

DECISION
OF THE BOARD OF APPEAL OF THE EUROPEAN UNION AGENCY FOR THE
COOPERATION OF ENERGY REGULATORS
of 9 December 2022

- Case number:** A-002-2022
- Language of the case:** English
- Appellant:** *RWE Supply & Trading GmbH*
Represented by: Dr U. SCHOLZ and Dr H. WESSLING (Freshfields
Bruckhaus Deringer)
- Defendant:** *European Union Agency for the Cooperation of Energy Regulators*
(“ACER”)
Represented by: C. ZINGLERSEN and its legal representatives P.
GOFFINET, R. SPANGENBERG and M. SHEHU (Strelia cvba/scrl)
- Application for:** Remittal to the competent body of ACER of Decision No 03/2022
of the European Union Agency for the Cooperation of Energy
Regulators of 25 February 2022 on the amendment to the
methodology for pricing balancing energy and cross-zonal capacity
used for the exchange of balancing energy or operating the
imbalance netting process.
- Board composition:** A. BIONDI (Rapporteur), A. MARIEN (Technical Rapporteur), K.
WIDEGREN, P. EECKHOUT, M. SUPPONEN 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 Context

1. Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing¹ (hereinafter the “EB Regulation”) provides for a series of requirements for electricity balancing, for the exchange of balancing, as well as pricing and settlement of balancing.
2. These requirements include for all TSOs to develop a proposal for a methodology to determine prices for the balancing energy that results from the activation of balancing energy bids for the frequency restoration process and the reserve replacement process. In particular, Article 30(2) of the EB Regulation provides that in case TSOs identify the need to set up technical price limits so as to guarantee an efficient functioning of the market, they may jointly develop, as part of the proposal for the pricing methodology, a proposal for harmonised maximum and minimum balancing energy prices, including bidding and clearing prices, to be applied in all scheduling areas. In such a case, harmonised maximum and minimum balancing energy prices take into account the

¹ OJ L 312, 28.11.2017, p. 6.

maximum and minimum clearing price for day-ahead and intraday timeframes pursuant to the CACM Regulation².

II. Procedure leading to the adoption of the Contested Decision

3. In 2019, all TSOs developed a proposal for the pricing methodology and submitted it to all national regulatory authorities; due to a lack of agreement between them, national regulatory authorities referred the matter to ACER. On 24 January 2020, ACER approved the pricing methodology³. The pricing methodology is established under Annex I to Decision 01/2020. Annex Ia to Decision 01/2020 contains the pricing methodology with track changes.
4. On 26 August 2021, ENTSO-E, on behalf of all TSOs, submitted to ACER the proposal for the amendment to the pricing methodology. On 25 February 2022, after consulting the relevant stakeholders, ACER, reviewed and amended the proposal, adopting Decision 03/2022⁴.

III. The Contested Decision

5. Decision 03/2022 (hereinafter “ the Contested Decision”) amends the methodology for pricing balancing energy and cross-zonal capacity used for the exchange of balancing energy or operating the imbalance netting process.
6. Annex I to the Contested Decision sets the amendment to the methodology for pricing balancing energy and cross-zonal capacity used for the exchange of balancing energy or operating the imbalance netting process in accordance with Article 30(1) of the EB Regulation.
7. Annex Ia to the Contested Decision contains the amendment to the pricing methodology with track changes.
8. Annex II to the Contested Decision sets out the evaluation of the responses to the public consultation on the amendment to the pricing methodology.

IV. Procedure before the Board of Appeal and forms of order sought by the Parties

9. On 27 April 2022, RWE Supply & Trading GmbH (hereinafter “the Appellant”) submitted its Notice of Appeal to the Registry of the Board of Appeal (hereinafter “the Registry”).
10. On 10 May 2022, the Registry effected the service of Notice of Appeal to the European Union Agency for the Cooperation of Energy Regulators (hereinafter “the Defendant” or “ACER”).

² Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, OJ L 197, 25.7.2015, p. 24.

³ Decision 01/2020 of the European Union Agency for the Cooperation of Energy Regulators of 24 January 2020 on the methodology to determine prices for the balancing energy that results from the activation of balancing energy bids (hereinafter ‘Decision 01/2020’).

⁴ Decision 03/2022 of the European Union Agency for the Cooperation of Energy Regulators of 25 February 2022 on the amendment to the methodology for pricing balancing energy and cross-zonal capacity used for the exchange of balancing energy or operating the imbalance netting process.

11. On 7 June 2022, the Defendant submitted an Application for an extension of the time limit to submit the Defence pursuant to Article 10 of the BoA Rules of Organisation and Procedure⁵.
12. On 9 June 2022, the Board of Appeal (hereinafter “the BoA”) extended the time limit until 30 June 2022.
13. On 4 August 2022, the BoA invited the Appellant and the Defendant (hereinafter “the Parties”) to comment on the possible implications of the Court of Justice judgment in case *Nord Stream 2 AG v European Parliament and Council of the European Union* (judgment of the Court of 12 July 2022, C-348/20 P, ECLI: EU: C: 2022:548) with regard to the admissibility of the appeal.
14. On 19 August 2022, the Defendant submitted its observations, while the Appellant submitted them on 22 of August 2022.

V. *Forms of order sought by the Parties*

15. In its Notice of Appeal, the Appellant requests the BoA to remit the case to the competent body of ACER and to annul the Contested Decision or to declare it void. Furthermore, the Appellant requests the BoA, if it were to conclude that it does not have the power to annul the Contested Decision, to suspend the application of the Contested Decision alongside the remittal.
16. The Defendant requests the BoA to dismiss the appeal in its entirety as unfounded and, should the BoA remit the Contested Decision to ACER, the Defendant requests the BoA to reject any other claims.

VI. *The Grounds of Appeal*

17. The Appellant maintains that the Contested Decision, in particular the setting of a transitional price limit of +/- 15,000 €/MWh for bids in the balancing energy market on the European procurement platforms is in violation of several provisions and principles of EU law. In particular, it claims that the Defendant had no power to decide because the TSO did not submit a proposal that is approvable or revisable. It also claims that the Defendant was not competent to adopt the Contested Decision, as the Defendant did not limit itself to approve or revise a TSOs proposal, but it also introduced new regulatory provisions. It further contends that no legal basis for setting the new transitional price limit to +/- 15,000 €/MWh could be established. On the contrary, the Appellant claims that by adopting the Contested Decision, the Defendant infringed Article 10(1) of Regulation 2019/943⁶ (hereinafter the “Electricity Regulation”).
18. The Appellant also claims that the transitional price limits adopted in the Contested Decision lack a technical nature and are, therefore, not compatible with Article 30(2) of the EB Regulation. It further claims that the price limit proposed by the Defendant does not comply with the purpose of the EB Regulation and in particular with its Article 3. The Appellant also contends that the Defendant did not adequately reason the Contested Decision and indicate its legal basis. Finally, the Appellant claims that it was not

⁵ Decision BoA No1-2011 laying down the rules of organisation and procedure of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators, as amended last on 5 October 2019.

⁶ Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast), OJ L 158, 14.6.2019, p. 54.

properly informed of the Defendant intention to adopt transitory price limits and that therefore the Defendant infringed the Appellant's right to be heard.

19. The Defendant maintains that the Appellant does not have locus standi to challenge the Contested Decision and requests the BoA to dismiss the appeal lodged by the Appellant as inadmissible *ratione personae*. As to the substance, the Defendant contends that the Appellant's arguments are neither relevant nor grounded and requests the BoA to dismiss the appeal in its entirety as unfounded. Should the BoA consider the Appellant's appeal admissible and well founded, the Defendant requests the BoA to remit the case to the competent body of ACER, without annulling the Contested Decision or declaring it void *ipso iure*. Finally, the Defendant requests the BoA to deny the Appellant request for the suspension of the application of the Contested Decision after the remittal to ACER and to maintain the application of the Contested Decision until a new decision is adopted.

VII. Admissibility

20. Concerning the conditions of admissibility of an appeal that the BoA examines *ex officio*, in the present case, the only question to be addressed is whether the appeal should be held admissible *ratione personae*.
21. Admissibility *ratione personae* is regulated by Article 28(1) of Regulation (EU) 2019/942⁷ (hereinafter the 'ACER Regulation') which provides that "*any natural or legal person, including the regulatory authorities, may appeal against a decision referred to in point (d) of Article 2 which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.*"
22. Further, Article 15(1) of the BoA Rules of Organisation and Procedure provides that "[T]he grounds on which an appeal shall be ruled inadmissible shall include the following: [...] (d) the appellant is neither an addressee of the decision contested by the appeal nor able to establish direct and individual concern according to Article 28(1) of Regulation (EU) 2019/942".
23. In the present case, the Contested Decision is not addressed to the Appellant. Article 2 of the Contested Decision establishes that the addressees are all the TSOs. There are no disputes between the Parties on this point.
24. The question to examine is, therefore, whether the Appellant is both directly and individually concerned within the meaning of Article 28(1) of the ACER Regulation and thus whether the appeal is admissible.
25. Before answering the above-mentioned question, the BoA considers necessary to make the following preliminary observations.

Assessment – Preliminary Observations

26. As stated in Recital 34 of the ACER Regulation, whilst ACER has decision-making powers, interested parties should, for reasons of procedural economy, be granted a right of appeal to a Board of Appeal, which should be part of ACER, but independent from its administrative and regulatory structure.

⁷ 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), OJ L 158, 14.6.2019, p. 22.

27. Such an overall principle is enshrined in Recital 3 of the BoA Rules of Organisation and Procedure, whereby “*the Board of Appeal aims to validate procedural economy through the entire appeal proceedings, in terms of the language of the procedure used, deadlines set, length of written documents and any other elements of the procedure where savings in time or in resources used can be achieved.*”
28. As clarified by the EU case law, procedural economy is a general principle of EU administrative law indissolubly linked with the principles of legal certainty and sound administration of justice (judgment of the Court of 15 November 2018, *Estonia v Commission*, C-334/17 P, EU:C:2018:914, paragraph 51).
29. The establishment of the BoA and its appeal mechanism are, however, aimed also at protecting the rights of the parties in cases brought against decisions involving significant decision-making powers over complex scientific or technical matters (judgement of the General Court of 18 November 2020, *Aquind v ACER*, T-735/18, EU:T:2020:542, paragraph 51).
30. The BoA, in carrying out its review duties, is also bound to ensure that Article 41 of the Charter of Fundamental Rights is fully complied with, as any substantive or procedural provisions adopted either by an EU agency or by any other EU bodies need to respect the principles of fairness, impartiality and timeliness. Article 41(2) of the Charter of Fundamental Rights also enshrines the right of every person to be heard before any kind of detrimental decision affecting him/her is taken (judgement of the Court of 28 June 2018, *EUIPO v Puma*, C-564/16 P, EU:C:2018:509, paragraph 61). The various emanations of the right of good administration are to be granted to both natural and legal persons when they have an interest involved in a certain type of proceedings. In particular, those rights should be guaranteed to those applicants whose economic position is going to be affected by a contested administrative decision (judgment of the General Court of 19 June 1997, *Air Inter v Commission*, T-260/94, ECLI:EU:T:1997:89, paragraph 63).
31. The above considerations underlie the existence of admissibility criteria in relation to the bringing of an appeal before the BoA, within its field of competence, against a decision issued by ACER. The BoA must exercise its duties and prerogatives in a manner which ensures respect for the principle of procedural economy, that is, the need to conclude proceedings swiftly so as to create legal certainty, while at the same time guaranteeing the effective protection of the rights of the parties and compliance with the panoply of the right to good administration.
32. As for the specific applicability of the conditions of direct and individual concern required by the ACER Regulation in the present case, the BoA observes the following.
33. The direct and individual concern criteria that need to be satisfied for an appeal to be declared admissible, as provided for in the ACER Regulation, are derived from Article 263 of the Treaty on the Functioning of the European Union (hereinafter ‘TFEU’) concerning actions for annulment of EU legal acts. Paragraph 4 of Article 263 of the TFEU, in particular allows “*any natural or legal person <...> [to] institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*”. Therefore, the EU Courts shall hear actions brought against an EU act: a) if the act is addressed to a specific person/entity; b) if the act is not addressed to a specific person/entity, but a party can demonstrate that it is directly and individually concerned by it; and c) if the action is brought against an EU regulatory act that does not entail implementing measures and a party can establish direct concern.

34. The TFEU has also introduced a constitutional differentiation as paragraph 5 of Article 263 of the TFEU deals specifically with admissibility of actions brought against agency decisions such as ACER. It provides that “[A]cts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.”
35. In this regard, the BoA notes that the requirements to interpret the criteria of admissibility of appeals before the BoA have to be essentially the same as those developed by EU case law under paragraph 4 of Article 263 of the TFEU. Whilst, as explained above, the contexts are markedly different, as the right to bring an appeal against an administrative decision, and hence the duties of the BoA, cannot *sic et simpliciter*, contextually be equated to a judicial action brought before the EU judiciary (as clearly indicated by the *ratio decidendi* of the General Court in *Aquind*, cit. above at point 29), it is nevertheless important that Article 28(1) of the ACER Regulation should be interpreted and applied in a manner consistent with the composite nature, aims and scope of the BoA review, as prioritized by the TFEU and the EU legislator, and certainly not more restrictively.
36. In light of the above considerations, the BoA turns to examine whether the present appeal satisfies the criteria of admissibility laid down in Article 28(1) of the ACER Regulation.

Direct Concern

37. Both Parties rely on the well-established EU case law. The Appellant claims to be directly concerned by the Contested Decision for the following reasons: firstly, the TSOs participating in the European balancing platforms have no discretion in implementing the Contested Decision; secondly, the Contested Decision directly restricts the Appellant from freely setting the prices of its bids on the balancing energy market.
38. The Defendant considers the appeal as inadmissible. It argues that the Appellant is not directly concerned, as although the Contested Decision does not leave the TSOs any discretion with respect to its implementation, the legal situation of the Appellant has not been directly affected.

Assessment

39. According to the EU case law, the notion of direct concern presupposes the joint fulfilment of two premises: 1) the EU act affects the legal situation of the person concerned directly; 2) the EU act leaves no discretion to the addressees that are responsible for its implementation, making the implementation of the act automatic, and without the involvement of intermediate rules (order of the General Court of 12 October 2016, T-669/15, *Lysoform and others v ECHA*, ECLI:EU:T:2016:610 paragraph 33, and judgement of the Court of 5 May 1998, *Dreyfus v Commission*, C-386/96 P, ECLI:EU:C:1998:193, paragraphs 43 and 44).
40. There is no dispute between the Parties with respect to the second premise of the notion of direct concern. The Appellant is directly concerned as the Contested Decision does not leave TSOs with any room for manoeuvre for its implementation. As the Court of Justice of the European Union (hereinafter ‘CJEU’) recently held in *NordStream 2 AG*, “in order to assess whether an act leaves its addressees discretion with a view to its implementation, it is necessary to examine the legal effects produced by that act’s provisions, as referred to in the action, on the situation of the person pleading the right to bring proceedings, pursuant to the second limb of the fourth paragraph of Article 263

TFEU” (cit. above at point 13, paragraph 63). Thus, in this regard, the applicability of the new transitional price limit of +/- 15,000 €/MWh for bids in the balancing energy market on the European procurement platforms is entirely determined by the EU rules. Article 3(1)(a) of Annex I to the Contested Decision clearly establishes that all TSOs shall apply the transitional upper price limits by 1 July 2022.

41. In relation to the first premise of the notion of direct concern, i.e., that the legal act affects the legal situation of the person concerned directly, the Appellant also satisfies this premise. As held by the CJEU in *NordStream 2 AG* (cit. above at point 13), for the purpose of examining whether a certain EU act may directly affect the legal situation of an applicant, what is relevant is not the form but the substance. By virtue of the new rules introduced by the Contested Decision, the Appellant is, to the extent foreseen by those rules, legally precluded from exercising its normal activities as a market operator that is free to choose different pricing policy. In particular, the Appellant is prevented from submitting bids outside the range of the transitional price limits set up in the Contested Decision. These constraints are new and not applicable to the previous commercial activity of the Appellant as a balancing energy provider.
42. The Appellant is, therefore, directly concerned by the Contested Decision.

Individual concern

43. The Appellant contends that the Contested Decision is of individual concern to it, insofar as it prevents it from offering balancing energy at prices (i) above 15,000 €/MWh and (ii) below -15,000 €/MWh. In the Appellant’s opinion, the fact that the Appellant is active in the balancing energy market and is one of the largest suppliers in the German market, makes it individually concerned. Thus, the Contested Decision “*massively and distinctly*” intervenes in the pricing discretion of the Appellant, both for current and future transactions (point 27 of Notice of Appeal). Furthermore, the Appellant contends that the *NordStream 2 AG* judgment (cit. above at point 13) can be interpreted as implying that individual concern can be established by looking at the nature of the legal effects produced by a certain measure. The Contested Decision establishing transitional prices is exactly designed so as to concern a predetermined group, that is the providers of balancing energy that have been prequalified to provide balancing energy or were in the process of prequalification. Finally, the Appellant in its observations on the *NordStream 2 AG* (cit. above at point 13) contends that the appeal should be held admissible because the Contested Decision is a regulatory act and therefore paragraph 4 of Article 263 of the TFEU requires only direct concern to be established.
44. The Defendant argues that the Appellant is not individually concerned. Relying on the EU case law, the Defendant submits that the Appellant is not in a situation which is so peculiar to it, and which differentiates it, as regards the Contested Decision, from all other (existing and future) balancing service providers in Europe. The Appellant has thus failed to show that there is something that distinguishes the Appellant from all the other balancing service providers with respect to the Contested Decision.

Assessment

45. According to the EU case law, an act is of individual concern to a natural or legal person if it affects that person by reason of certain attributes that are peculiar to that person or by reason of circumstances in which such person is differentiated from all the other persons, and by virtue of these factors, that person is distinguished individually, just as

the other addressees of the act (see, *inter alia*, judgments of the Court of 15 July 1963, *Plaumann v Commission*, 25/62, EU:C1963:17, p. 107, and judgement of 17 September 2015, *Mory and Others v Commission*, C-33/14 P, EU:C:2015:609, paragraph 93).

46. Moreover, the fact that certain operators are more affected economically by an EU act than others is not sufficient to distinguish them individually from other operators where that measure is applied, in any event, by virtue of an objectively determined situation (judgment of the Court of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 72). The CJEU further clarified that even if an operator was the only one carrying out an economic activity affected by an EU act at the time of its adoption, it could not be considered as “individually concerned” if any other economic operator could, actually or potentially, be affected in the same manner. Thus, the possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies, by no means implies that it must be regarded as being of individual concern to them, as long as that measure is applied by virtue of an objective legal or factual situation defined by it (judgment of the Court of 13 March 2018, *European Union Copper Task Force v Commission*, C-384/16 P, EU:C:2018:176, paragraph 94). Furthermore, if a contested decision does not affect the interests of the appellants alone, but also those of (i) other competing companies, (ii) companies active on other markets, or (iii) final customers, then individual concern cannot be established (judgment of the General Court of 2 March 2010, *Arcelor v Parliament and Council*, T-16/04, EU:T:2010:54, paragraphs 104 to 110). Thus, in order to be individually concerned an appellant must “[establish] the existence of a set of factors constituting such a situation which is peculiar to the applicant and which differentiates it, as regards the measure in question, from all other traders” (judgment of the Court of 13 March 2008, *Commission v Infront WM*, C-125/06 P, EU:C:2008:159, paragraph 71).
47. The EU case law specifies that, where a measure affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of that group, those persons may be individually concerned by that measure inasmuch as they form part of a limited class of economic operators (see, to that effect, judgment of the Court of 27 February 2014, *Stichting Woonpunt and Others v Commission*, C-132/12 P, EU:C:2014:100, paragraph 59; see also *NordStream 2 AG*, *cit. above* at point 13).
48. It follows from the above that none of the arguments presented by the Appellant is sufficient to distinguish its position from that of any other economic operators. The Contested Decision concerns all providers of balancing energy in the same manner as it applies to all the market participants willing to submit balancing energy bids on European balancing platforms. The fact that the Appellant has been active in the balancing market is also not sufficient to distinguish it individually from other operators. Concerning the argument that because of the setting of the transitional price limit to +/- 15,000 €/MWh, the balancing energy price cannot be formed freely in accordance with supply and demand, it is sufficient to observe that those concerns pertain to the merits of the appeal, not to its admissibility. In conclusion, the Appellant is in the same situation as any other provider of balancing energy and is not the only economic operator affected by the Contested Decision. The Contested Decision applies indiscriminately and indistinctively to any trader falling within its scope.

The Contested Decision as a regulatory act

49. As for the Appellant's argument based on paragraph 4 of Article 263 of the TFEU, the Treaty provision specifically refers to paragraphs 1 and 2 of Article 263 of the TFEU, which are dealing with a judicial review action before the EU judicature. However, as mentioned above in points 33 to 35, it would be illogical to interpret admissibility criteria for an administrative review in a more restrictive manner than for a judicial review action.
50. On the question of whether the Contested Decision should be considered as a regulatory act, first, it is a well established principle that the form in which a certain act is cast is in principle irrelevant as regards the right to challenge such an act, as it is necessary to look at its substance instead (judgment of the Court of 11 November 1981, *IBM v Commission*, 60/81, EU:C 1981:264, paragraph 9, and *NordStream 2 AG*, cit. above at point 13, paragraphs 63, 64 and 67). Second, according to established EU case law, a regulatory act is understood as *'an act of general application which has not been adopted in accordance with the ordinary legislative procedure or the special legislative procedure within the meaning of paragraphs 1 to 3 of Article 289 of the TFEU'* (judgment of the General Court of 25 October 2011, *Microban International and Microban (Europe) v Commission*, T-262/10, EU:T:2011:623, paragraph 21, and *a contrario*, judgment of the Court 21 October 2021, *Lípidos Santiga v Commission*, C-402/20 P, ECLI: EU:C:2021:872, paragraphs 35 to 38). Therefore, for a given act to be considered as a regulatory act: a) the act must be of general application, and b) the act must not be a legislative act – i.e., it must not have been adopted under a legislative procedure.
51. The BoA considers that the Contested Decision is a regulatory act as it is of general application inasmuch as it applies to future situations determined objectively and indiscriminately. The Contested Decision does not constitute a legislative act, since it was not adopted in accordance with either the ordinary legislative procedure or the special legislative procedure within the meaning of paragraphs 1 to 3 of Article 289 of the TFEU (see judgment of the General Court of 7 March 2013, *Bilbaina de Alquitranes and Others v ECHA*, T-93/10, EU:T:2013:106, paragraphs 55-59, and judgment of the General Court of 30 April 2015, *Hitachi Chemical Europe and Others v ECHA*, T-135/13, EU:T:2015:253, paragraphs 30 to 40). The Contested Decision is an act of ACER adopted on the basis of the ACER Regulation and the EB Regulation.
52. Article 28(1) of the ACER Regulation refers to both direct and individual concern. The BoA cannot ignore such clear textual constraint. Far from being a purely formalistic stance, the BoA must exercise its prerogatives within its constitutional boundaries. The BoA is part of ACER, and although independent from its administrative and regulatory structures, is bound by the ACER Regulation, which establishes its competences and sets the conditions for, and limits of, its review. As recently held by the General Court specifically with reference to the ACER BoA system *"it follows from the legislative and judicial system established by the FEU Treaty that the EU Courts alone are entitled, under the terms of Article 277 TFEU, to rule that an act of general application is unlawful and to draw the consequences of the inapplicability which results from that with regard to the act of individual scope contested before them, the EU institution, body, office or agency providing for the internal remedies not being afforded such competence by the Treaties"* (judgment of the General Court of 16 March 2022, *MEKH v Commission*, T-684/19, ECLI:EU:T:2022:138, paragraph 50).

53. Thus, it is not for the BoA to question the legality of Article 28 (1) of the ACER Regulation, a task clearly reserved for the EU Courts. The Appellant's argument based on an application of paragraph 4 of Article 263 of the TFEU should thus be dismissed.

VIII. Conclusion

54. For the reasons given above, the BoA finds that the Appellant is directly concerned by the Contested Decision (points 40 to 42), that the Contested Decision is a regulatory act and that it does not entail any implementing measures (points 49 to 51). It follows that if the BoA applied the EU case law associated with paragraph 4 of Article 263 of the TFEU, the action would be admissible as being brought "*against a regulatory act which is of direct concern to them and does not entail implementing measures*" and consequently, the merits would have been examined. However, as discussed above (points 52 to 53), the third limb of paragraph 4 of Article 263 of the TFEU is not reflected in the ACER Regulation. The ACER Regulation omits any reference to the admissibility of appeals against regulatory acts which are of direct concern to the Appellant and do not entail implementing measures. As discussed above, the BoA cannot assess the validity of EU law or its compatibility with the Treaties, in this case the compatibility of the ACER Regulation with the TFEU.
55. The current situation, in which an appeal is inadmissible on the grounds of secondary legislation whilst it would otherwise needed to be declared admissible on the grounds of the TFEU, is unsatisfactory. Even though the ACER Regulation defines the conditions of admissibility of administrative review and the TFEU sets the conditions of admissibility of judicial review, it cannot be maintained that the conditions of administrative review should be more restrictive than the conditions for judicial review (see above points 34 to 35).
56. The BoA, by applying the criteria of admissibility as laid down in the ACER Regulation, finds the appeal inadmissible. However, given the particular tension which exists between the provisions of the ACER Regulation and the TFEU and the BoA's inability to apply the TFEU directly, the BoA considers it is useful to provide a more extensive reasoning for its decision in this case, in order to fully ensure access to administrative review and respect of the Appellant's right to judicial review.

Request for further measures

57. The Appellant also requests that in case the BoA finds that the power to remit does not include a power to annul or to void, the BoA should suspend the Contested Decision alongside with the remittal or, alternatively, to order the Defendant to do so. To this end, it invokes several provisions in support of the suspension sought: (i) it requests the BoA to suspend the application of the Contested Decision pursuant to Article 28(3) of the ACER Regulation in joint reading with Article 27 of the BoA Rules of Procedure, or (ii) alternatively, it requests the BoA to order the Defendant to suspend the application of the Contested Decision pursuant to Article 21(3) of the BoA Rules of Procedure,
58. The Defendant considers that all the provisions put forward by the Appellant are irrelevant because none of them provides for the scenario where the BoA can suspend the Contested Decision after the remittal of the case to ACER (i.e., after the end of the appeal proceedings before the BoA). The suspension sought by the Appellant should thus be rejected for a lack of proper legal basis. In any event, the Defendant considers that the Contested Decision should not be suspended after (and if) the BoA remits the case to ACER. Should the BoA consider the appeal admissible and well founded, the Defendant

requests the BoA to only remit the case to the competent body of ACER, without annulling the Contested Decision or declaring it void *ipso iure*; should the BoA remit the case to the competent body of ACER without annulling the Contested Decision or declaring it void *ipso iure*, the Defendant requests the BoA to deny the Appellant's request for the suspension of the application of the Contested Decision after the remittal to ACER, and to maintain the application of the Contested Decision until a new decision replaces the Contested Decision.

Assessment

59. In light of the appeal having been declared inadmissible, the BoA considers that there is no need to decide on these requests for further measures.

For the above reasons, the Board of Appeal hereby:

1. declares the appeal inadmissible;
2. establishes that there is no need to decide on the other pleas and forms of order sought by the Appellant;
3. dismisses the Appellant's request for procedural measures.

Done at Ljubljana, 9 December 2022

For the Registry

The Registrar

S. VAONA

For the Board of Appeal

The Chairperson

M. PREK