COURT OF JUSTICE
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Judgments of the General Court in Cases T-606/20 and T-607/20 | Austrian Power Grid and Others v ACER

The Court confirms the enhanced powers of the European Union Agency for the Cooperation of Energy Regulators (ACER) to take individual decisions on cross-border issues

Thus, ACER is entitled to amend the proposals of the transmission system operators in order to ensure their compliance with EU energy law, without being bound by any points of agreement between the competent national regulatory authorities

European Commission Regulation 2017/2195 on electricity balancing [1] provides for the implementation of several European platforms for the exchange of balancing energy. Those platforms include, first, the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation ('the aFRR platform') and, secondly, the European platform for the exchange of balancing energy from frequency restoration reserves with manual activation ('the mFRR platform') [2].

In accordance with the procedure set out in Regulation 2017/2195 [3], all transmission system operators ('TSOs') have submitted for approval by the national regulatory authorities ('the NRAs') [4] common methodology proposals for the implementation of the aFRR platform and the mFRR platform.

Following a joint request by the NRAs, the EU Agency for the Cooperation of Energy Regulators (ACER), under that regulation [5], took a decision on those proposals, as amended following exchanges and consultations between ACER, the NRAs and the TSOs. ACER adopted two decisions, one on the aFRR methodology and the other on the mFRR methodology ('the ACER decisions'), to which the methodologies in question, as amended and approved by ACER, were attached.

Austrian Power Grid, ČEPS, a.s., Polskie sieci elektroenergetyczne S.A., Red Eléctrica de España SA, RTE Réseau de transport d'électricité, Svenska kraftnät, TenneT TSO BV and TenneT TSO GmbH brought an action [6] to the ACER Board of Appeal ('the Board of Appeal') against those decisions. Their appeals having been dismissed, they brought two actions before the Court seeking annulment of the decisions of the Board of Appeal, in so far as they concern them, of certain provisions of the ACER decisions and of the methodologies attached to them.

[1] Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing (OJ 2017 L 312, p. 6).

[2] Articles 20 and 21 of Regulation 2017/2195, respectively.

[3] Article 20(1) and Article 21(1) of Regulation 2017/2195.

[4] Article 5(1) and (2)(a) of Regulation 2017/2195.

[5] Article 5(7) of Regulation 2017/2195.

[6] Under Article 28 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 (OJ 2019 L 158, p. 22).

Those actions were dismissed by the Second Chamber (Extended Composition) of the Court, which, on that occasion, ruled, first, on the division of competences between ACER and the NRAs in the context of the adoption of the aFRR and mFRR methodologies and, secondly, on the functions required for the operation of the aFRR and mFRR platforms under Regulation 2017/2195.

The Court's assessment

As a preliminary point, the Court declares the actions for annulment inadmissible in so far as they are directed against the ACER decisions and their annexes. In that regard, it notes that, in accordance with the fifth paragraph of Article 263 TFEU and the act establishing ACER, namely Regulation 2019/942 [7], the applicants, as non-privileged parties [8], may only seek annulment before the Court of the decisions adopted by the Board of Appeal, but not of the ACER decisions and their annexes. Consequently, the Court is limited, in the present case, to reviewing the legality of the decisions of the Board of Appeal, in particular insofar as they confirm in their entirety the ACER decisions and the aFRR and mFRR methodologies attached thereto.

In accordance with the determination made above, the Court continues its analysis on the merits. In the first place, it rejects the applicants' argument that the Board of Appeal erred in law by failing to find that ACER had exceeded the limits of its competence in adopting the decisions concerned.

On that point, the Court notes that, under Article 6(10) of Regulation 2019/942 and Article 5(7) of Regulation 2017/2195, as applicable at the time of the adoption of the decisions of the Board of Appeal ACER is competent to decide or adopt individual decisions on regulatory issues or problems having an effect on cross-border trade or on the security of the cross-border network, such as the aFRR and mFRR methodologies, where, as in the present case, the NRAs make a joint request to that effect. In the Court's view, it does not follow from those provisions that ACER's competence is limited to points of disagreement between the authorities concerned.

That literal interpretation is supported by the context and the objectives pursued by the regulation of which those provisions form part. In that regard, the explanatory memorandum of the proposed Regulation 2019/942 and the previously applicable Regulation 713/2009 [9] indicate a clear intention of the EU legislator to make decision-making on cross-border issues more efficient and expeditious by strengthening ACER's individual decision-making powers in a way that is consistent with the maintenance of the central role of NRAs in the field of energy regulation, in accordance with the principles of subsidiarity and proportionality. It is also clear from the preamble of Regulation 2019/942 [10] that ACER was established to fill the regulatory vacuum at EU level and to contribute to the efficient functioning of the internal markets in electricity and natural gas.

Therefore, the purpose and context of the relevant provisions of Regulations 2019/942 and 2017/2195, as well as the specific circumstances of the present case, confirm that ACER is empowered to decide on the development of the aFRR and mFRR methodologies, in case of a joint request from the NRAs to do so. Similarly, as ACER has been granted its own decision-making powers to enable it to carry out its regulatory functions independently and effectively, it is entitled to modify the TSOs' proposals in order to ensure their compliance with EU energy law, without being bound by any points of agreement between the relevant NRAs.

It follows that the ACER Board of Appeal did not err in law in upholding ACER's jurisdiction to rule on points in the aFRR and mFRR methodologies that were agreed between the NRAs.

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[7] Recital 34, Article 28(1) of Regulation 2019/942.

[8] The privileged parties are the parties referred to in the first and second paragraphs of Article 19 of the Court's Statute, namely the Member States, the institutions of the Union, the States, other than the Member States, which are parties to the Agreement on the European Economic Area (EEA) and the EFTA Surveillance Authority referred to in that Agreement.

[9] 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 2009 L 211, p. 1).

[10] Recital 10 of Regulation 2019/942, previously recital 5 of Regulation 713/2009.

In the second place, the Court rejects the applicants' claims that the Board of Appeal erred in law by finding that the inclusion of the capacity management function among the functions required for the operation of the aFRR and mFRR platforms had not been imposed on the TSOs by ACER, but resulted directly from the application of Regulation 2017/2195.

The Court makes clear from the outset that that inclusion is decisive in assessing whether the proposals developed by the TSOs had to comply with the additional requirements set out in Regulation 2017/2195 [11] where, as in the present case, the TSOs envisage designating several entities to perform the different functions required. In that regard, it notes that, in accordance with that Regulation, the proposed methodologies submitted by TSOs must include the definition of the functions required for the operation of the aFRR and mFRR platforms [12]. While it follows from Regulation 2017/2195 that those platforms are to include at least the activation optimisation function and the TSO-TSO settlement function [13], it is not excluded that another function, such as capacity management, is also considered to be required for the operation of those platforms, in particular if the addition of such a function appears to be necessary to ensure a high-level design of that platform in line with common governance principles and business processes.

An interpretation of the notion of 'function required' for the operation of aFRR and mFRR platforms, in the light of the context and objectives pursued by Regulation 2017/2195, suggests that it is a function which, both technically and legally, appears to be necessary for the efficient and safe establishment and operation of those platforms.

In the Court's view, the capacity management function meets such a condition of necessity. From a legal point of view, Regulation 2017/2195 requires TSOs to update continuously available cross-zonal transmission capacity for the purpose of balancing energy exchange or imbalance compensation. Technically, as is evident from the proposed aFRR and mFRR methodologies developed in the present case, the continuous updating of that capacity, which underpins the capacity management function, is an essential input to the activation optimisation function. The capacity management function has been added to the platforms by the TSOs themselves, in order for them to meet the requirements of a high level design in terms of efficiency and safety required by Regulation 2017/2195.

In the light of the above considerations in particular, the decisions of the Board of Appeal are upheld.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

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[11] Article 20(3)(e)(i) to (iii) and Article 21(3)(e)(i) to (iii) of Regulation 2017/2195.

[12] Article 20(3)(c) and Article 21(3)(c) of Regulation 2017/2195.

[13] Article 20(2) and Article 21(2) of Regulation 2017/2195.