the integrity of the decision-making process, so as to exclude the perception of conflicts of interest at all levels.

The Board of Appeal, after discussion, endorsed the proposal of the Registrar to extend the rules on conflict of interest to the staff working in the Registry. In particular, the relevant staff, once an appeal is entered and on the basis of the decision that has been challenged, will need to declare whether: i) she/he has any personal or professional interest in relation to the case and ii) whether participated or represented ACER in connection to the challenged decision. Any staff working in the Registry which will declare an interest will not be involved in the specific case at hand.

VIII. APPOINTMENT OF DEPUTY REGISTRAR

The Registrar informed the Board that, in the attempt to address the requests for human resources to be assigned full-time to the Registry, ACER, considering the shortage of staff, proposed to enlarge the number of staff at disposal of the Board on a part-time basis.

The Registrar, therefore, introduced Mr NORDSTROM, legal advisor at ACER, indicating his availability and relevant experience making him suitable to act as deputy Registrar, cooperating with and replacing the Registrar when unavailable.

The Board of Appeal endorsed the proposal of the Registrar indicating Mr Nordstrom as deputy Registrar.

IX. RECENT DEVELOPMENTS IN THE ENERGY MARKETS AND ACER

Upon invitation of the Chair, Mr GENGE-CREUX, Head of ACER Electricity Department provided a presentation on the most recent developments in the energy markets and the ongoing activity of ACER regarding the electricity markets.

Mr MARIEN, alternate of the Board of Appeal, provided a presentation with regard to bidding on short term markets.

X. LEGISLATIVE DEVELOPMENTS AND ACER BOARD OF APPEAL

Upon invitation of the Chair, Mr KOCH, European Commission, provided a presentation related to the legislative developments and a possible increase of competences of ACER and its impact upon the Board of Appeal.

XI. ANALYSIS OF RECENT DECISIONS AND EXPERIENCE FROM RAPPORTEURS

At the presence of the Members and Alternates only, the Board discussed the past cases in the attempt of sharing experiences and lessons learnt. Within this context and for reasons of expediency, the Board merged the discussion with the subsequent point from the agenda related to its functioning in light of the most recent case-law touching upon the intensity of its review.

XII. LITIGATION BEFORE THE COURT OF JUSTICE

ACER attorneys in litigation before the European Court of Justice were invited to attend this session, in particular to share their past experience in ligating before the Union Courts in cases where the decisions of the Board were challenged.

CONCLUSION

In the absence of any other business to be treated, the Chair closed the 25th meeting of the Administrative Board at 17h30.