

# DECISION OF THE BOARD OF APPEAL OF THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS

[17 March 2017]

*(Application for annulment – ACER Decision No. 06/2016 – Inadmissibility – Competence of ACER – Proportionality – Violation of procedural rules)*

<b>Case number</b>	A-001-2017 (consolidated)
<b>Language of the case</b>	English
<b>Appellants</b>	<b>Appellant I.</b> Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft ('E-Control') Represented by: DLA Piper Weiss-Tessbach Rechtsanwälte GmbH, <b>Appellant II.</b> VERBUND AG Represented by: Becker Günther Polster Regner Rechtsanwälte, <b>Appellant III.</b> Austrian Power Grid AG ('APG') Represented by: Cerha Hempel Spiegelfeld Hlawati Rechtsanwälte, <b>Appellant IV.</b> Vorarlberger Überträgungsgesellschaft m.b.H ('VUEN') Represented by: Cerha Hempel Spiegelfeld Hlawati Rechtsanwälte
<b>Defendant</b>	Agency for the Cooperation of Energy Regulators ('the Agency') Represented by: Alberto Pototschnig, Director
<b>Admitted Intervenors</b>	<b>On behalf of Appellants III. and IV.:</b> E-Control <b>On behalf of Defendant:</b> Hungarian Energy and Public Utility Regulatory Authority Represented by: Attila Nyikos Vice-President President of Energy Regulatory Office, Poland Represented by: Małgorzata Kozak Director

Chairwoman of the Energy Regulatory Office (Czech Republic)  
Represented by: Alena Vításková

MAVIR Hungarian Independent TSO  
Represented by: Attila Lengyel, Director of Legal Affairs

POLSKIE SIECI ELEKTROENERGETYCZNE SPOŁKA  
AKCYJNA (PSE S.A.)  
Represented by: Wojciech Wrochna

**Application for** Annulation of Decision no 06/2016 ('the Contested Decision') of 17 November 2016 adopted by the Agency for the Cooperation of Energy Regulators pursuant to Article 19 of 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 (OJ L 211, 14.08.2009, p. 1).

## THE BOARD OF APPEAL

composed of Andris Piebalgs (Chairman), Mariano Bacigalupo Saggese, Yvonne Fredriksson, Jean-Yves Ollier (Rapporteur), Mariusz Swora, Michael Thomadakis (Members).

**Registrar:** Andras Szalay

gives the following

## Decision

## *I. Background*

### *Legal background*

1. Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management ('CACM Regulation') laid down a range of requirements for cross-zonal capacity allocation and congestion management.
2. Under Article 9(1) and (6) (b) and Article 15(1) of the CACM Regulation, transmission systems operators ('TSOs') are required jointly to develop a common proposal regarding the determination of capacity calculation regions and submit it to all national regulatory authorities ('NRAs') for approval. Then, according to Article 9(10) of the CACM Regulation, the regulatory authorities, receiving the proposal on the determination of capacity calculation regions, shall reach an agreement and take a decision on that proposal, in principle, within six months after the receipt of the proposal by the last regulatory authority.
3. According to Article 9(11) of the CACM Regulation, if the regulatory authorities fail to reach an agreement within the six-month period the Agency is called upon to adopt a decision concerning the TSOs' proposal.

### *Facts giving rise to the dispute*

4. On 13 November 2015, the European Network of TSOs for Electricity ('ENTSO-E') published and submitted on behalf of all TSOs a proposal for Capacity Calculation Regions ('CCRs') pursuant to Article 15 of the CACM Regulation ('the CCR Proposal'), together with an explanatory document. By 17 November 2015, all TSOs required by the CACM Regulation submitted the CCR Proposal to their respective NRAs.
5. On 13 May 2016, E-control requested all European TSOs to amend the CCR Proposal to the effect that the bidding zone border between Germany/Luxembourg and Austria be removed and that the CEE CCR and CWE CCR be merged into one common CWE-CEE CCR.

6. In a letter of 17 May 2016, the Energy Regulators' Forum – the platform established by NRAs to consult and cooperate in order to reach a unanimous agreement when a decision is to be taken jointly by all NRAs - informed the Agency that the regulatory authorities could not reach a unanimous decision on the CCR Proposal and that, therefore, the Agency should adopt a decision concerning the CCR Proposal within six months, in accordance with Article 9(11) of the CACM Regulation and Article 8(1) of Regulation (EC) No 713/2009.
7. The Agency consulted the NRAs, along with the European Commission's Directorate General for Energy ('DG ENER'), about its preliminary findings and conclusions by e-mail on 24 August 2016: all responding NRAs supported the merger of CWE and CEE CCRs into one CCR, except for E-Control.
8. By email of 15 September 2016, the Agency consulted the NRAs and the TSOs on its preliminary draft decision.
9. On 17 November 2016, the Agency adopted Decision No. 06/2016 on the Electricity Transmission Operators' Proposal for the Determination of Capacity Calculation Regions.
10. On 17 November 2016 the Decision was published on the Agency's public website ([www.acer.europa.eu](http://www.acer.europa.eu)). Annex I to this Decision sets out the CCRs, pursuant to Article 15(1) of the CACM Regulation, as determined by the Agency.

*Procedure*

11. On 17 January 2017 the Appellants filed their respective appeals with the Registry of the Board of Appeal for full or partial annulment of the Contested Decision.
12. The appeals were registered under A-001-2017 (with respect to E-Control, later 'Appellant I.'), A-002-2017 (with respect to VERBUND, later 'Appellant II.'), A-003-2017 (with respect to APG, later 'Appellant III.') and A-004-2017 (with respect to VUEN, later 'Appellant IV.').

13. Further to the appeals, Appellants I., II. and III. on 17 January 2017, along with their submission for appeal, requested suspension of the application of the Contested Decision. All Appellants also claimed confidential treatment for certain documents: for the full document or for a part of it.
14. The Defendant was notified of the appeals on 18 January 2017. The announcements of appeals, along with the schedule of the potential oral hearings, were published on the public website of the Agency on 19 January 2017.
15. Between 23 January 2017 and 31 February 2017, the Registry received altogether 45 requests for intervention from 19 different applicants<sup>1</sup> supporting one or several Appellants or the Defendant.
16. Further to the requests for intervention, the Registry also received approximately 100 ‘statement in support’ intending to support an Applicant for intervention.
17. On 2 February 2017, the Board of Appeal published an announcement on the Agency’s public website indicating that the appeal procedure under Article 19 of Regulation (EC) No 713/2009 does not foresee the status of supporter to an intervener, and that the submission of a statement in support of an intervention does not imply the participation to the procedure, nor access to any procedural documents.
18. The statements in support of an intervention do not form part of the appeal proceeding.
19. The Chairman, upon consulting the Board of Appeal, decided to consolidate the four appeal cases into one, under the reference of A-001-2017 (consolidated) on 31 January 2017.
20. The Board of Appeal notified the Parties of its composition on 1 February 2017.

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<sup>1</sup> Federation of Austrian Industries( for Appellants I., III. and IV.), Österreichs E-Wirtschaft (for Ap. III.), Fritz Egger GmbH & Co. OG (for Ap. I-IV.) , Austrian Federal Chamber of Labour (for Ap. III.), E-Control (for Ap. III. and IV.), voestalpine AG (for Ap. III.), VERBUND (for Ap. III.), Bunge Austria et al. (for Ap. III.), EXAA AG (for Ap. III.), MONDI AG (for Ap. III.), Wirtschaftskammer Österreich (for Ap. I-IV.), Hungarian Energy and Public Utility Regulatory Authority (for Defendant), Krajowa Izba Gospodarcza Elektroniki i Telekomunikacji (KIGEIT – for Def.), President of Energy Regulatory Office Poland (for Def.), MAVIR Hungarian Independent TSO (for Def.), Chairwoman of the Energy Regulatory Office (ERO CZ – for Def.), Polish Confederation Lewiatan (for Def.), Polish Power Transmission and Distribution Association (for Def.), POLSKIE SIECI ELEKTROENERGETYCZNE SPOŁKA AKCYJNA (for Def.)

21. By a reasoned order of 6 February 2017, the Board of Appeal dismissed the applications for suspension of the Contested Decision.
22. Between 14 and 17 February 2017<sup>2</sup>, the Board of Appeal decided upon the requests for intervention. The six Admitted Intervenors listed in the present decision were granted with right to intervene and received access to the case documents on 15 February 2017.
23. Among the allowed Intervenors, PSE SA filed a supplementary submission with the Registry by reiterating its claim.
24. On 24 February 2017, after informing the Parties about the closure by the Registrar of the written procedure on 20 February 2017, the Chairman, after having consulted the Board of Appeal, notified the Parties and Intervenors of the closure of the written procedure.
25. By the deadline of 1 March 2017, three working days after the notification on the closure of the written procedure, the Registry of the Board of Appeal did not receive any requests for oral hearings.
26. On 1 March 2017, one of the dismissed applicants for intervention, EXAA AG notified the Registry via its legal representative that it appealed the decision dismissing its request for intervention before the General Court of the European Union. The applicant further requested the Board of Appeal that the proceeding should be stayed until the decision on the General Court on the appealed decision on intervention.
27. On 10 March 2017, another dismissed applicant for intervention, MONDI AG, notified the Registry via its legal representative that it appealed the decision dismissing its request for intervention before the General Court of the European Union. This applicant also further requested the Board of Appeal that the proceeding should be stayed until the decision on the General Court on the appealed decision on intervention.
28. On 17 March 2017 the Board of Appeal decided on the applications for to stay the proceeding and dismissed them as inadmissible and also unfounded since Article 19(2)

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<sup>2</sup> Apart from the time-barred submission of KIGEIT which was dismissed as inadmissible on 6 February 2017

of Regulation (EC) No 713/2009 does not provide any possibility for the Board of Appeal to extend the statutory deadline of two months for deciding upon the appeals.

*Main arguments and forms of order sought by the Parties and other participants*

29. E-Control presented its pleas by referring to violation of procedural rules and fundamental procedural guarantees (lack of competence of the Agency to change the proposal of the TSOs and lack of competence because it disregarded E-Control's amendment request, no adequate procedure to secure fundamental rights, lack of impartiality, infringement of right to be heard and absence of proper justification); lack of competence for the determination of bidding zones; no proof of structural congestion; violation of proportionality; violation of competition rules of the Treaty and infringement of Articles 34 and 35 TFEU. VERBUND referred to lack of competence to implement bidding zone border and unlawfulness of the Contested Decision (for substantive grounds, and for lack of proper justification). APG and VUEN claimed unlawfulness of the Contested Decision due to the Agency's lack of competence to introduce new bidding zone borders and capacity calculation; violation of substantive provisions of Regulation (EC) 714/2009 (wrong definition of congestion, acting contrary the objectives of the Regulation, wrong technical assumptions); violation of EU primary law (proportionality, fundamental freedoms, competition law); violation of procedural rights (basing the Decision on Article 15 of the CACM Regulation, not considering the amendment request, wrong assessment of underlying facts, insufficient reasoning of the Decision).
30. The Defendant indicated that it was competent to accept a new bidding zone border; competent to decide on the CCRs Proposal despite E-Control's amendment request; Article 15 of the CACM Regulation was the appropriate basis for the Decision; it applied correctly the definition of 'congestion'; it correctly identified the DE-AT interconnection as structurally congested; there were no alternative measures to address structural congestion problems; the Decision did not violate proportionality; the introduction of the bidding zone border was in line with primary EU law; the Agency did take the Decision without any procedural irregularities; the Decision was adequately

reasoned; the Agency respected the right to be heard, acted impartially and examined the facts sufficiently, its decision-making procedure was adequate.

31. The Interveners acting on behalf of the Appellants or the Defendant did not raise further pleas in law.

## *II. Admissibility*

### *Ratione temporis*

32. Article 19(2) of Regulation (EC) No 713/2009 provides that “[t]he appeal, together with the statement of grounds, shall be filed in writing at the Agency within two months of the day of notification of the decision to the person concerned, or, in the absence thereof, within two months of the day on which the Agency published its decision.”
33. All appeals were submitted by the Appellants on 17 January 2017 seeking for annulment of ACER Decision No. 06/2016 which was published on 17 November 2017.
34. The appeals were received by the Registry in writing, by e-mail, and they contained the statement of grounds.
35. Therefore, the appeals are admissible *ratione temporis*.

### *Ratione materiae*

36. Article 19(1) of Regulation (EC) No 713/2009 provides that decisions referred to in Article 7, 8 and 9 of this Regulation may be appealed before the Board of Appeal.
37. The Contested Decision issued on the basis of Article 8(1) of Regulation (EC) No 713/2009, to which its explicitly referred in its introductory part.
38. Therefore, since the appeals fulfil the criterion of Article 19(1) of Regulation (EC) No 713/2009, the appeals are admissible *ratione materiae*.

*Ratione personae*

39. Article 19(1) of Regulation (EC) No 713/2009 provides that “*any natural or legal person, including national regulatory authorities, may appeal against certain a decision referred to in Articles 7, 8 or 9 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.*”

*Appellant I.*

40. Appellant I. is the NRA of Austria.

41. Although it is not an addressee of the Contested Decision, Appellant I. claims that this decision is of direct and individual concern to it as (i) it defines CCRs in a binding manner for the purposes of the regulatory process and framework which NRAs are entrusted with implementing, (ii) NRAs have a procedural right to claim against the Contested Decision, since Article 9 of the CACM Regulation provides that the TSOs’ joint proposal for the determination of capacity calculation regions is subject to approval by all NRAs, and that the Agency shall adopt a decision if they fail to reach an agreement within six months, and as (iii) the Contested Decision specifically addresses E-Control by denying that its amendment request was valid.

42. In its defence the Defendant raised an objection of inadmissibility against the appeal of Appellant I., on the account that Appellant I. did not establish to the required legal standards that it was directly affected by the Contested Decision; that the binding nature of the Contested Decision would not mean an automatic direct concern and that the Contested Decision did not affect the legal status of Appellant I.

43. The Board of Appeal found that Appellant I. was one of the NRAs to which the CCR Proposal was initially submitted by all TSOs for approval, and that the Contested Decision followed from the failure of these NRAs to reach an agreement and take a joint decision on that proposal. It notes that, in such a case, Article 8(1) of Regulation 713/2009 provides that the competent NRAs and the TSOs concerned have specific procedural rights, to be consulted by the Agency and to be informed of the proposals

and observations of all the TSOs concerned. The Board of Appeal considers that any NRA which was competent to approve the CCR Proposal as part of the initial decision making proceeding has a right, in this capacity, to contest the Agency's decision which stems from the failure to reach a joint decision.

44. Moreover, the legally binding nature of the Contested Decision which affects the regulatory capacity of NRAs, since they are entrusted with enforcing such decision and have no discretion in this respect, establishes a direct and existing interest on behalf of Appellant I.

45. Appellant I's appeal is therefore admissible.

*Appellant II.*

46. Appellant II. is a company, a stock corporation ('Aktiengesellschaft') incorporated under Austrian law.

47. Appellant II. is not an addressee of the Contested Decision.

48. However, it claims that the Decision is of direct and individual concern to it on the grounds that the Decision is addressed to its 100% subsidiary, Austrian Power Grid AG, and that its own legal and economic situation would be directly affected by the Contested Decision in various manners.

49. The Defendant claims that the appeal of Appellant II. is inadmissible since, as a shareholder of an addressee, it is only indirectly affected by the result of the case, and it does not provide sufficient and detailed evidence that the Contested Decision is of direct and individual concern to it.

50. As regards the interests of Appellant II. as the sole shareholder of Austrian Power Grid AG (Appellant III. in the present proceedings), the Board of Appeal considers that the case law referred<sup>3</sup> to in the appeal of Appellant II. is not relevant, since it depicts general parent-sister companies' links where the sole owner has obvious right to control the structure and activities of the company which is an addressee of the contested decision,

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<sup>3</sup> Joined cases T-273/06 and T-297/06 par. 43, T-289/03 par. 80, T-112/97 par. 58

while for TSOs special rules are applied by statutory law in terms of control over their decision-making and organisation. Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC requires vertically integrated TSOs to be independent from parent companies in terms of decision-making, organisational structure, commercial and financial relations. Since Appellant II.'s direct control over Appellant III. is missing, direct and individual interest cannot be found on this account.

51. [CONFIDENTIAL]

52. Appellant II. is not an addressee of the Contested Decision, nor it is legally obliged to implement it. It is not demonstrated that otherwise it has direct and individual interest in the result of the case.
53. With regard to the above mentioned, the Board of Appeal found the appeal of Appellant II. inadmissible *ratione personae*.

*Appellants III. and IV.*

54. Appellants III. And IV. are transmission system operators (TSOs) and addressees of the Contested Decision, according to Article 3 of the Decision.
55. The admissibility of the appeals of Appellants III. An IV. is not disputed by the Defendant.
56. Since Appellants III. and IV. are addressees of the Contested Decision, their appeals are admissible *ratione personae* pursuant to Article 19(1) of Regulation (EC) No 713/2009.

### **III. Merits**

#### *Pleas and arguments of the Parties and other participants*

##### *First plea - Lack of competence of the Defendant to change TSOs' proposal*

57. Appellant I. refers to Article 15(1) of the CACM Regulation, which provides that all TSOs shall jointly develop a common proposal regarding the determination of CCRs which, pursuant to Article 9(6) (b), shall be subject to approval of all NRAs. Appellant I. notes that Article 9(12) of the CACM Regulation provides that the NRAs can request an amendment to approve the terms and conditions submitted by the TSOs. However, Appellant I. stresses that "*Regulation (EU) 2015/1222 does not provide for a competence to disregard the common proposal or change it*" (§ 22 of the appeal), and further that "*the CACM Regulation does not provide for an unlimited competence by the NRAs to change the proposal submitted*" (§ 24 of the appeal).
58. Where the NRAs have not been able to reach an agreement within six months, the Agency shall adopt a decision (Article 9(11) CACM Regulation). According to Appellant I., the Defendant does not possess more power in this proceeding than the NRAs and, therefore, does not have "*unlimited discretionary power*" to amend the TSOs proposal.
59. Therefore, Appellant I. comes to the conclusion that the Contested Decision violates Article 9(11) of the CACM Regulation, insofar as the Agency substituted the TSOs proposal with its own assessment and implemented changes in its own discretionary power.
60. Appellant I. acting as Intervener for Appellants III. and IV. repeated the same line of argumentation in its intervention.
61. The Defendant in its defence indicated that both Article 8(1) of Regulation (EC) No 713/2009 and Article 9(11) of the CACM Regulation task the Agency to take a binding decision where NRAs fail to reach an agreement in certain cases. Those cases relate in general - according to Article 8(1) of Regulation (EC) No 713/2009 – to regulatory issues for cross-border infrastructure that fall within the competence of NRAs. These issues may include the terms and conditions for access and operational security, but are

not limited to these terms and conditions. In particular, they involve, according to Article 9(11) in connection with Articles 9(6)(b) and 15 of the CACM Regulation, the determination of CCRs and the definition of bidding zone borders within those CCRs, cross-zonal capacity allocation and congestion management being clearly related to cross-border infrastructure. According to the Defendant, since the NRAs could not reach an agreement within six months, the Defendant had not only power but duty to take a binding decision on this subject-matter.

62. The Board of Appeal noted that Appellant I. was ambiguous as to whether the CACM Regulation does not provide the NRAs with any competence to change the TSOs proposal, or does not provide for an “*unlimited competence*” of NRAs in this respect. Similarly, Appellant I. infers from the consideration that Article 9(11) of the CACM Regulation “*does not give ACER unlimited discretionary power*” to amend or change the proposal of the TSOs, that it had no competence to substitute the proposal of TSOs with its own assessment and to implement changes.

63. The Board of Appeal found that there are no explicit provisions providing that the Defendant may or shall request an amendment to the TSOs proposal, unlike the procedure of Article 9(12) of the CACM Regulation, which is available to NRAs. It notes that neither Article 8(1) of Regulation (EC) 713/2009, nor Article 9(11) and 9(12) of the CACM Regulation explicitly limit the ability of the Agency to amend or change the proposal of the TSOs. However, these regulations do not explicitly provide that the Agency is competent to modify the TSOs’ proposal. Thus, the analysis should consider other elements than the letter of the CACM Regulation, such as its finality and the consistency of its provisions.

64. Recital (5) of Regulation (EC) 713/2009 provides that the Agency was established “*to contribute towards the effective functioning of the internal markets in electricity and natural gas. The Agency should also enable national regulatory authorities to enhance their cooperation at Community level and participate, on a mutual basis, in the exercise of Community-related functions.*”

65. The Contested Decision is based on the failure of the ordinary procedure established to determine the CCRs, in which, after receiving the TSOs proposal, the NRAs shall seek an agreement, and only if and when the NRAs have not been able to reach an agreement

in the time-period given, the Agency is compelled to decide on the matter in question. Therefore, the Agency's powers are granted by Article 8(1) of Regulation 713/2009 and Article 9(11) of the CACM Regulation in order to solve a non-conventional situation. The limitations of the decision-making powers and procedures available to the Agency should be considered in the view of this objective.

66. The Agency's decision-making power only exists when the NRAs have not been able to reach an agreement by themselves. In the case of the definition of CCRs pursuant to Article 15 of the CACM Regulation it applies to a procedure which was to be initiated within three months of the entry into force of the CACM Regulation, and which is a major initial step in the implementation of this regulation.
67. In such circumstances, if the Agency had no discretion to modify the TSOs' proposal and was compelled to request an amendment, the decision-making process could become inefficient if the NRAs and/or TSOs were not willing to reach an agreement, since, as noted by the European Commission in its letter dated 4 July 2016<sup>4</sup>, the proposals could go back and forth many times, causing significant delays or a stalemate.
68. Hence, the Board of Appeal considers that the mere circumstance that the Contested Decision includes changes is not in itself a violation the rules governing the Agency's competence.
69. However, the discretionary power granted to the Agency in respect of the Contested Decision is not unlimited. It is circumscribed by various conditions and criteria which limit the Agency's discretion.<sup>5</sup> In particular, it shall apply the conditions and criteria set out by Article 15(3) of the CACM Regulation for the proposal of TSOs, which relate to the definition of the bidding zone borders, and to the merger of CCRs applying a flow-based approach into one CCR if the three cumulative conditions<sup>6</sup> are met. The Agency is required by Article 8(1) of Regulation 713/2009 to consult the competent NRAs and

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<sup>4</sup> Annex 6 of the Defence

<sup>5</sup> CJEU C-270/12 pars. 45-54

<sup>6</sup> (i) their transmission systems are directly linked to each other; (ii) they participate in the same single day-ahead or intraday coupling area; (iii) merging them is more efficient than keeping them separate. The competent regulatory authorities may request a joint cost-benefit analysis from the TSOs concerned to assess the efficiency of the merger.

the TSOs concerned. The Consolidated Decision is subject to an appeal before the Board of Appeal as well as to judicial review.

70. In the view of the above, the Board of Appeal considers that the Contested Decision falls into the discretionary power of the Defendant, and rejects the claim that the Agency did not have any competence to change the TSOs proposal or that it illegally exercised “unlimited discretion” in this respect.

*Second plea - Lack of competence of the Defendant to disregard E-control's request for amendment*

71. Appellant I. submits that it requested a change in the TSOs Proposal in respect to the proposed bidding zone border between Austria and Germany. The Agency disregarded the request for amendment relying on the argument that only all NRAs could request such a change.

72. Appellant I. takes the view that the Defendant ignored the wording of Article 9(11) of the CACM Regulation, which covers the situation where even one NRA can request an amendment and, subsequently, all NRAs have to decide on this proposal. Appellant I. takes the further view that Article 9(11) of the CACM Regulation presupposes a situation where the NRAs do not agree with the proposal which would leave it without effect.

73. According to Appellant I.'s conclusion concerning that plea, the Defendant lacked the competence to decide on the proposal because it disregarded the valid amendment request taken by Appellant I.

74. Appellants III. and IV. added that the Defendant evidently wrongly interpreted Article 9(12) of CACM Regulation.

75. The Defendant states that the interpretation of Appellant I. does not follow from the wording of Article 9(12) of the CACM Regulation. In a situation where all NRAs have to approve a joint TSOs' proposal, a unilateral amendment request by a single NRA, with which the other competent authorities disagreed, will never lead to the

resubmission of a TSOs' proposal: those regulators that disagreed with the requested amendment will naturally disagree with the amendment in a newly submitted TSOs' proposal.

76. The Defendant adds that the interpretation of Appellant I. ignores the fact that an NRA has authority over the TSOs in its own territory. Where the NRAs disagree on an amendment request, it will not be possible that TSOs jointly develop a common proposal as required by Article 15(1) of the CACM Regulation.
77. For these reasons, the Defendant claims that Appellant I.'s amendment request was not valid pursuant to Article 9(12) of the CACM Regulation and, consequently, the Agency was competent to decide and it did not commit a procedural error.
78. The Board of Appeal notes that, when all NRAs have to approve a joint TSOs' proposal, a unilateral amendment requested by a single NRA, with which all the other competent authorities disagree, cannot succeed and would then not have as a consequence the resubmission of a TSOs' proposal.
79. The Board of Appeal considers that if, in such circumstances, the Agency could not use the procedure provided for by Article 9(11) of the CACM Regulation, this procedure, which is designed to adopt a decision when the NRAs have not been able to reach an agreement, would be rendered ineffective.
80. Therefore the Board of Appeal rejects the plea that the Agency did not have the competence to disregard E-control's amendment request.

#### *Third plea - Lack of competence of the Defendant to determine bidding zone*

81. Appellant I. takes the view that the procedure described in Article 15(1) and Article 9(11) of the CACM Regulation does not provide the Defendant with the competence to decide on bidding zone borders. According to Appellant I., the Defendant not only chose

a wrong procedure but, by doing so, acted *ultra vires* and interfered with the competences of the Member States.

82. Appellant I. considers that Article 15 of the CACM Regulation only refers to existing bidding zone borders, which are to be included in a CCR and not the introduction of new bidding zones. A change of existing bidding zones does not fall into the scope of Article 15 of the CACM Regulation and, therefore, the Agency should have used the review process laid down in Article 32 of the CACM Regulation, which is the only procedure available to change existing bidding zones.
83. According to Appellant I., it comes from the structure of the CACM Regulation that the determination of the CCRs is clearly distinguished from the configuration of the CCRs, as regards the procedure and the applicable criteria.
84. Appellants III. and IV. provide literal, systemic, teleological and historical interpretations of the relevant articles of the CACM Regulation and refers to case law in support of the same view.
85. According to their literal interpretation, the term ‘define’ in Article 15(2) of the CACM Regulation is linked to a descriptive process and not to a prescriptive or normative one; they further refer to the verb tenses in Article 15(2) letter c) and to the different terminology (‘determine’ and ‘define’) used in Article 15(1) and (2).
86. According to Appellants III. and IV.’s systemic interpretation of that the localisation of Article 15 within the CACM Regulation in a chapter entitled “Capacity Calculation” and not in the chapter entitled “Bidding Zone Configuration” indicates that it may not serve as a basis of normative changes to or of the existing bidding zones. Articles 30 to 32 of the CACM Regulation provide a specific procedure for configuration of bidding zones. The Agency may initiate this procedure but it is not part of the decision-making process itself.
87. The teleological interpretation of Article 15 of the CACM Regulation refers to the purpose to ensure the determination of all CCRs shortly after the Regulation has been entered into force.

88. As regards the historical interpretation, Appellants III. and IV. add that CACM Regulation was strongly influenced by the Network Code proposed by ENTSO-E, which distinguishes between determination and configuration of capacity calculation regions.
89. Appellants III. and IV. refer to par. 87 of the decision of the General Court of the CJEU in case T-671/15 which made a distinction between ‘determination of capacity calculation regions pursuant to Article 15’ and ‘final outcome of bidding zone review process pursuant to Article 32’ of the CACM Regulation.
90. Appellants III. and IV. add that the introduction of capacity allocation based on Article 15 of the CACM Regulation is an *ultra vires* act of the Agency as well, since it did not have competence to do so. Nor did the Agency have a competence to decide on new bidding zone borders or capacity allocation on the basis of Article 8 of Regulation (EC) 713/2009.
91. The Defendant indicated in its defence that the Contested Decision was correct in finding that a new bidding zone border could be introduced in the course of determination of CCRs and of the definition of bidding zones pursuant to Article 15 of the CACM Regulation. It referred to the letter which was enclosed as Annex 7 to the defence.<sup>7</sup>
92. The Board of Appeal notes that Article 15 of the CACM Regulation provides that the proposal of the TSOs “*shall define the bidding zone borders attributed to TSOs*” who are members of each CCR. The word “*define*” may be understood in a descriptive sense as well as in a prescriptive and normative one. The German version of the CACM Regulation uses the verb “*festlegen*”, which has a prescriptive and normative sense. Hence, the letter of Article 15 of the CACM Regulation does not exclude the ability to decide on bidding zones as part of the procedure it sets out.
93. The regulatory design of the CACM Regulation is based on a gradual integration approach. Recital (1) highlights the importance of “*the urgent completion of a fully functioning and interconnected market*” is crucial to the objectives of the Union policy on energy.

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<sup>7</sup> Letter of the European Commission of 27 January 2017

94. Article 15 of the CACM Regulation provides for a procedure to define the CCRs as an initial step in the implementation of the regulation, since the TSOs are required to jointly develop a common proposal within three months of its entry into force.
95. By contrast, Articles 32 to 34 of the CACM Regulation provides for a procedure to review the existing bidding zones configuration, which takes place in a different timeframe: the TSOs develop the methodology and assumptions and propose alternative bidding zones, the participating NRAs may require coordinated amendments within three months, and the TSOs shall submit a joint proposal within 15 months of the decision to launch a review, on which the NRAs have six months to agree. The procedure has the task, among others, to review the overall market efficiency, the stability and robustness of bidding zones and it shall include scenarios which take into account a range of likely infrastructure developments throughout the period of ten years starting from the year following the year in which the decision was taken. It is reasonable to consider that these two procedures deal with the design of bidding zones at different integration phases.
96. Recital (11) of the CACM Regulation refers to a sequence between the initial definition of bidding zones and subsequent modifications: “*Bidding zones reflecting supply and demand distribution are a cornerstone of market-based electricity trading and are a prerequisite for reaching the full potential of capacity allocation methods including the flow based method. Bidding zones therefore should be defined in a manner to ensure efficient congestion management and overall market efficiency. Bidding zones can be subsequently modified by splitting, merging or adjusting the zone borders. The bidding zones should be identical for all market time-frames. The review process of bidding zone configurations provided for in this Regulation will play an important role in the identification of structural bottlenecks and will allow for more efficient bidding zone delineation.*”

97. The main goal of the relevant EU legislation<sup>8</sup> is to complete the internal market of electricity and to create a level playing field for all electricity undertakings established in the Union. Congestion management is one of the initial tasks.
98. Considering that the initial determination of CCRs is linked to Article 15(2) of the CACM Regulation by the definition of bidding zone borders, and noting that Recital (11) stresses that the initial definition of bidding zones “*in a manner to ensure efficient congestion management and overall market efficiency*” is critical, it is reasonable to conclude that a procedure to determine CCRs based solely on the existing bidding zones would not be effective and would not achieve the required goals.
99. The purpose of Regulation (EC) 714/2009 and the CACM Regulation is to address network congestion problems with non-discriminatory market based solutions which give efficient economic signals to the market participants and transmission system operators involved.<sup>9</sup>.
100. The procedure of Article 15 of the CACM Regulation should be considered as allowing to change the definition of bidding zones as part of the initial definition of CCRs, independently from the procedure to review of bidding zones provided for in Articles 32 to 34, in order to address congestion problems in an efficient manner from the outset of the implementation of the CACM Regulation. Limiting the determination of bidding zone borders to the procedure established in Article 32 of the CACM Regulation, and imposing that the initial definition of CCRs should rely on existing bidding zones, would not be consistent with the goals of the CACM Regulation, and of Regulation 714/2009.
101. For these reasons the Board of Appeal concluded that the Defendant did not act *ultra vires* and had competence to introduce a new bidding zone in order to define CCRs pursuant to Article 15 of the CACM Regulation.

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<sup>8</sup> Recitals (4), (5) and (7) of Regulation (EC) 714/2009

<sup>9</sup> Article 16(1) of Regulation (EC) 714/2009 and Recital (3) of the CACM Regulation

*Fourth plea – No proof of congestion on the German-Austrian border*

102. Appellant I. submits that the Contested Decision does not offer sufficient proof that a structural congestion exists on the German-Austrian border. Appellant I. requests the Board of Appeal to collect information from the German TSOs concerning capacity constraints inside Germany referring to Article 21(3)(c) and (d) of the Rules of Procedure.
103. Appellants III. and IV. contend that the Contested Decision was based on the erroneous assumption of structural congestion on the German-Austrian border and it is not in line with the definition of congestion of Regulation (EC) 714/2009 and that of the CACM Regulation. The restriction of the transmission capacity contradicts Article 16(3) and clause 1.1. of Annex I. of Regulation (EC) 714/2009 as well as to its objectives and, further, the Agency's assessment does not consider the requirements set up in Article 33 of the CACM Regulation.
104. The Defendant consider that the Appellants intend to narrow the interpretation of the term ‘congestion’ in Article 2(2)(c) of Regulation (EC) No 714/2009 to the effect that the existence of congestion could only be assessed at the level of individual network elements, in complete isolation from the interconnected system.
105. The Defendant referred to that the Contested Decision identified which network elements in the CORE CCR are structurally physically congested within the meaning of Article 2(19) of the CACM Regulation and it established a direct and significant causal link between the request for trade at German-Austrian border and the identified structurally physically congested elements. According to the defendant, this causal link is constant, stable and consistent and, therefore, meets the criteria established in Article 2(19) of the CACM Regulation.
106. The Board of Appeal found that it is not debated that congestion, physical congestion and structural congestion, need to be defined according to the definitions of Article 2(2)(c) and Annex I of Regulation (EC) 714/2009 and Articles 2(18) and (19) of the CACM Regulation. However the Parties disagree on the methodology that has to be

employed in order to determine congestion, in particular structural congestion, in order to apply the above-mentioned definitions.

107. According to settled case-law of the Court of the European Union<sup>10</sup>, when complex economic and technical issues are involved, the appraisal of the facts is subject to more limited judicial review.
108. The Board of Appeal considers that in the limited timeframe given to decide on the Contested Decision, and with regard to the complex economic and technical issues involved, it should not carry out its own analysis of the correct methodology to define congestion but control only whether the Defendant made a manifest error of assessment. The Board of Appeal therefore considers that the Agency should be granted a certain *margin of appreciation* of methodological nature to precise the concrete requirements to be met to assess that there is a situation of structural congestion.
109. In the course of this control, the Board of Appeal found that Appellants I., III. and IV. had neither established that (i) the Contested Decision had not relied on factually accurate, reliable and consistent evidence, (ii) nor the Decision relied on evidence, in particular its Technical Justification Document that did not contain all the information which had to be taken into account in order to assess a complex situation; and (iii) nor the Decision insufficiently substantiated the conclusions drawn from the evidence.
110. With regard to these conclusions, the Board of Appeal considers that Appellants I., III. and IV. have not established that the Contested Decision was based on a manifest error of assessment, nor that it is insufficiently motivated.
111. The Board of Appeal further notes that with regard to the burden of proof, it is the Parties' duty to provide the necessary evidences in the appeal proceeding and, therefore, it is irrelevant to request the Board of Appeal to collect evidences from third persons to which Appellant I. intends to refer.

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<sup>10</sup> Case C-12/03 P par. 39; Case T-201/04 par. 89; Case T-301/04 par. 95; Case T-398/07 par. 62; Case C-452/10 par. 103; Joined Cases T-29/10 and T-33/10 par. 103; Case T-68/89 par. 160

*Fifth plea - Violation of the principle of proportionality*

112. Appellant I. takes the view that the Contested Decision or its annexes do not show that a capacity allocation mechanism on the German-Austrian border was a proportionate response to supposed problems of network stability. ACER Opinion No. 09/2015 as well as the Contested Decision on the technical justification lack any analysis on the effects of the split of the German-Austrian market and does not provide thorough evaluation of alternative solutions. Therefore, the Defendant disregarded Article 16 of Regulation (EC) 714/2009 on the proportionality principle.
113. The Defendant submits that capacity allocation mechanism is the only mechanism that can maintain operational security and simultaneously maximise economic efficiency in case of structural congestion problems. For this reason, according to the Defendant, the proposed measure is proportionate and none of the other alternative measures meets the requirements of Article 16 of Regulation (EC) No 714/2009.
114. The Board of Appeal found that the Appellants did not establish that the Contested Decision was not appropriate to achieve the congestion management requirements set out by Regulation 714/2009 and by the CACM Regulation, nor that it went beyond what was necessary in order to attain this objective. Hence it rejects the plea that the Contested Decision violated the principle of proportionality.

*Sixth plea – Violation of Articles 34, 35, 101 and 102 of the Treaty*

115. Appellant I. submits that, due to the lack of proof of structural congestion and the proportionality in the applied measure, the Contested Decision, which requires TSOs and NRAs to restrict cross-border flow of electricity, infringes Articles 34 and 35 TFEU which prohibit quantitative restrictions on imports and exports between the Member States and all measures having equivalent effects.
116. Appellant I. also contends that the prescribed market division would lead to discrimination between different groups of consumers depending on their locations and orders undertakings to act contrary to Article 101 and 102 TFEU.

117. Appellants III. and IV. came to similar conclusion.
  118. The Defendant contends that it is not clear how competition between trade requests for scarce capacity of the network has negative effects on the integration and competitiveness of the market. In order to avoid the potentially negative impacts, the Decision invites the involved regulatory authorities to investigate mitigating measures.
  119. The Board of Appeal found that, assuming the Contested Decision could be assessed in the light of Articles 34 and 35 or of Articles 101 and 102 of the TFEU, the Appellants did not establish that the Contested Decision met the cumulative criteria required to substantiate a breach of any of these provisions.
- Seventh plea – Violation of procedural rules*
120. Appellants III. and IV. submits that the Defendant exceeds its competence and misuses its power by declaring the non-binding ACER Opinion No 09/2015 binding by including it into Annex V. of the Decision.
  121. According to Appellants III. and IV., the Defendant infringed also the principle of good faith, the prohibition of surprises and the right to be heard under Article 41 CFR by providing significantly incomplete information, inadequate reasoning and no comprehensive clarification, nor access to the complete case file to Appellant I.
  122. The Defendant considers the Appellants' interpretation on the right to be heard is erroneous. Appellant I. was consulted several times and it did not request access to the complete case file. The disagreement with the arguments of Appellant I. does not mean the infringement of the right to be heard.
  123. The Defendant argues that in particular in Annexes II to IV of the Decision the Agency provides all the relevant facts, assessed them with all due care and gave an adequate explanation. Moreover, in particular, in Annexes II and III the Defendant reported on both the comments made by stakeholders.

124. The Board of Appeal found that the right to be heard and other procedural rights referred to in the appeals 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 law.
125. The procedures set out in Article 8(1) of Regulation 713/2009 and Articles 9 and 15 of the CACM Regulation, which specifically deal with the right to be heard, namely by providing for the direct participation of interested parties at different stages and for a public consultation to be held. The Appellants do not establish that the procedure leading to the Contested Decision did not comply with these requirements.
126. As for the duty for state reasons, it is settled case law<sup>11</sup> 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 decision. A proper justification of the Decision, adopted under the procedure established in Articles 15 and 9 of the CACM Regulation, does not require the Defendant to perform the analyses required by the bidding zone review process under Article 32 of the CACM Regulation. This is a special procedure that is governed by its own special provisions and by the general principles of EU law.
127. As regards ACER Opinion No 09/2015, the Board of Appeal found that the fact of including it into Annex V. of the Decision did not give it a binding nature, but had the effect of including it among the evidence supporting the Decision. In this respect, the Board of Appeal noted that the Technical Justification Document updated and completed the analysis made in this opinion.
128. As noted above in the assessment of the fourth plea, the Board of Appeal found that the Appellants had not established the Contested Decision was insufficiently motivated in the view of the procedural rules applicable to such decision.

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<sup>11</sup> T-587/14, par. 31., 16/65 (EU:C:1965:117)

## DECISION

On those grounds,

## THE BOARD OF APPEAL

hereby dismisses the appeal of Appellant II. as inadmissible and the appeals of Appellant I., Appellant III. and Appellant IV. for full or partial annulment of the Contested Decision as unfounded.

This decision may be challenged pursuant to Article 263 of the Treaty on the Functioning of the European Union and Article 20 of Regulation (EC) No 713/2009 within two months of its publication on the Agency website or of its notification to the Appellant as the case may be.

Andris Piebalgs

Andras Szalay

Chairman of the Board of Appeal

Registrar of the Board of Appeal