

IV. ANNOUNCEMENT OF APPEAL²

Case	A-004-2020
Appellant:	TenneT TSO GmbH and TenneT TSO B.V.
Appeal received on	23 March 2020
Subject matter	ACER's imposition of an entity requirement for the European platform for the exchange of balancing energy from FRR with automatic activation
Keywords	Electricity Balancing Guidelines Regulation, Single entity requirement, ACER's competences, ACER's power of revision
Contested decision Number:	ACER Decision 02/2020
Language of the case	English

Remedy sought by the Appellant

The Appellant requests the Board of Appeal to:

annul ACER Decision 02/2020. Because the parts where ACER exceeded its powers cannot be separated from the parts which could be lawful, the Decisions should be annulled in their entirety.

Pleas in law and main arguments


The contested decision was adopted on 24 January 2020

The Appellant contests the Agency's decision. The Appellant's claims and arguments can be summarised as follows:

ACER obliges the transmission system operators ("TSOs") to appoint one single entity or one joint venture structure for the functions of activation optimisation, TSO-TSO settlement and capacity management (the "Single Entity Requirement"). TenneT disagrees with the Single Entity Requirement for the following reasons.

(i) First and (ii) second plea: The Single Entity Requirement exceeds ACER's competences under the Electricity Balancing Guidelines Regulation (Regulation 2017/2195); The Single Entity Requirement exceeds ACER's competences under the ACER Regulation (Regulation 2019/942)

- ACER states that its competence to take a decision arises from Article 5(7) Electricity Balancing Guidelines Regulation and Article 6(10) ACER Regulation, which applies "where the relevant regulatory authorities have not been able to reach agreement (...) or upon their joint request".
 - With regard to the Single Entity Requirement, neither condition for conferring decision making power on ACER was fulfilled in this case, as the relevant NRAs had reached an agreement on this issue, and the NRAs had not requested ACER to take a revision decision on this point.

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- ACER's competence to take decisions (other than confirming the NRAs position) cannot and should not be extended to issues that NRAs have reached agreement on or where the NRAs have not requested this, in the way ACER has extended its competences in this case.
- In accordance with the principle of subsidiarity, ACER shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States. In the case at hand, ACER was therefore precluded from imposing the Single Entity Requirement, as the Member States had already jointly agreed on an effective course of action which was compliant with EU law.

(iii) Third Plea: ACER's decision to impose the Single Entity Requirement is contrary to Articles 20(2) and 21(2) EB Regulation

- Articles 20(2) and 21(2) Electricity Balancing Guidelines Regulation allow the platform to be operated by more than one entity.
- Leaving open the possibility of a multi-entity system does not automatically imply that the additional requirements of Articles 20(3)(e) and Article 21(3)(e) EB Regulation cannot be fulfilled.
- The capacity management function is not a necessary function to operate the platform.
- The applicable rules should be interpreted in line with the principle of proportionality; a system without a Single Entity Requirement can still achieve a well-functioning platform, and would at the same time be less onerous on TSOs.

(iv) Fourth Plea: the ACER Regulation does not confer competence to revise decisions to ACER in the case at hand


- The text of Article 6(10) ACER Regulation does not confer competence to revise decisions to ACER in the case at hand.
- ACER can also not rely on a broader competence of revision to impose the Single Entity Requirement.
 - While Article 5(2) ACER Regulation - and only this Article - does grant ACER the competence for "revision and approval", this competence arises in the context of the approval of TCM proposals, while the Decisions were taken in the context of the resolution of an inability to agree among NRAs.

Further information

More information on the appeal procedure can be found on the 'Appeals' section of the Agency's website:

http://www.acer.europa.eu/The_agency/Organisation/Board_of_Appeal/Pages/default.aspx

² Announcement published in accordance with Article 9 of Decision BoA No1-2011 Laying down the rules of organisation and procedure of the Board of Appeal of the Agency for the Cooperation of the Energy Regulators.

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