DECISION

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

of 31 July 2025

Case number and name:	A-001-2021_R (consolidated) - TransnetBW GmbH
Language of the case:	English
Appellants:	*TransnetBW GmbH ("the Appellant")* Represented by: T. BURMEISTER, P. KISTNER
Defendant:	*European Union Agency for the Cooperation of Energy Regulators* (*"ACER"* or *"the Defendant"*) Represented by: C. ZINGLERSEN
Interveners:	*Amprion GmbH ("Amprion")* in support of the Appellant *Hungarian Energy and Public Utility Regulatory Authority ("HEA")* *Commission for Electricity and Gas Regulation ("CREG")* *Energy Regulatory Office ("ERO")* *MAVIR Hungarian Independent Transmission Operator Company Ltd ("Mavir")* *Regulatory Office for Network Industries ("URSO")* in support of the Defendant
Relaunched procedure upon:	Judgment of the General Court of 25 September 2024, *TransnetBW GmbH v ACER* (T-476/21, ECLI:EU:T:2024:649) - annulment of Board of Appeal Decision A-001-2021 (consolidated) of 28 May 2021
Board composition:	K. O'BRIEN (Technical Rapporteur), P. EECKHOUT (Legal Rapporteur, Vice-Chair), K. WIDEGREN, K. SARDI, T. PARTANEN and M. PREK (Chair)

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

HAS ADOPTED THIS DECISION:

I. Legal background

1. Article 74 "*Redispatching and countertrading cost sharing methodology*" of Commission Regulation (EU) 2015/1222 of 24 July 2015, as amended, establishing a guideline on capacity allocation and congestion management[1] (hereinafter "CACM"), requires Transmission Systems Operators (hereinafter "TSOs") of each Capacity Calculation Region (hereinafter "CCR") to submit a proposal for a common methodology for redispatching and countertrading cost sharing (hereinafter "RDCTCS") for their region, no later than 16 months after the decision on CCR is taken, and lays down the regulatory requirements in relation to the adoption of the RDCTCS.

2. The bottom-up decision-making procedure for the adoption of the RDCTCS is set out in Article 9 "*Adoption of terms and conditions or methodologies*" of CACM.

3. Decision No 30/2020 of the European Union Agency for the Cooperation of Energy Regulators of 30 November 2020 on the Core CCR[2] TSO's Proposal for the methodology for cost sharing of redispatching and countertrading (hereinafter also referred to as "the Contested Decision") - addressed to 17 TSOs of the Core CCR - adopts the RDCTCS for the Core CCR and joins it as Annex I to the Contested Decision.

II. Facts giving rise to the Contested Decision and to the Annulled Decision

4. Pursuant to Article 9(1), 9(7)(h) and 74(1) of CACM, TSOs of each CCR are required to develop a common proposal for RDCTCS in accordance with Article 74 of CACM and submit it to the competent National Regulatory Authorities (hereinafter "NRAs").

5. All Core TSOs did not submit their RDCTCS proposal for the Core CCR by 17 May 2018.

6. In accordance with Article 9(4) of CACM, all Core TSOs informed Core NRAs and ACER about the failure to submit such a proposal. The reported reason for the failure was that Core TSOs needed more time to test and develop several aspects of the RDCTCS. In accordance with Article 9(4) of CACM, ACER, in turn, informed the European Commission about all Core TSOs' failure to submit their RDCTCS proposal.

7. The European Commission consulted with Core TSOs, NRAs and ACER and provided guidance to Core TSOs to develop a proposal and submit it for approval as early as possible, assuming that further testing and development could be performed during the approval proceedings of the Core NRAs and that NRAs could, in any event, request necessary amendments to the all Core TSOs' proposal.

[1] OJ L 197, 25.7.2015, p. 24–72.
[2] EU Electricity Core Capacity Region (Core CCR) is a geographical area within the European electricity market that includes thirteen countries: Austria, Belgium, Croatia, Czech Republic, France, Germany, Hungary, Luxembourg, Netherlands, Poland, Romania, Slovakia, and Slovenia.

8. All Core TSOs developed the RDCTCS Proposal for Core CCR (hereinafter "All Core TSOs' RDCTCS Proposal"). The submission of All Core TSOs' RDCTCS Proposal was received by the last Core NRAs on 27 March 2019. All Core TSOs' RDCTCS Proposal was accompanied by a supporting Explanatory Document (hereinafter "All Core TSOs' RDCTCS Explanatory Document")[3].

9. Core TSOs did not publicly consult on their RDCTCS Proposal prior to its submission.

10. Upon Core NRAs' request, ACER extended the period for Core NRAs to grant regulatory approval to All Core TSO's RDCTCS Proposal by 6 months, i.e. until 27 March 2020 (ACER Decision No 11/2019[4]).

11. On 13 March 2020, all Core TSOs published All Core TSOs' RDCTCS Experimentation Report.

12. On 27 March 2020, the Chair of the Core Energy Regulators' Forum informed ACER on behalf of all Core NRAs that all Core NRAs had not been able to reach an agreement on All Core TSOs' RDCTCS Proposal by 27 March 2020. In accordance with Article 9(11) of CACM and Article 5(3) 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 (recast)[5] (hereinafter the "ACER Regulation"), all Core NRAs referred All Core TSOs' RDCTCS Proposal to ACER for regulatory approval in accordance with Article 6(10)(a) of the ACER Regulation.

13. On 27 March 2020, since the NRAs of the Core CCR had not been able to reach an agreement on the RDCTCS Proposal submitted by the TSOs, ACER declared itself competent to adopt a decision on that proposal in accordance with Article 5(3) and Article 6(10) of the ACER Regulation and Article 9(11) of CACM.

14. On 27 March 2020, all Core NRAs published the All Core NRAs' RDCTCS Non-Paper.

15. On 30 April 2020, all Core TSOs published All Core TSOs' RDCTCS Non-Paper.

16. As of 9 April 2020, ACER closely cooperated with all Core NRAs and Core TSOs and further consulted on the amendments to All Core TSOs' RDCTCS Proposal during numerous teleconferences and meetings and through exchanges of amendments. In this period, discussions were held within ACER's Electricity Working Group.

17. From 31 July 2020 until 20 August 2020, ACER held a hearing phase with all Core NRAs and all Core TSOs.

18. On 18 November 2020, the Board of Regulators gave its favourable opinion to the Agency's draft Contested Decision.

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[3] Explanatory document to the common methodology for redispatching and countertrading cost-sharing for single day-ahead and intraday coupling for Capacity Calculation Region Core in accordance with Article 74 of the Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a Guideline on Capacity Allocation and Congestion Management of 22 February 2019, available at https://www.e-control.at/documents/1785851/0/201902_Core+CACM+74_Explanatory+note.pdf/083b4ff9-7617-588b-987b-51d55944a097?t=1575301393324.

[4] Decision No 11/2019 of the European Union Agency for the Cooperation of Energy Regulators of 26 September 2019 on the request of regulatory authorities of the Core Capacity Calculation Region to extend the period for reaching an agreement on the proposal for the methodology for the coordination and the cost sharing of redispatching and countertrading.

[5] OJ L 158, 14.6.2019, p. 22–53.

19. ACER issued the Contested Decision on 30 November 2020. Annex I to the Contested Decision contains the RDCTCS for the Core CCR.

20. On 29 January 2021, appeals were submitted by Polskie Sieci Elektroenergetyczne S.A. ("PSE" or "Appellant I"), Commission de Régulation de l'Énergie ("CRE" or "Appellant II"), TransnetBW GmbH, Bundesnetzagentur ("BNetzA" or "Appellant IV"), and TenneT TSO GmbH and Tennet TSO B.V. ("Tennet" or "Appellant V") to the Registry of the Board of Appeal (hereinafter "BoA") against the Contested Decision, respectively in cases A-001-2021, A-002-2021, A-003-2021, A-004-2021 and A-005-2021.

21. On 30 January 2021, a sixth appeal was submitted by Réseau de Transport d'Électricité ("RTE" or "Appellant VI") to the Registry of the BoA against the Contested Decision in case A-006-2021.

22. On 1 February 2021, the above-mentioned appeals were received by the Registry of the BoA. The Registry of the BoA duly acknowledged receipt through a notice.

23. On 16 February 2021, the announcements of the appeals were published on the website of the Agency.

24. On 18 February 2021, case A-003-2021, which relates to three different ACER Decisions, was divided into three cases for procedural reasons, namely (i) case A-009-2021 regarding the appeal against the Contested Decision; (ii) case A-010-2021 regarding the appeal against ACER Decision No 33/2020 and (iii) case A-011-2021 regarding the appeal against ACER Decision 35/2020.

25. On 18 February 2021, in accordance with Article 20(3)(h) of the BoA Rules of Organisation and Procedure (hereinafter "BoA ROP")[6], the Chairperson of the BoA ordered to consolidate appeal cases A-001-2021, A-002-2021, A-004-2021, A-005-2021, A-006-2021 and A-009-2021, involving similar issues and being related to the same Contested Decision, into A-001-2021 (consolidated).

26. On 19 February 2021, the Registrar communicated the composition of the BoA to the parties.

27. On 23 February 2021, the Registry of the BoA received Amprion GmbH's ("Amprion" or "Intervener I") application for leave to intervene on behalf of the Appellant.

28. On 1 March 2021, the Registry of the BoA received an application for leave to intervene on behalf of Appellants II and VI by Union française d'Électricité ("UFE").

29. On 2 March 2021, the Registry of the BoA received applications for leave to intervene on behalf of the Defendant by Hungarian Energy and Public Utility Regulatory Authority ("HEA" or "Intervener II"), Commission for Electricity and Gas Regulation ("CREG" or "Intervener III"), Energy Regulatory Office ("ERO" or "Intervener IV"), MAVIR Hungarian Independent Transmission Operator Company Ltd ("Mavir" or "Intervener V") and Regulatory Office for Network Industries ("URSO" o "Intervener VI") and by the Netherlands Authority for Consumers and Markets ("ACM").

[6] Rules of Organisation and Procedure of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators as amended by Decision No 01/2023 of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators of 22 November 2023.

30. On 5 March 2021, the BoA invited the appellants to update the confidentiality status of their appeals by 10 March 2021 in light of the consolidation of the cases and access of other appellants to the documents. To this extent, on 10 March 2021, the Appellant submitted an updated confidentiality request regarding their Annex 9 to the appeal.

31. On 12 March 2021, the BoA allowed the Appellant to regularise its appeal beyond the set deadline, having received no objections to do so by the Defendant.

32. On 12 March 2021, the Registry of the BoA informed the Appellant and the Defendant about the received applications for leave to intervene along with an invitation to lodge observations on the application and the opportunity to update the confidentiality status of their appeal documents in light of the applications for leave to intervene by 19 March 2021.

33. On 18 March 2021, ACER filed its Defence with the Registry of the BoA requesting the BoA to dismiss all appeals.

34. On 23 March 2021, the BoA granted Interveners I, II, III, IV, V and VI the right to intervene.

35. On 23 March 2021, the BoA dismissed ACM´s application for leave to intervene on behalf of the Defendant.

36. On 23 March 2021, the BoA invited all appellants to submit their replies to the Defence, including further observations on the merits of interventions of Interveners I, II, III, IV, V and VI, with a maximum of 15 pages, within the extended period of time of 8 April 2021.

37. On 23 March 2021, the BoA granted all Interveners access to the case documents and invited them to submit a second submission according to Article 11(9) of the BoA ROP. No second submissions were submitted by the Interveners.

38. On 24 March 2021, the Defendant submitted a regularised Defence within the set deadline upon request of the Registry.

39. On 25 March 2021, the BoA extended the deadline for the replies until 13 April 2021.

40. On 29 March 2021, the BoA allowed the Defendant to regularise its Defence beyond the set deadline, having received no objections to do so by the appellants.

41. On 1 April 2021 a further extension for the replies was granted until 14 April 2021.

42. On 14 April 2021, all appellants filed their Replies to the Defence with the Registry.

43. On 15 April 2021, the BoA invited the Defendant to submit its Rejoinder, with a maximum of 15 pages, within the extended period of time of 7 May 2021.

44. On 15 April 2021, the Defendant submitted a request for extension of the maximum length of the Rejoinder, which was denied by the BoA on 19 April 2021.

45. On 16 April 2021, the BoA requested the Defendant to disclose (i) a cover note and letter presented to the BoR in connection with the meeting of 13 December 2017 and (ii) legal advice presented by the Legal Expert Network in connection with the meeting of 14 March 2018.

46. On 20 April 2021, the Defendant disclosed the documents in response to the BoA's Disclosure Request.

47. On 3 May 2021, the BoA sent a Second Request for Information to the Defendant and the Appellant in accordance with Article 20 of the BoA ROP.

48. On 5 May 2021, the BoA issued its Decision on the Confidentiality of the Disclosed Documents.

49. On 5 May 2021, all parties submitted their replies to the first request for information and the Appellant submitted its reply to the second request for information.

50. On 7 May 2021, the Defendant submitted its rejoinder to the Registry.

51. On 10 May 2021, the Defendant submitted its reply to the second request for Information.

52. The BoA held an oral hearing on 17 May 2021.

53. On 19 May 2021, the BoA sent a third request for information to all parties in accordance with Article 20 of the BoA ROP.

54. On 21 May 2021, all parties submitted their replies to the third request for information, except Appellant II, who failed to reply within the set deadline.

55. On 28 May 2021, the BoA adopted Decision A-001-2021(consolidated), which dismissed the appeals against the Contested Decision as unfounded.

56. By application lodged on 9 August 2021, the Appellant applied for the annulment of Decision A-001-2021(consolidated) before the General Court of the European Union (also referred to as "GCEU").

57. On 25 September 2024, the GCEU delivered its judgments in cases *CRE v ACER* (T-446/21, ECLI:EU:T:2024:647), *RTE v ACER* (T-472/21, ECLI:EU:T:2024:648), *TransnetBW v ACER* (T-476/21, ECLI:EU:T:2024:649), *TenneT TSO GmbH and TenneT TSO BV v ACER* (T-482/21, ECLI:EU:T:2024:650), *Polskie sieci elektroenergetyczne v ACER* (T-484/21, ECLI:EU:T:2024:652), and *BNetzA v ACER* (T-485/21, ECLI:EU:T:2024:653), hereinafter "the Judgments of the GCEU", annulling Decision A-001-2021 (consolidated) of 28 May 2021 (hereinafter also referred to as "BoA Decision A-001-2021 (consolidated)" or the "Annulled Decision").

58. In case *TransnetBW GmbH v ACER* (T-476/21, ECLI:EU:T:2024:649) (hereinafter referred to as "the Judgment"), the GCEU annulled BoA Decision A-001-2021 (consolidated), in so far as it confirms ACER Decision No 30/2020 of 30 November 2020 on the proposal of the electricity transmission system operators of the 'Core' capacity calculation region, comprising Belgium, the Czech Republic, Germany, France, Croatia, Luxembourg, Hungary, the Netherlands, Austria, Poland, Romania, Slovenia and Slovakia, for the methodology for cost sharing of redispatching and countertrading, and dismissed the applicants' appeal in that case; also, it ordered ACER to bear its own costs and to pay those incurred by TransnetBW GmbH and ordered the Federal Republic of Germany and Amprion GmbH to bear its own costs.

59. The Judgment was not appealed.

III. Procedural steps relevant for the decision

60. On 19 November 2024, the BoA relaunched the appeal case under reference number A-001-2021_R (consolidated).

61. To this end, in accordance with Article 30 of the BoA ROP, on 19 November 2024, the BoA invited the Appellant and the Defendant to submit by 20 December 2024 their observations, if any, on the conclusions to be drawn from the Judgment.

62. The Appellant and the Defendant submitted their observations to the BoA on 20 December 2024.

IV. Legal background of the resumption of the procedure before the BoA

63. Article 266 of the Treaty on the Functioning of the European Union (hereinafter "TFEU") provides that "*[T]he institution, body, office or entity whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union*".

64. Article 29 of the ACER Regulation provides that "*(...) ACER shall take the necessary measures to comply with the judgments of the Court of Justice.*"

65. Article 29 of the BoA ROP regulates review and referral back by the General Court in the following way:
"*1. When a decision of the Board of Appeal is annulled, ACER shall notify the Board of Appeal as soon as seized of the judgment.*

2. ACER shall inform the Board of Appeal of the actions it intends to take within one month form the notification of the judgment from the previous paragraph.

3. In the absence of information from ACER within one month from the notification of the judgment from the previous paragraph, the Board of Appeal may consider that ACER will take no action."

66. Article 30 of the BoA ROP regulates the conduct of the proceedings in the following way:
"*1. Within two months of the service of the judgment of the General Court, the parties to the proceedings before the Board of Appeal shall be heard in their observations on the conclusions to be drawn from the judgment of the General Court.*

2. The parties may lodge their written observations on the conclusions to be drawn from that judgment for the outcome of the proceedings within one month from the notification of the request of the Board of Appeal to submit their observations. This time limit may not be extended.

3. The Chairperson may, by way of measures of organisation of procedure, invite the parties to the proceedings before it to lodge written submissions and may decide to hear the parties' submissions in a hearing."

67. Based on the above-mentioned provisions, the BoA takes the necessary measures to comply with the Judgment by examining the situation after annulment of BoA Decision A-001-2021 (consolidated) by the GCEU.

V. Main observations and forms of order sought by the Parties

68. In the Observations of 20 December 2024, the Appellant claims that, in light of the Judgment of the GCEU, the BoA has to ensure that as a next step, the TSOs have to undertake the analysis as prescribed in Article 16, paragraph 13 of the Electricity Regulation. ACER has to foster the analysis and the determination of the loop flow threshold per bidding zone border. Also, it must be ensured that the new RDCT Cost Sharing Methodology implements a cost sharing mechanism that takes into account that the loop flow threshold has to be determined per bidding zone border and not per network element and that there are bidding zones with more than one cross-border network element/interconnector.

69. The Appellant highlights that the GCEU came to the conclusion that it is necessary to annul the whole RDCT Cost Sharing Methodology as confirmed by the Contested Decision. The Appellant reiterates its statements from the notice of appeal dated 29 January 2021, according to which it needs to be ensured that the RDCT Cost Sharing Methodology is in itself consistent and lawful, which can only be ensured in case all aspects (including loop flow threshold, scope and penalisation of loop flow threshold) are properly linked.

70. The Appellant upholds all pleas in law as brought forward in its notice of appeal dated 29 January 2021 in order to avoid any discrepancies and out of precaution.

71. The Defendant maintains its Defence except for the determination of the loop flow threshold, for which it recognizes that the Appellant's original pleas are justified in light of the Judgment.

VI. No need for an oral hearing or for measures of organisation of procedure

72. The circumstances of the case have been sufficiently discussed and established in the preceding steps leading to the annulment of BoA Decision A-001-2021(consolidated) related to the Contested Decision, as well as in the observations on the consequences of the Judgment submitted by the parties on 20 December 2024; therefore, the BoA considers that in the circumstances of the present case there is no need to conduct an oral hearing or to adopt measures of organisation of procedure.

VII. Merits of the relaunched appeal case

The Judgment

73. The Appellant's first plea, concerning the scope of the contested cost sharing methodology, was rejected in paragraphs 46 to 153 of the Judgment.

74. The Appellant's third plea, concerning penalisation of loop flows above the threshold, was rejected in paragraphs 162 to 195 of the Judgment.

75. The second plea concerning the determination of the loop flow threshold of the contested cost sharing methodology was upheld in paragraphs 203 to 300 of the Judgment. The GCEU accordingly annulled the BoA Decision A-001-2021 (consolidated) in so far as it confirms the Contested Decision (paragraph 302). The GCEU also concluded that, in as far as the second plea concerns a central element of the contested cost sharing methodology, which is the subject of BoA Decision A-001-2021 (consolidated), the GCEU cannot annul BoA Decision A-001-2021 (consolidated) only in part (paragraph 301). The GCEU concluded also that there was no need to examine the fourth plea of the Appellant (paragraph 303 of the Judgment).

Violation of Article 16(13) of the Electricity Regulation

76. The Appellant requested the annulment of the BoA Decision A-001-2021(consolidated), among others, the part regarding the setting of the loop flow threshold. In accordance with Article 16(13) of the Electricity Regulation, the threshold should have been set following a joint analysis by all TSOs and approved by all NRAs in the region and for each bidding zone border; the same Article also requires that the threshold must correspond to the 'level that could be expected without structural congestion'.

77. In paragraphs 210 and 211 of the Judgment, the GCEU noted that it is common ground that the TSOs did not carry out the required analysis and that ACER did not carry out that analysis either. The setting of 10% by ACER of the maximum capacity of the network element as the first stage in the determination of the threshold takes no account of "*the specific characteristics of those zones or of the borders between them*" (paragraph 230 of the Judgment) and the analysis carried out in the second stage "*does not take account of the characteristics of the different bidding zones*" (paragraph 231 of the Judgment). The GCEU found that "*the threshold set by ACER does not comply with the requirement laid down in the second subparagraph of Article 16(13) of Regulation 2019/943, according to which the threshold must be defined 'for each individual bidding zone border*" (paragraph 232 of the Judgment).

78. In the Judgment, the GCEU also noted that it was common ground that the analysis normally required to determine the level of loop flows that could be expected without structural congestion, required by the first subparagraph of Article 16(13) of the Electricity Regulation, was not carried out (paragraph 233 of the Judgment) and that, in the absence of the required analysis "*the threshold set by ACER cannot comply with the requirement for that threshold to correspond to the level of loop flows that could be expected without structural congestion*" (paragraph 234 of the Judgment).

79. In paragraphs 240 to 241 of the Judgment, the GCEU concluded that "*the threshold set by ACER does not comply with the requirements laid down in Article 16(13) of Regulation 2019/943, according to which the threshold must correspond to the 'level that could be expected without structural congestion' and must be defined 'for each individual bidding zone border '*". Therefore, "*ACER's determination of the threshold in the contested cost sharing methodology does not comply with Article 16(13) of Regulation 2019/943*".

80. The GCEU examined whether ACER could rely on an implicit competence authorising it to determine the threshold. In paragraph 242 of the Judgment, the GCEU determined that ACER did not comply with Article 16(13) of the Electricity Regulation in setting the threshold, and its invocation of Article 6(10) of the Electricity Regulation to establish a competence to set the threshold was therefore irrelevant and that provision, in any event, does not "*allow ACER to set a threshold that does not comply with the requirements of Article 16(13) of Regulation 2019/943.*"

81. The GCEU then examined whether "*ACER had, in the specific situation in which it found itself, an implicit competence authorising it to determine a threshold in a different way than that prescribed by that provision.* " (paragraph 243 of the Judgment). This was examined in light of ACER's assertion that it needed to act. The GCEU found that:

    i. "*…it cannot in principle be accepted, in the light of the principle of legality, that an agency of the European Union, such as ACER, may derogate from the applicable legal framework. It follows that ACER could not, in principle, derogate from Article 16(13) of Regulation 2019/943*" (paragraph 245 of the Judgment);

ii. while Article 6(12)(b) of the ACER Regulation allows ACER to "*provide an interim decision to ensure that ... operational security is protected*", ACER did not rely on this provision to establish the threshold and "*in any event the adoption of the cost sharing methodology cannot be regarded as necessary in order to ensure that security of supply or operational security is protected"* (paragraph 246 of the Judgment). The provision does not either allow ACER, even temporarily, to set the threshold "*in a different way than that prescribed by Article 16(13) of Regulation 2019/943*" (paragraph 247 of the Judgment);

iii. "…*in accordance with the case law, mere reliance on an interest linked to effectiveness is insufficient to create a competence on the part of an agency of the European Union*" (paragraph 248 of the Judgment).

82. In paragraph 249 of the Judgment, the GCEU noted that while reliance on effectiveness in itself is insufficient to allow an agency to derogate from the applicable legal framework, it could not rule out effectiveness "*provided that it corresponds to a real need to ensure the practical effect of the provisions of the Treaties*" as dictated by case law. Accordingly, the GCEU examined whether the conditions for recognising that ACER has implicit competence were satisfied, in accordance with the cited case-law.

83. ACER claimed that the need to adopt a cost sharing methodology within the prescribed time limit had forced it to set the threshold itself, despite the absence of the analysis normally required. In this respect, the GCEU found that:

i. ACER was "in principle" required to adopt a cost sharing methodology by 28 September 2020. However, according to case law, as there was no penalty for not complying, this deadline was indicative only (paragraph 254 of the Judgment). The case law also recognises that, in complex cases where the timeframe is indicative, more time can be taken. Therefore "*[I]t was open to ACER to allow the TSOs sufficient time to carry out the analysis…"* (paragraph 258 of the Judgment). Also, neither "*Decision No 30/2020 nor the contested decision explores the possible consequences, for the timetable for adopting the cost sharing methodology, of the fact that the obligation to determine a threshold and, therefore, to carry out the corresponding analysis did not enter into force until 1 January 2020*" (paragraph 261 of the Judgment). According to the GCEU, "*mere reliance on an indicative time limit for ACER to adopt the cost sharing methodology is insufficient to demonstrate a real need to ensure the practical effect of the provisions at issue*" (paragraph 263 of the Judgment);

ii. ACER stated that the need for it to act was justified by the TSOs' '*failure to act*' (paragraph 264 of the Judgment); however, the TSOs did not consider it mandatory to set a threshold prior to the entry into force of the regulation (paragraph 266 of the Judgment) and that "*[E]even if it were accepted that the need to set a threshold was recognised by the TSOs before the adoption of Regulation 2019/943*", the threshold had to be based on *"an analysis of the level [of loop flows] that could be expected without structural congestion*" and "*for each individual bidding zone border*" (paragraph 267 of the Judgment).

According to the GCEU "*ACER could not legitimately criticize the TSOs for not being able*, '*in a period of nearly 3 years', to carry out the analysis required by Article 16(13) of Regulation 2019/943*" (paragraph 269 of the Judgment);

iii. while ACER contended that the need for it to act was justified by the TSOs' failure to comply with the time limit that it had set for them (paragraph 273 of the Judgment) which was a four-month period from 18 April 2020 to 20 August 2020, and considered that the

analysis was complex and would take time (paragraph 274 of the Judgment), ACER has not demonstrated that during the period "*...it facilitated, in one way or another, the work of the TSOs in carrying out the analysis…*" (paragraph 275 of the Judgment). According to the GCEU, ACER was required to do this in accordance with Article 6(11) of the ACER Regulation which "*reflects the principle of sincere cooperation enshrined in Article 4(3) TEU*" (paragraph 276 of the Judgment).

Hence, "*ACER cannot legitimately criticize the TSOs for not being able to carry out the analysis required by Article 16(13) of Regulation 2019/943 within the prescribed time limit, namely four months*" (paragraph 278 of the Judgment).

84. The GCEU considered also ACER's argument that the need to adopt the contested cost sharing methodology, without being able to wait for the analysis required is justified by two further considerations. With respect to the first one, i.e. the need to give TSOs sufficient time to put in place the necessary arrangements properly to implement the methodology (paragraph 280 of the Judgment), the GCEU found that it "*is not sufficient to demonstrate, in the light of the very long period laid down for implementing it, a real need to adopt that methodology without being able to wait for the analysis required by Article 16(13) of Regulation 2019/943*" (paragraph 282 of the Judgment).

85. As to the second consideration, ACER contended that the contested cost sharing methodology had to be implemented simultaneously with the RDCT methodology and the methodology for regional operational security coordination for the Core region ('the ROSC methodology').

86. The GCEU noted that "*…the present case in no way involves deciding whether ACER was authorised to set the same dates for the implementation of the contested cost sharing methodology, the RDCT methodology and the ROSC methodology, but rather determining whether ACER could adopt the contested cost sharing methodology without being able to wait for the analysis required by Article 16(13) of Regulation 2019/943. '*(paragraph 284 of the Judgment).

87. Furthermore, in paragraph 286 of the Judgment, the GCEU found that "*ACER has not demonstrated that there was a real need to ensure the practical effect of the provisions at issue that would justify recognising that it has implicit competence.*"

88. The GCEU concluded in paragraph 299 of the Judgment that "*ACER's determination of the threshold in the contested cost sharing methodology, as confirmed by the contested decision, infringes Article 16(13) of Regulation 2019/943, in that that threshold does not meet the criterion that the threshold must correspond to the 'level that could be expected without structural congestion' or the criterion that the threshold must be defined 'for each individual bidding zone border'. Furthermore…ACER was also not entitled to determine a threshold differently in order to comply with the time limit set for it to adopt the contested cost sharing methodology*."

89. In those circumstances, the GCEU upheld the Appellant's second plea, without examining the other objections raised by the Appellant in support of it (paragraph 300 of the Judgment).

90. The GCEU, in so far as the second plea concerned a central element of the contested cost sharing methodology, which was the subject of BoA Decision A-001-2021 (consolidated), could not annul BoA Decision A-001-2021 (consolidated) only in part (paragraph 301 of the Judgment). Consequently, the GCEU upheld the Appellant's action on the basis of the second plea and annulled BoA Decision A-001-2021 (consolidated) in so far as it confirmed the Contested Decision (paragraph 302 of the Judgment).

Assessment and Conclusion of the BoA

91. The BoA examined the Annulled Decision in the light of the Judgment, based on the documents and information at its disposal, including the information contained in the observations submitted by the parties on 20 December 2024, taking into account the applicable legal framework.

92. ACER stated in its Observations of 20 December 2024 that "*these errors also impact the legality of the Contested ACER Decision 30/2020"* and that "*insofar as they pertain to the errors found by the General Court with respect to the loop flow threshold, the claims and pleas put forward by the Appellants in their original submissions appear justified*".

93. Given the origin and nature of the error, found by the GCEU in the Contested Decision, this error can only be remedied by ACER. The case, therefore, needs to be remitted to ACER.

94. In paragraph 212 of the Judgment, the GCEU observed that it is apparent from paragraph 112 of the Contested Decision that "…*in the absence of a threshold analysed and defined by the TSOs and approved by the NRAs in accordance with Article 16(13) of Regulation 2019/943, ACER examined whether it was in a position to perform that analysis itself and concluded that that was not the case, due to constraints on resources, the time available and the necessary expertise*".

95. The GCEU found that ACER did not have an implicit competence to set the level of the threshold itself and in any event not in a different way than that established in Article 16(13) of the Electricity Regulation. Accordingly, the BoA instructs that ACER set the threshold following an analysis carried out by the TSOs and approved by the NRAs.

96. In adopting its decision, ACER will need to ensure that the threshold corresponds to a level that could be expected without structural congestion and is defined for each individual bidding zone border.

97. In the process of adoption of the new decision, Core TSOs will need to undertake the analysis underpinning the determination of the loop flow threshold(s), in order to make RDCTCS implementable, while ACER will need to observe the limits to its actions, as set by the GCEU in its Judgment, to fully respect Article 16(13) of the Electricity Regulation, as interpreted by the GCEU.

98. The BoA observes that a considerable amount of time has elapsed since the adoption of the Contested Decision and is cognisant that the TSOs and ACER have progressed in their analysis since.

99. In line with the GCEU observation that the purpose of the principle of sincere cooperation enshrined in EU legislation was to make decision-making on difficult but necessary cross-border issues more efficient and faster (paragraph 277 of the Judgment), the BoA requests that ACER have regard to such principle and its objectives in the process of making its new decision.

100. The case being remitted, it is not necessary for the BoA to examine other pleas of the Appellant.

VIII. Conclusions

101. The BoA conducted a thorough review of the Annulled Decision based on the findings of the GCEU, examined or re-examined the relevant pleas of the Appellant and the submissions of ACER, as last confirmed or modified in the Observations of 20 December 2024.

102. In its Observations of 20 December 2024, ACER concludes that "*all the claims and pleas put forward by the Appellants in their original submissions which do not concern the loop flow threshold are unfounded*" and requests the Board of Appeal to "*dismiss as unfounded all the claims and pleas put forward by the Appellants in their original submissions which do not concern the loop flow threshold*".

103. The errors concerning the loop flow threshold of the Contested Decision cannot be remedied by the BoA. Thus, even a new decision of the BoA, if adopted, would still suffer from the substantive error that the BoA cannot remedy.

104. The remittal of the case to ACER is imposed by the origin and nature of the error, as established by the GCEU at paragraph 301 of the Judgment, where it states that in so far as the successful plea concerns a central element of the contested cost sharing methodology, which is the subject of BoA Decision A-001-2021 (consolidated), the GCEU could not annul BoA Decision A-001-2021 (consolidated) only in part. Similarly, the BoA cannot partially remit the case to ACER.

105. The BoA does not take position with regard to any of the parties' statements at this stage as it is first necessary to remit the case to ACER to remedy the substantive error concerning the loop flow threshold.

106. ACER will be able to provide elements that will allow the proper examination of the new decision from the formal as well as from the substantive points of view.

107. Once the new decision is adopted, and if its review is requested, the BoA will be able to discharge its obligations with respect to the correct application of the law to avoid the deficiencies of the Annulled Decision as identified by the GCEU in the Judgment.

108. Based on the above considerations, the BoA remits the case to ACER.

IX. Remittal to ACER

The case is remitted to ACER.

Done at Ljubljana, 31 July 2025

For the Registry | *For the Board of Appeal*

The Registrar
J. NORDSTROM

The Chairperson
M. PREK