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The appeal procedure in the application of the EU Energy Law – experience from ACER's Board of Appeal 2016-2021

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Abstract

This paper analyses the design and functioning of the EU Agency for the Cooperation of Energy Regulators' board of appeal, and provides a record of the key issues of substance and procedure it faced, from the inside perspective of the authors, as former chairman and vice chairman of this body, from November 2016 to October 2021. As in some other EU decentralised agencies, the BoA is an independent panel of specialists appointed to review the appeals against the agency's decision, and a mandatory gateway to the General Court. It's specificities stem from those of ACER's role in the construction of energy markets and of the place of the decisions it takes in the architecture of the EU energy policy : despite being labelled as "individual decisions" many of ACER's decisions are of general application and have major impacts on energy markets. In the context of the implementation of network codes, the BoA was faced with an increasing number of cases (29 appeals, which were consolidated into 19 decisions) on complex issues. The time limit in which it must issue its decisions has been extended from 2 to 4 months to enable it to progressively adjust the depth of its scrutiny to the appropriate level. Outstanding questions remain on the resources allocated to the board and on the clarification of its powers and procedures.

Keywords

ACER; decentralised agency; board of appeal; energy policy

Introduction

The institutional architecture of the European Union is quite complex. The European Commission, the European Parliament, the Council of the European Union and the European Council are well known for making decisions in the framework created by the Treaty on the European Union and the Treaty on the Functioning of the European Union (TFEU). Less well known are the decentralised agencies, established by EU regulations to perform specific tasks and to pool technical and specialist expertise, in order to support EU institutions and Member States in implementing EU policy objectives. There are more than 30 such agencies. The tasks of most of them are related to the development of the internal market, but there are also agencies in the areas of social policy, security and justice and of common security and defence policy.

The EU Agency for the Cooperation of Energy Regulators (ACER) was created in 2009, and entrusted with the mission to assist national regulatory authorities (NRAs) in exercising their regulatory tasks at Community level, and, where necessary, to coordinate their action in order to facilitate the further development of a more competitive, efficient and secure energy market[1].

The development of the internal energy market is proceeding in a particular legal environment, as energy is a shared responsibility between the EU and Member States[2], and the implementation of the EU energy policy and legislation follows a specific institutional framework. The general framework of article 291 of TFEU provides that the implementation of legally binding Union acts is a competence of Member States, except where uniform conditions for implementing them are needed, in which case those powers are in principle conferred to the Commission. However, in the case of the energy policy, NRAs play a key role in exercising the Member State's implementing powers, within the framework and the duties defined by EU regulations and directives on the electricity and gas markets: their competence extends to cross-border or Union-wide matters which require uniform decisions, and which would as such normally fall within the competence of the Commission.

ACER's coordination role, which in principle mainly consists in providing advice and support to NRAs and EU institutions, has involved issuing an increasing number of binding decisions — which NRAs, network operators and market players are required to comply with — within the scope of the duties of NRAs, in particular when NRAs in the EU, in a given region, or in charge of regulating a given infrastructure, are required to issue identical or consistent decisions but fail to agree.

As some of the other decentralised agencies that can adopt decisions having a bearing on the legal situations of individuals[3], ACER has been given a board of appeal (BoA). These boards are panels of specialists appointed to review the appeals against their decisions, with the power to issue a new decision or to refer the matter back to the relevant body. Advocate general Campos Sanchez-Bordona has stressed the hybrid nature of these boards in a recent opinion on a case regarding a decision of ACER's BoA: "*They are administrative review bodies, internal to the agencies, which enjoy a degree of independence. They are not judicial in nature, although they perform quasi-judicial functions through adversarial proceedings*"[4].

The specificities of ACER's BoA stem from those of the agency's role in the construction of energy markets and of the place of the decisions it takes in the architecture of the EU energy policy.

1 By regulation (EC) n° 713/2009 of the European parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

2 Article 194 of the TFEU provides that Union energy policy is to ensure the functioning of the energy market, the security of supply, to promote energy efficiency, energy saving and renewable energy, and the interconnection of energy networks, but that Union measures must not affect a Member State's right to determine the general structure of its energy supply.

3 The European Union Intellectual Property Office (EUIPO), the Community Plant Variety Office (CPVO), the European Union Aviation Safety Agency (EASA), the European Chemicals Agency (ECHA), the Agency for the Cooperation of Energy Regulators (ACER), the Single Resolution Board (SRB), the European Union Agency for Railways (ERA) and the three European Supervisory Authorities (the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA)), which share a single Board of Appeal.

4 Opinion delivered on 15 September 2022 in case C-46/21, *ACER v Aquind Ltd*, pts 40 and 41.

This paper analyses the design and functioning of ACER's BoA in this context (1), and provides a record of the key issues of substance and procedure addressed by the 19 decisions it took from November 2016 to October 2021 (2), and of challenges and lessons learned, from the inside perspective of the authors as former members of this body, chairman and vice chairman of the Board. Both were also involved in the creation or integration of the European energy market, respectively as EU Energy Commissioner and as director of a NRA.

1. ACER's board of appeal in the context of the construction of energy markets : design, activity and functioning

ACER's role in the integration of the EU energy market (1.1) partly relies on its competence to adopt decisions on the implementation of network codes or on cross-border interconnections, when the NRAs concerned have failed to agree, and increasingly to directly decide in certain cases. Despite being labelled as "individual decisions," many of these decisions are "of general application" (1.2). As in other EU decentralised agencies, the BoA is an internal body, which was established within ACER for reasons of procedural economy, to review these decisions without systematically referring them to the Court of justice. The BoA is one of the means to hold the ambitious calendar which has been set out for measures relating to the integration of the energy market (1.3). The increasing stream of appeal cases is a function of the number of decisions issued by ACER, which has sharply increased in 2019 and 2020, as a consequence of this calendar and of the difficulty of reaching agreements between NRAs in certain areas, such as rules and methodologies to implement certain network codes (1.4). The composition and functioning of ACER's BoA reflect its hybrid nature: as a part of ACER's organisation which is independent from others, and conducts an administrative review, while following a quasi-judicial procedure. Its resourcing is critical, given the permanent flow and the complexity of cases (1.5).

1.1. ACER's role in the context of the construction of integrated energy markets

The role of NRAs

The EU electricity and gas markets have evolved from isolated national markets over a long period of time. The first rules on the integration and on the liberalisation of the internal market were adopted in 1996. The following steps came in 2003 and 2009, with the second and third energy packages of EU legislation, to speed up these evolutions. Member States were required to establish national regulatory authorities, which were independent from the interests of the industry5 (1996), and eventually from any other private or public entity, with separate annual budgets and appropriate resources (2009), to implement and to enforce these rules in certain areas.

Today, NRAs have broad powers, including to approve transmission and distribution tariffs or their methodologies, to enforce consumer protection provisions, and to implement EU network codes[6], through national measures or coordinated regional or Union-wide measures[7]. They also regulate projects of common interest (PCIs) for trans-European energy infrastructure[8].

5 Including from Government activities associated with the ownership and control of energy undertakings.

6 Network codes are Commission regulations, adopted pursuant to the comitology procedure. They are prepared by the European network of TSOs, in areas listed by regulations (EC) N° 714/2009 and N° 715/2009 of the European Parliament and of the Council of 13 July 2009, and on priorities defined by the Commission within these lists, within non-binding framework guidelines developed by ACER. There currently are 9 electricity network codes — on markets and the management of interconnections (in various timeframes : day-ahead and intra-day, longer timeframes, or for balancing in real time), connection to the grids (demand connection, requirement for generators, HVDC), the operation of the transmission network (system operation, emergency and restoration) — and 5 gas network codes.

7 Art. 59 of directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and article 41 of directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas.

8 Regulation (EU) N° 347/2013 of 17 April 2013 the European Parliament and of the Council on guidelines for trans-European energy infrastructure (the TEN-E regulation).

The need for coordination on cross-border issues

The **integration of EU energy markets** relies on the cooperation of NRAs to approve common rules for cross-border exchanges, system operations and security — where EU regulations grant them such power-, to consistently enforce them, and to monitor cross-border transactions.

In particular, many **network codes** provide for proposals for common terms and conditions or methodologies — at the level of the EU or of a given region — to be submitted by all transmission system operators (TSOs) or all nominated electricity market operators (NEMOs)[9] and to be unanimously approved by all NRAs[10] within given timeframes. These **EU-wide or regional terms and conditions or methodologies** form additional layers of **implementation regulation governing the functioning of EU energy markets**.

The regulation of **cross-border infrastructure** (electricity and gas interconnectors) requires the concerned NRAs to adopt common, identical or consistent decisions on investments (planning, cost sharing, financing) and on their use and operation, at a bilateral or at a regional level.

NRAs have organised a voluntary coordination, through the Council of European Energy Regulators (CEER) (2000), through regional initiatives (2006), as well as bilaterally.

ACER's coordination role

The third package established ACER as part of an EU-wide institutional and regulatory framework, in which **cooperation among NRAs on cross-border issues has become a mandatory requirement**, formalised in defined procedures. As noted in the explanatory memorandum for the proposal which led to regulation (EC) n° 713/2009 : "*although the internal market for energy has developed considerably, a regulatory gap remain[ed] on cross-border issues*," which "*in practice usually require[d]* ***the agreement of 27 regulators and of more than 30 system operators***".

As the name suggests, ACER was conceived not as a European energy regulator, but as an EU body to promote and to support regulatory cooperation and to coordinate the activities of NRAs at EU level, as a complement to voluntary initiatives. The scope of its activities followed the extension of the role of NRAs, to monitoring wholesale markets[11], promoting trans-european energy infrastructure, assisting the strengthening of gas supply security[12], and more recently, as part of the Clean Energy Package (2019), to addressing generation adequacy and regulating regional coordination centres established by electricity TSOs.

According to article 1 of Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019[13] "*the purpose of ACER shall be to assist the regulatory authorities (…) in exercising, at Union level, the regulatory tasks performed in the Member States, and, where necessary, to coordinate their action and to mediate and settle disagreements between them*", as well as to contribute to high-quality common regulatory and supervisory practices.

9 Mandated by the competent authorities to perform tasks related to day-ahead and intraday market coupling.

10 For instance the **CACM Regulation** (Commission regulation (EU) 2015/1222 of 24 July 2015 2015 establishing a guideline on capacity allocation and congestion management), on the allocation of **intraday and day-ahead interconnexion capacities**, provides for 16 pan-European methodologies — on the determination of capacity calculation regions (art. 15), common sets of requirements for coupling algorithms (art. 37), products accommodated (art. 40 and 53), maximum and minimum prices (art. 41 and 54), pricing and operation of intraday coupling (art. 55 and 59) — to be unanimously approved by NRAs, within 6 months of the TSOs' proposals.

11 Regulation (EU) No 1227/2011 of 25 October 2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency (REMIT).

12 Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply.

13 Which extends this role to mediation and the settlement of disagreements between NRAs.

In general terms, ACER has a double role in helping to ensure that the single European market in gas and electricity functions properly, with a variety of regulatory tools. Firstly, it monitors and evaluates developments on energy markets, and provides analysis and suggestions on how to improve their functioning, through reports, opinions and recommendations which are are non-binding. Secondly, it coordinates NRAs, to a broad extent through the pooling of resources and the exercise of non-binding powers. However, its coordination role also requires the power to adopt what the regulations label as "individual decisions".

1.2. The nature and evolution of ACER's decision powers and procedures

Article 2(d) of regulation (EU) 2019/942 lists a dozen of areas where ACER can issue individual decisions.

Chart I – ACER's decision powers

	Regulation (EC) N° 713/2009	**Regulation (EU) 2019/942** (art. 2(d))
On technical issues	Art. 7(1): On technical issues where those decisions are provided for in directives 2009/72/EC and 2009/73/EC and regulations N° 714/2009 and 715/2009	Art. 6(1): same provisions with updated references to the Clean energy package.
In case of disagreement between regulators: ***general***	Art. 8: Decisions on terms and conditions for access to and operational security of cross-border infrastructure, when they fall within the competence of NRAs, if they have failed to reach an agreement within 6 months or upon a joint request of the competent NRAs to do so.	Art. 6(10): On regulatory issues having an effect on cross-border trade or cross-border security, which require a joint decision by at least 2 NRAs (pursuant to a legislative act of the EU or a network code).
on projects of common interest	Where NRAs have not reached an agreement on an investment request (including cross-border cost allocation and reflection in tariffs) (art. 12(6) of TEN-E regulation).	Art. 11(4): refers to art. 12(6) of the TEN-E regulation.
on exemption of cross-border infrastructure	Art. 9: Decisions on exemptions to the rules applicable to unbundling and third party-access for new cross-border infrastructure, under the same conditions.	Art. 10: same provisions with updated references to the Clean energy package.
Approval or amendment of TSOs proposals on		The methodology regarding the use of revenues from congestion income (art. 4(4)) Common terms and methodologies, when a legislative act of the EU or a network code requires approval of all NRAs (art. 5(2)) Upon request of the director or of the BoR when a regionally agreed proposal would have a tangible impact on the internal market or on security of supply beyond the region (art. 5(3)) On the methodology and assumptions to be used in the bidding zone review process (art. 5(7)) The definition of a system operation region and the extension of its tasks (art. 7(2)a) Methodologies and calculations for resource adequacy assessment; technical specifications for cross-border participation in capacity mechanism (art. 9(1)) Methodologies for identifying electricity crisis scenarios at regional level and short-term and seasonal adequacy assessments (art. 9(3))
REMIT	Collection of data, mechanisms to share the information it receives with NRAs, disclosure of information, coordination of investigations (art. 8, 10, 12 and 16 of REMIT)	Art. 12: refers to art. 7 to 12 and 16(4) of REMIT
Other matters		Information requests (art. 3(2)c, 7(2)b and 8(c))

The type of decisions which is closest to the spirit of the establishment of ACER is **arbitration between regulators:** ACER steps in and issues a decision **if NRAs fail to agree within a given timeframe or if they jointly refer a matter** to the agency. The new regulation extends its scope from terms and conditions for access to and operational security of cross-border infrastructure falling within the competence of NRAs, to all regulatory issues having an effect on cross-border trade or cross-border security and requiring a joint decision by at least two NRAs. ACER also has such a role on decisions on PCIs and on exemptions from internal market rules for new infrastructure.

Regulation (EU) 2019/942 also substantially increases the scope of ACER's decision powers beyond cases of disagreement between NRAs and the initial set of technical issues, thus making it act as a **European regulator** in certain areas:

- on Union-wide methodologies and common terms or conditions for the implementation of network codes, and any amendment thereof, which were previously submitted to all NRAs for approval. To streamline the regulatory approval in these areas, ACER has direct approval and amendment powers where it only could decide in case of failure of NRAs to agree or of joint request under the former regulation,
- on bidding zone reviews as well as on new areas of regulation, such as generation adequacy and system operation regions.

ACER's decisions in practice

ACER took 27 individual decisions **pursuant to regulation (EC) n° 713/2009**, between August 2014 and June 2019. 8 were purely procedural decisions extending the deadlines given to NRAs to reach agreements. The remaining **19 decisions** were issued following a failure to agree or a referral: 16 on the implementation of network codes (of which 12 on Union-wide rules or methodologies to be approved by all TSOs[14] 2 on regional rules and methodologies, and 2 on bilateral issues[15]), 1 on a request for exemption of an electricity interconnector, 2 on cost-benefit analysis for PCIs.

The pace has accelerated **under regulation (EU) 2019/942** (see chart II): ACER has issued 60 individual decisions between July 2019 and the end of 2021, of which 8 were deadline extensions. Out of the remaining **52 decisions**, 28 were issued following a disagreement or a referral (of which 17 on regional rules and methodologies), 23 on direct approval powers, and 1 was an information request.

The decision-making capacity of ACER in most cases depends on other parties. It can always be scrutinised to determine if the agency had the power to adopt a decision and if all the procedural steps have been followed (regarding the TSOs' or the NEMOs' proposal, and if applicable the NRAs' referral or failure to agree within a given timeframe). With the development of the internal energy market, this is a cumbersome procedure — as illustrated by some of the cases summarised below — but it follows the logic that ACER essentially complements the regulatory functions performed by the NRAs and is not the European regulator of the energy market. This compromise definitely costs time and is favourable to legal challenges by the parties affected by ACER's decisions.

14 9 pursuant to the CACM regulation, 1 to the regulation on forward capacity allocation (FCA), 2 to the System Operation Guidelines (SOGL).

15 Regarding the implementation of the network code on capacity allocation mechanisms (CAM).

Despite being labelled as "Individual decisions", many of these decisions are "of general application"

The cautious language of the regulation, labeling ACER's decisions as "individual decisions," is inspired by a strict approach to the powers which may be delegated to an EU Agency[16] under the *Meroni*[17] and *Romano*[18] doctrines.

Yet the Court of Justice, in the *Short-Selling* case, has admitted that an EU agency could be delegated the power to adopt "acts of general application" as long as the circumstances in which such measures may be taken are strictly defined (Judgement of 22 January 2014, *UK v Parliament and Council*, C-270/12, pts 64 and 65[19]).

Despite this evolution in case law, the reference to "individual decisions" has been kept in regulation (EU) 2019/942. Each of these decisions is formally addressed to designated persons (the addressees): usually the authors of the proposal on which ACER has decided: all electricity TSOs or all NEMOs (which are individually listed in most decisions[20]), ENTSO-E[21], or all the TSOs in a given region, or in charge of a given infrastructure.

This formalism does not reflect the fact that many of the decisions issued ACER are general and impersonal decisions, which have or are likely to have a direct effect on an entire category of operators or on all market participants, rather than individual decisions whose effects are limited to specific addressees. They could fall under the qualification of "decisions of general application" in EU law or of *acte réglementaire* in French law. This is the case, for instance, of decisions approving methodologies, terms and conditions for the implementation of network codes, which concern all TSOs or all nominated energy market operators (NEMOs), and in some cases all market participants, for instance those setting price limits or opening and closure times for a given market.

In two recent decisions, taken after the end of our mandate, the BoA considered that a decision on the methodology to determine price for the balancing energy that results from the activation of balancing energy bids (which includes price limits for these bids) was "*a regulatory act as it is of general application inasmuch as it applies to future situations determined objectively and indiscriminately*" (9 December 2022, *RWE*, A-002-2022 ; *Uniper Global Commodities SE*, A-003-2022).

This appears to be specific to ACER, by contrast with the scope of appeals before other BoAs, which seems to be limited to decisions adressed to / and having direct effects on one or few persons, with the exception of decisions issued by financial authorities such as ESMA in exceptional circumstances.

16 Recital 29 of regulation 2019/942 : " *In accordance with the principle of subsidiarity, ACER should adopt individual decisions only in clearly defined circumstances, on issues that are strictly related to the purposes for which ACER was established*. "

17 Judgement of 13 June 1958, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, Case 9-56 : "*The consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers, the exercise of which can be subject to strict review in light of objective criteria, determined by the delegating authority, or whether it involves a discretionary power, implying a wide margin of discretion, which may, according to the use which is made of it, make possible the execution of actual economic policy. A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, while a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility. (…) To delegate a discretionnary power by entrusting it to bodies other than those which the treaty has established to effect and supervise the exercise of such power would render (…) ineffective*" the fundamental guarantee consisting in *the balance of powers which is a characteristic of the institutional structure of the Community.*" (pt 152).

18 Judgement of 14 May 1981, *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, Case 98/80: "*It follows both from article 155 of the Treaty and the judicial system created by the Treaty, and in particular by articles 173 and 177 thereof, that a body such as the administrative commission may not be empowered by the Council to adopt acts having the force of law*,**"** (pt 20).

19 In the case of the European Securities and Markets Authority (ESMA), which is entitled to issue general prohibitions or conditions to market participants in exceptional circumstances by article 28 of regulation n° 236/2012 *on short selling and certain aspects of credit default swaps.* Cf. Jean-Claude Bonichot, *« A propos de l'attribution du pouvoir réglementaire à l'Autorité européenne des marchés financiers ,"* RFDA 2014 p. 325.

20 Some decisions refer to "all TSOs" in addition to listing them.

21 The European network of electricity TSOs.

1.3. The purpose and specificities of ACER's BoA

Specific conditions concerning the right to institute proceedings against ACER's decisions

The right of a person to institute proceedings before the Court of justice against an act of the EU which is addressed or which is of direct and individual concern to that person[22] is guaranteed by article 263 TFEU and applies to "*acts of EU agencies intended to produce legal effects vis-à-vis third parties*". However, acts setting up these agencies "*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*".

ACER's BoA was initially set up by article 18 of regulation (EC) n° 713/2009. Its current legal basis are articles 25 to 28 of regulation (EU) 2019/942, which set out such "specific conditions".

An internal review body

The BoA is a **part of the administrative and management structure of ACER**, besides the Administrative Board, the Board of Regulators and the Director[23]:

- The **Administrative Board** exercises powers relating to the appointment of the Director, of the members of the two other boards, and with the administrative management of the Agency (budget, work programme, oversight, right of access to documents);
- All the other decisions of ACER are adopted by the **Director**, subject in most cases to a favourable opinion of the board of regulators, which acts at a 2/3 majority of its members (the representatives of each NRA) which are present.
- The **BoA** decides, independently from these other bodies, on appeals against certain decisions issued by the Director. The categories of decisions which can be appealed are listed by article 2(d) of the new ACER regulation (see above, chart I)[24].

A rationale of procedural economy in a specific regulatory context

The creation of the BoA is formally justified by reasons of procedural economy[25] which means providing the parties with an efficient procedure to challenge the agency's decisions without systematically going to the Court of Justice of the EU.

The BoA is a gateway: only after exhaustion of the appeal procedure before the board do parties have the right to take action against ACER decisions before the General Court[26] (see below 2.2). It must decide in a very short timeframe: 2 months under regulation (EC) n° 713/2009 extended to 4 months under the new regulation, to be compared with an average duration of more than two years of the proceedings before the Court on cases relating to ACER.

22 Or a regulatory act which is of direct concern to them and does not entail implementing measures.
23 Article 17 of regulation (EU) 2019/942.
24 They were previously listed by articles 7, 8 or 9 of Regulation (EC) N° 713/2009.
25 Recital 19 of regulation (EC) n° 713/2009 and recital 34 of regulation (EU) 2019/942 both provide that "*Where the Agency 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 the Agency, but independent from its administrative and regulatory structure*."
26 The Court of Justice of the EU comprises two branches : the General Court (Court of first instance until 2009), which has jurisdiction to hear actions against EU institutions, and the Court of Justice, which rules on appeals on points of law against judgements of the General Court.

In the case of ACER, this short review procedure is designed to provide a degree of legal certainty in the implementation of network codes, which requires the adoption of numerous decisions on common terms and conditions or methodologies (most of them being of general application, as noted above) within a defined and ambitious timeframe, even when NRAs disagree on such decisions. The nature of the decisions appealed as well as the contribution of the procedure to ensuring that the schedule of implementation measures is held appear to be quite specific to ACER's BoA as compared to other decentralised agencies of the EU.

This design has not prevented half of the appellants from continuing their cases before the Court.

1.4. An increasing stream of appeal cases

The numbers of appeals sharply increased during the mandate of the second BoA (2016-2021), as can be seen from Chart II. While the first board (2011-2016) had issued only 2 decisions[27], the second took 19 decisions and the third took 5 in the first 15 months of its mandate. While 2016 had not brought any appeal, the number of decisions of ACER appealed before the BoA grew from 2 in 2017 to 7 in 2021.

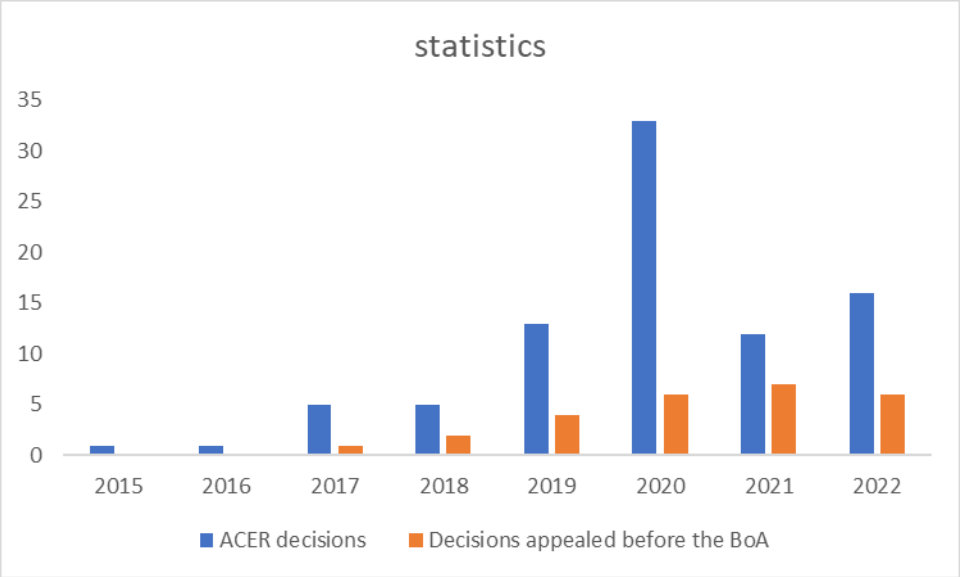
The number of appeals is **a function of the number of decisions issued by ACER**, which has sharply increased in 2019 and 2020 (up to 33[28]), mainly **reflecting the number of decisions which were to be taken by NRAs on EU-wide or regional rules and methodologies** for the the implementation of network codes (CACM and FCA in 2017-2019, system operation guideline and electricity balancing from 2019 to 2021) **and the difficulty of reaching an agreement** between them in certain areas. For instance NRAs failed to agree on more than half of the EU-wide rules and methodologies which they had to unanimously approve pursuant to the CACM regulation, and on some of the regional methodologies to be adopted in the Core Capacity calculation region, which includes the borders of the bidding zones between 13 countries.

On average, 30% of ACER's decisions are appealed, but there are significant variations in time and between the types of decisions appealed. The rate of appeals is roughly one third on decisions issued in cases of disagreement between NRAs or referral (6/19 on such decisions issued under regulation [EC) n° 713/2009 and 8/28[29] on decisions taken between July 2019 and December 2021 under regulation (EU) 2019/942) and one in six on direct approval powers (4/23 under regulation 2019/942 during the same period).

While the extended scope of ACER's powers under the new regulation (see 1.2) carries increased risks of disagreements with NRAs and TSOs, the simplification of the decision-making procedures could contribute to reducing them (or their continuation through appeals). If the trend of a lower appeal rate against direct approvals is confirmed, the evolution of the balance between direct decisions and arbitrations could lead to a decrease in the global appeal rate against ACER's decisions. However, this has not been the case for decisions issued in 2022[30].

27 Rejecting appeals against non-binding opinions of ACER as inadmissible.
28 Leaving aside extensions of deadlines.
29 On decisions taken between July 2019 and December 2021.
30 The rate of appeal against decisions issued on the basis of direct approval powers having risen to one third (4/12).

Chart II – Statistics on appeals before the BoA



		2015	2016	2017	2018	2019	2020	2021	2022	Total	%
1	Number of ACER decisions*	1	1	5	5	13	33	12	16	86	
2	Number of appeals before the BoA**	2	0	4	2	6	8	11	7	40	
3	Number of ACER decisions appealed before BoA***	0	0	1	2	4	6	7	6	26	30 %
4	Procedures after cancellation by the General Court (EGC)	0	0	0	0	0	1	1	0	2	
5	Number of decisions of the BoA****, of which :	2		1	1	4	7	7	4	26	
6	*dismissals*	2		1	1	3	5	6	3	21	81 %
7	*ACER decisions cancelled or remitted to the Agency*			0	0	1	2	1	1	5	19 %
8	Appeals before the EGC	1		2	1	5	2	8		19	
9	*BoA decisions appealed before EGC*	1		1	1	2	3	3		11	50 %*****
10	of which decisions annulled	0		1	1	2	0			4	36 %
11	of which decisions upheld	1		0	0	0	2	1		4	36 %
12	of which BoA decisions on which appeal before EGC is pending						1	2		3	28 %

* based on the list of individual decisions issued during a given year (leaving aside purely procedural decisions)

** based on announcements of appeals during a given year.

*** counts the number of ACER decisions appealed (based on the year of appeal). Some may be subject to multiple appeals (the line above indicates the total number of appeals).

**** counts the number of BoA decisions based on the date of decision. Lines 6 and 7 break down this figure between appeals dismissed and annulments or remittal to the agencies. Statistics on cases before the EGC are presented in the column corresponding to the year of the BoA's decision.

***** as a proportion of BoA decisions issued between 2015 and 2021 (11/22).

1.5. The composition and functioning of ACER's BoA

Composition

The BoA consists of six members and six alternates. Their appointment is proposed by the European Commission, following a public call for expression of interest, after having consulted ACER's Board of Regulators. The formal endorsement is done by ACER's Administrative Board.

The eligibility and selection criteria are broad. The regulation provides that members and alternates are selected among current and former senior staff of NRAs, competition authorities or other EU or national institutions with relevant experience in the energy sector. It does not explicitly refer to legal skills. Among selection criteria, the last call for expression of interest mentions: experience and knowledge in the fields of regulated network industries, energy policy and regulation, the functioning of the internal energy market, EU law, competition law and judicial proceedings. This leaves the Commission broad leverage in making the choice. The variety of experiences can benefit the board, but the level of skills is critical.

The members and alternates of the second BoA, except the chair, were (predominantly) former or (for a minority) current members or senior staff of energy or multisectoral regulators, with a majority having a background in engineering, science or economics and a minority having a legal background[31]. They were of 12 different nationalities.

An alternate steps in when a member is not available for the proceedings, for example in a situation of conflict of interests or due to professional constraints. Each member has an alternate and she/he is the first choice in case of unavailability of the member. This 'twinning' aims to preserve some geographical balance in the composition of the Board. In theory alternates could stay outside the decision-making for all five years of the mandate and it is important to find ways to get them involved in the work of the BoA.

There has been a strong change in the professional engagement of members which is needed. The BoA was an honorary commitment until 2019. The workload, on a basis of more than 5 cases per year on average since 2019, with an extended timeframe and increased scrutiny requirements, is at least 25 working days per year per member and two or three times as much for the chair. The members and alternates sitting on a case have received an indemnity per case since the end of 2019. It has been replaced since the end of 2021[32] by a remuneration based on actual workloads, which is more in line with the requirement of a substantial part time commitment as a member of a board of a regulatory agency. If the increasing trend in the number of cases continues it would make sense to move to fully professional members with more precise skill requirements, particularly judicial ones.

Independence

The regulation puts emphasis on guaranteeing the independence of members and alternates of the BoA in making their decisions, while taking into account the fact that some of them may be current or former members or senior staff of NRAs. They may not perform any other duty within ACER, its boards and working groups, nor be bound by any instructions in performing their duties[33]. They are appointed for fixed terms and can only be removed in the case of serious misconduct.

31 While the composition of the third BoA presents an even balance between technical skills and legal skills.

32 Of 1,200 euros per case for the chair, 1,500 for the rapporteur and 700 for other members pursuant to decision 17/2019 of 26 September 2019 the administrative board. As of October 2021, they have been replaced by a remuneration of 750 euros/day for the chair and rapporteur with a maximum of 9,000 euros/case and 625 euros/day with a maximum of 5,000 for other members (decision n° 9/2021).

33 Article 26 (2) of regulation (EU) 2019/942 : "*The members of the Board of Appeal shall be independent in making their decisions. They shall not be bound by any instructions. They shall not perform any other duties in the Agency, in its Administrative Board or in its Board of Regulators. A member of the Board of Appeal shall not be removed during his term of office, unless he has been found guilty of serious misconduct, and the Administrative Board, after consulting the Board of Regulators, takes a decision to that effect*."

They are required to provide annual interest declarations, which are published, and to confirm the absence of any conflict of interest (personal interest, previous involvement as representative of a party, participation in the decision under appeal) before starting a case.

In the five years of our mandate, the composition of boards dealing with appeal cases has never been challenged by parties[34] nor by other stakeholders. The current architecture ensures the required independence of board members and avoidance of conflicts of interest, while enabling the BoA to benefit from adequate industry experience and regulatory skills.

In performing their duties, members and alternates are protected by ACER from the risk of lawsuits and similar claims by any party.

Functioning and procedure

The ACER regulation sets out the rules governing the form and admissibility of appeals (written filing, statement of grounds, time limit, categories of appealable decisions, interested persons), the principle of contradictory filings within specified time limits, and the right of parties to make oral observations. These key features of the procedure before the BoA are closer to those of judicial proceedings than to those of an an administrative review. So is the vocabulary used by the regulation: "appeal proceedings", "registry," "admissible," "well-founded," "parties".

The regulation provides that the BoA shall adopt and publish its **rules of procedure** (RoP), which set out in detail the arrangements governing the organisation and functioning of the board and the rules applicable to appeals. The RoP were adopted in 2011 and subsequently amended, in particular in 2019 to adjust to the extension of time limits by the new ACER regulation. They define the minimal content of notices of appeal, the timeframe for the agency's defence, rules applicable to interventions, to confidentiality requests as well as to the organisation of hearings. The RoP also set out the organisation of the work of the BoA:

- a rapporteur is designated among members or (in case of replacement) alternates to carry out a preliminary examination of the merits of the appeal and to present a draft decision (in practice based on a discussion among board members on the results of the preliminary examination);
- the registry is in charge of ensuring the functioning of procedures: schedule, reception, transmission and custody of documents, notifications, publications, procedural and organisational tasks delegated by the Chair. It's staff may not participate in any proceedings of the agency relating to decisions which may be subject to appeals;
- the chair appoints the rapporteur, convenes meetings, decides on procedural measures, and chairs meetings and hearings;
- the board deliberates on decisions, at a qualified majority of four of the six members (as required by the regulation) if voting is necessary.

The chair organises the work and the debates of the board. As the majority rule can in theory lead to a stalemate (3/3) and the nature of questions raised does not allow much compromise, the chair's actions is critical to ensure a decision is reached in the required timeframe.

34 The regulation establishes a procedure allowing parties to object to the participation of a member of the BoA.

Resources

The BoA has to run a quasi-judicial procedure to decide on complex and disputed regulatory issues in a timeframe which remains very short, despite having been increased to 4 months, giving a better opportunity to go deeper into the merits of cases.

It is an internal body of ACER, composed of members and alternates who have no link with the other bodies of the agency. While the former ACER regulation did not include provisions on the resources supporting the BoA to perform its duties, the new regulation provides that ACER's budget shall comprise a separate budget line for the financing of the registry of the BoA.

Appropriate resources should be made available to the BoA in a manner that ensures its independence. The chair of the BoA and the director — who manages ACER and its staff, and implements its working programme and its budget — have concluded an **administrative arrangement**.

It covers the recruitment by ACER of a legal officer, who acts in priority as a **registrar**, reports exclusively to the chair as far as these activities are concerned, and may work for the agency in other fields (such as general administration) which could not lead to appeals, provided the activity as registrar is securely walled off. With members being involved only part-time, the role of the registrar is particularly important to ensure the proper organisation and continuity of the work of the board. In addition to procedural matters, the registrar manages the BoA's budget line, organises meetings and keeps links with consultants. As it is difficult to predict the number of cases, the staffing is challenging. The registry requires more than a full-time officer during certain periods, when several cases overlap — with for instance 5 appeals (consolidated in 3 cases) filed between April and June 2019, 7 appeals (consolidated in 4 cases) between March and May 2020 and 9 appeals (consolidated in 5 cases) in December 2020 and January 2021. The administrative arrangement provides for the recruitment of a deputy registrar (under the same terms as the registrar) to support the board during such periods and to ensure continuity.

The registry has not been designed nor staffed to provide members with extensive support on the analysis of the legal merits of case or on the drafting of decisions[35]. Such support is required in most cases, given the quasi-judicial nature of proceedings and decisions, the mass of filings, the substance of the debate between parties, the complexity of cases, short time limits and the fact that only a minority of the board's members were lawyers. On technical matters (in particular to review studies supporting the agency's decision or provided by the appellants), the BoA cannot rely on assistance from experts from within the agency, which would not be compatible with independence requirements, given their high degree of specialisation within the agency. The BoA may need to hire an external expert to support its members in some of cases. This organisational design, in which a board of part-time members relies essentially on their own work and skills to review the technical reasoning underlying decisions prepared by a staff of experts within ACER and the NRAs, limits the extent of the review of the merits ACER's decision, how deep the experience and skills of board members may be.

The administrative arrangement organises the provision of independent outside expertise, in particular through **framework contracts** for specialised legal advice.

As it is difficult to predict the number of cases, the budget and staffing of the registry are challenging. So far, the agency has always been supportive in adjusting the budget and organising recruitments to avoid shortages in the board's operations.

35 Apart from their procedural components or from decisions on interventions.

Chart III – budget of ACER's BoA

	2016	2017	2018	2019	2020	2021	2022
Initial adopted budget	49,000	54,000	54,000	130,000	72,000	1,050,000	682,000
Final adopted budget		54,000	49,000	164,000	711,000	950,000	682,000
Commitments	26,335	46,000	34,000	149,000	706,000	904,000	
Payments made	26,335	50,000	35,000	119,000	215,000	1,147,000	

In the view of the permanent flow of highly complex cases, of the clarification of the role of the BoA and of the cost of external assistance, a different balance between the work of members, the assistance of the registry and external experts could be considered, with an increased and more continuous staffing of the registry. This would ensure the fluidity of the handling of cases and an appropriate level of independence.

2. The decision practice of ACER's second board of appeal (2016-2021)

During our mandate (2016-2021), the BoA issued 19 decisions on 29 appeals[36]. 15 of these decisions dismissed the appeals, one annulled ACER's decision and 3 remitted the case to the director of the agency. 10 of the BoA's decisions were challenged before the General Court which, to date, has annulled 4 of them and rejected 3 appeals.

The BoA's practice has adjusted to the limitation of its powers, which initially included the ability to exercise any of the ACER's powers, and to annul its decisions, and has been limited under the new ACER regulation, to confirming them or remitting the case to the competent body (2.1). The imposition by the regulation of the BoA as a gateway to the Court of Justice has led to paradoxical consequences, in particular as regards the remedies that can be sought by appellants, and to a restriction of parties entitled to appeal (2.2). Appeals before the BoA have focused on a limited number of areas, which include sensitive and disputed questions of major importance for the integration of European energy markets, on the assessment of which which the board has exercised an increasingly detailed degree of scrutiny (2.3).

2.1 Powers which have been limited under the new ACER regulation

The main question the BoA has been faced with during our mandate with respect to its powers related to its ability to annul ACER's decisions, which was not explicitly mentioned in the initial regulation, and has been removed in the new regulation.

Under regulation (EC) n° 713/2009

Art. 19(5) of regulation (EC) n° 713/2009 of 13 July 2009 provided that, as the all the other boards of appeal which had been previously established in EU agencies (CPVO, ECHA, EASA in the former regulation, EUIPO)[37], the BoA of ACER "*may exercise any power which lies within the competence of the Agency or may remit the case to the competent body of the Agency. The latter shall be bound by the decision of the Board of Appeal* ". Although this was not explicitly stated in these provisions — no

36 As it consolidated the cases when several appeals were directed against the same decision.

37 Art. 72 of Council regulation of 27 July 1994 on Community plant variety rights (Community plant variety office, CPVO), art. 93(3) of regulation (EC) n° 1907/2006 of the European Parliament and of the Council 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency (ECHA), art. 49 of regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (EASA), art. 71 of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (EUTMR), codifying Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (as regards regards the EU intellectual property office).

more than in regulations establishing other agencies except EUIPO[38] – and could not be indirectly inferred from the regulation[39], **the BoA considered that the scope of its powers included the power to annul ACER's decision**, consistently with the practice of other BoAs.

The BoA used this power in only one instance, in which the decision of ACER's director selecting the web-based booking platform for the allocation of gas transmission capacities at the Mallnow interconnection point between Poland and Germany (the Polish and German TSOs and the NRA having failed to agree) had been appealed by another candidate. It annulled the decision due to the absence of proof that the agency had used a predetermined evaluation method (14 February 2019, *PRISMA European Capacity Platform GmbH*, A-002-2018). It remitted the case to the agency, with the option of reiterating the evaluation of offers or the entire procedure.

The power to amend and replace the agency's decision which was given to the BoA was not realistic, given the timeframe the board had to perform its review and the fact that it cannot rely on the support of technical staff nor consult stakeholders on amendments.

Under regulation (EU) 2019/942

The BoA's powers have been restricted in regulation (EU) 2019/942 which, following the model of more recent regulations on boards of appeal (European Supervisory Authorities [ESAs], SRB, ERA, EASA in the new regulation)[40], provides that the BoA " *may confirm the decision, or it may remit the case to the competent body of ACER. The latter shall be bound by the decision of the Board of Appeal* " (art. 28(5)). The consequences of this change of wording have been debated. The practice of these other BoAs, when they find that the grounds for appeal are founded, is to **remit the case to the agency without annulling its decision**[41]. ACER's BoA has followed the same approach under the new regulation, in the three cases where it ruled that an appeal was well-founded (22 May 2020, *E-Control and others*, A-001-2017 R[42]; 24 September 2020, *ENTSO-E*, A-007-2020; 19 April 2021, *PSE*, A-009-2020).

This limitation of its powers suppresses a key element which likened its role to an administrative review, since it can no longer exercise the powers of the agency. Yet it also has lost the power to annul the decision, which is a usual feature of a judicial review of administrative decisions. The BoA is only left with the option of sending the decision back to its author, with **binding motives**.

The appeal has no suspensory effect. The BoA has kept the power to suspend the application of the contested decision if it considers that circumstances so require[43], but has never used it. This power to suspend becomes particularly relevant in cases where the BoA remits the case to the Agency, in a legal context under which it considers it may no longer annul it. Suspension should probably not be systematic (which would amount to an annulment), but the issue of letting a decision continue to produce legal effects despite a finding of illegality should be weighed against the consequences of a suspension on the interests at stake.

38 Art. 22(1) of Commission Delegated Regulation (EU) 2017/1430 of 18 May 2017.

39 Which did not specify whether the agency had the power to repeal or to annul its decisions and whether it could do so *ex nunc* (from the point of the new decision onward) or *ex tunc* (retroactively, from the outset).

40 Art. 60(5) of regulation (EU) n° 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), art. 85 of regulation (EU) n° 806/2014 of the European Parliament and Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund (Single Resolution Board), art. 62 of regulation (EU) 2016/796 of the European Parliament and of the Council of 16 May 2016 on the European Union Agency for Railways (ERA) and art. 113 of regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency.

41 BoA of ESAs, 27 February 2019, *Svenska Handelsbanken AB & others v. ESMA (Shadow ratings)*, D-2019-01 to 04 ; SRB Appeal panel, 11 April 2019, case 4/2019, 15 April 2020, case 9/2019.

42 "*Regulation 2019/942 does not vest any body of the Agency with the power to annul the Contested decision with a retroactive effect* " (pt 47).

43 Article 19(3) of regulation (EC) n° 713/2009 ; article 28(3) of regulation (EU) 2019/942.

The question of whether the BoA has indeed lost its power to annul ACER's decision, and of the circumstances in which a remittal of the case to the Agency should result in a suspension of the initial decision pending the new one, could be clarified in future amendments to the ACER regulation.

2.2. A narrow gateway to the Court of Justice

The BoA is a gateway to the Court of Justice: the most substantial decisions of ACER – many of which are of regulatory nature-, listed in article 2 d of the ACER Regulation, cannot be challenged directly before the General Court, but only indirectly through appeals against the BoA's decisions. This leads to paradoxical consequences. The annulment of ACER's decision can be sought neither before the BoA nor before the Court. Appellants must go through the BoA to have access to the Court and indirectly challenge ACER's decisions, on grounds which in some cases cannot be raised before the board. The provisions of the ACER regulation defining the parties entitled to bring an appeal before the BoA are narrower than those defined by the TFEU for appeals before the Court.

An exhaustive list of decisions appealable before the BoA

The scope of decisions which are appealable before the BoA is strictly defined in the ACER regulation, by reference to an exhaustive list of their legal bases (see above, 1.3 and chart I). These decisions also include the failure to act within the applicable time limits[44].

As a consequence, in its first two decisions (taken during its first mandate) the BoA dismissed as **inadmissible** appeals against a **non-binding opinion** of ACER (16 December 2015, *E-control*, A-001-2015 ; APG, A-002-2015)[45], which is **not a decision**. For the same reason, it dismissed an appeal against **REMIT debit notes**[46], which are **not among decisions listed in article 2(d)** of regulation 2019/942 (31 May 2021, *Vp Energieportfolio*, n° A-008-2021).

A gateway to the Court of Justice

Article 20 of regulation n° (EC) 713/2009 provided that actions before the Court of First Instance of the Court of Justice could only be brought against decisions of the BoA or against decisions of ACER which were outside of the BoA's jurisdiction. This seemed to imply that the BoA was a mandatory gateway, **excluding any direct action before the Court against ACER's decision on matters which were within the BoA's jurisdiction.**

In the first cases where parties had brought such direct action, the Court dismissed the appeal as inadmissible on other grounds : because it targeted an opinion and not a decision (Judgement of 19 October 2016, *E-control v. ACER*, T-671/15), or because it was brought after the expiry of the period of two months specified in article 263 TFEU (Judgement of 24 October 2019, *APG and VUEN v ACER*, T-333/17, pt 33). In the Aquind case, the General Court dismissed the appeal as inadmissible in so far as it directly sought the annulment of ACER's decisions (Judgement of 18 November 2020, *Aquind ltd v. ACER*, T-735/18, § 34) by analogy with a precedent on EASA's BoA (Judgement of 11 December 2014, *Heli-Flight GmbH & Co. KG v EASA*, T-102/13, pts 22 to 31).

In matters which fall within the BoA's competence, **the Court may only annul decisions of the BoA** rejecting the appeals against ACER's decisions, even if the annulment derives from the illegality of ACER's initial decision (Judgement of 24 October 2019, *E-control v. ACER*, T-332/17; *APG and VUEN v ACER*, T-333/17, cancelling the BoA's decision for having ruled that the Agency was competent to decide on the matter[47]).

44 Pursuant to art. 29 of Regulation 2019/942. Under art. 19(2) of regulation n° 2009/713, actions against ACER's failure to take a decision were brought directly before the court of first instance.

45 Confirmed by the General Court of the EU (EGC), Judgement of 29 June 2017, *E-control v. ACER*, T-63/16.

46 Regarding fees due by each reporting party to ACER for collecting, handling, processing and analysing of information reported under the REMIT Regulation.

47 In cases where the appellants before the Court had not directly sought the annulment of ACER's decision, unlike in the precedents mentioned in the previous paragraph.

The new wording of article 29 of regulation (EU) 942/2019 seemed to allow direct actions against ACER's decisions before the General Court after the exhaustion of the appeal procedure before the BoA[48]. However, the Court continues to dismiss direct appeals as inadmissible (Judgement of 16 March 2022, *MEKH and FGSZ v ACER*, T-684/19 and T-704/19, pts 29-42 ; Judgement of 7 September 2022, *BNetzA v ACER*, T-631/19, pt 28).

The pleas in law and arguments before the Court on irregularities relating to the initial decision, such as a lack of grounds or insufficient grounds for that decision, are in principle dismissed as ineffective as the Court can only rule on the legality of the BoA decision, which replaces ACER's decision (*BNetzA v ACER*, T-631/19, pts 28 and 82, by analogy with Court of Justice, Judgement of 28 January 2016, *Heli-Flight GmbH & Co. KG v EASA*, C-61/15 P, pt 84). However, to the extent the decision of the BoA is based on the grounds stated in the initial decision and confirms them, the pleas and arguments directed against those grounds must be found to be fully effective for the purpose of reviewing the legality of the BoA's decision (*BNetzA v ACER*, T-631/19, pt 28).

Paradoxical consequences

As a consequence, **the annulment of ACERs decision can be sought neither before the BoA,** which has lost the power to annul, **nor before the Court**, which rejects conclusions to this effect as inadmissible.

When the Court annuls the BoA's decision for a reason which derives from the illegality of ACER's initial decision, the only option for the BoA – if the appellants indicate they wish to continue the proceedings — is to send the case back to the director, who will repeal or amend his decision, or refer the matter to the competent party.

This can lead to counter-intuitive outcomes. The General Court annuled the first decision taken by the BoA during our mandate (17 March 2017, *E-Control and others*, A-001-2017 Cons.), which had incorrectly ruled that ACER was competent to adopt a decision on the establishment of capacity calculation regions (CCRs) pursuant to the CACM regulation (Judgements of 24 October 2019, *E-Control v. ACER*, T-332-17, *APG and VUEN v. ACER*, T-333-17)[49]. The BoA reopened the case, and the only possibility it had — having lost in the meantime the power to annul ACER's decision — was to remit the case … to the director of ACER, with motives specifying that ACER should refer the decision to the competent party or parties (based on the rules of competence provided for by current regulations) to allow them to amend it, replace it or confirm it, as they saw relevant, and based on current circumstances (22 May 2020, A-001-2017 R).

The limits of the competence of the BoA as a mandatory gateway have led to a complex situation in the HUAT case, which related to a project for the creation of increased gas transmission capacity at the interconnection point between **Hungary and Austria**, pursuant to Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems (the **CAM Regulation**)[50]. The project of the two TSOs (FGSZ and GCA) had been approved by the Austrian regulator and rejected by its Hungarian counterpart, MEKH. The BoA dismissed the appeals filed by FGSZ and MEKH against the decision of ACER approving the proposal (6 August 2019, A-004-2019 Cons.).

The General Court cancelled the BoA's decision on the basis of a plea of illegality that had not and could not have been brought before the BoA. It ruled that regulation (EU) n° 715/2009 and directive 2009/73/CE intended for the implementation of relevant EU rules on network development and the creation of incremental capacity to come within the competence of the Member States alone. The Commission had not been empowered to adopt the provisions set out in chapter V the CAM

48 "*Actions for the annulment of a decision issued by ACER pursuant to this Regulation and actions for failure to act within the applicable time limits may be brought before the Court of Justice only after the exhaustion of the appeal procedure referred to in Article 28. ACER shall take the necessary measures to comply with the judgments of the Court of Justice*."

49 As one NRA had requested an amendment to the TSOs proposal. Se below, 2.3 (1).

50 The CAM Regulation is one of the 5 gas network codes.

Regulation which, in certain cases, compelled TSOs to create incremental capacities by making the necessary investments. As a consequence of the illegality of these provisions, the BoA's decision, which had applied them, was annulled. The question of the validity of the CAM regulation or any other network code had not been raised before the BoA, and could not have been successfully, since " *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 its inapplicability (Judgement of 16 March 2022, *MEKH and FGSZ v ACER*, T-684/19 and T-70, pts 50 and 51[51]). If it had been raised, the BoA would have had to apply this chapter and to dismiss the plea.

To sum up the paradoxes of this case : the parties were compelled to go through the BoA to have access to the General Court in order to raise a plea of illegality which could not have been submitted to the BoA, and to eventually obtain the annulment of the BoA's decision. To our knowledge, ACER's decision does has not been formally repealed since the Court's judgement.

A narrow definition of the admissibility of appeals *ratione personae*

Appeals against a decision of ACER may be brought before the BoA by any natural or legal person, including NRAs, (i) to which such decision is addressed or (ii) to which such decision "*although in the form of a decision addressed to another person, is of direct and individual concern to that person*"[52]. Unlike article 263(4) of the TFEU, the ACER regulation does not mention the ability to appeal "*against a regulatory act which is of direct concern to them and does not entail implementing measures*". This reflects the fiction according to which ACER does not issue any regulatory act (see above 1.2). It results in a very strict definition of admissible appellants.

During the mandate of the second BoA, all appeals but two have been submitted either by **addressees** of the challenged decision (18 byTSOs, 2 by ENTSO-E, 2 by candidates in a tendering process, 1 by a debtor) or by **NRAs** (6 appeals).

In the two only cases where one of the appellants had none of those qualities, the BoA dismissed their appeals as inadmissible. It found that Verbund AG[53] had no direct interest to challenge the decision on CCRs as a shareholder of a TSO, and it dismissed its arguments on a direct and individual concern on other grounds[54] (17 March 2017, *E-Control and others*, A-001-2017). It ruled that Vereniging Energie Nederland[55] had not established that the methodology to determine price for the balancing energy that results from the activation of balancing energy bids directly affected its members (i.e. that it directly affected their legal situation and left no discretion to its addressees), nor that it was of individual concern, i.e. that it affected the interest of its members alone (16 July 2020, *Tennet and Vereniging Energie Nederland*, A-003-2020).

These decisions reflect a **restrictive case law** on the admissibility of appeals before European Courts, based on the same terms of "***direct and individual concern***" used by art. 263(4) of the TFEU. Yet the ACER regulation acknowledges that ACER's decisions have effects on "*other persons*" than their addressees. Such "*other persons*" should include NRAs, but not exclusively.

In recent decisions on appeals against an amendement to the same methodology as in the *Tennet and VEN* case, which set a new price limit (of +/- 15,000 EUR/MWh) for bids, the BoA (our successors) ruled that the decision was of direct concern, as the appellants, in the view of the most recent case law[56] demonstrated that it left no discretion to TSOs in its implementation, and directly affected their legal situation by preventing them from submitting bids outside this range. Yet the fact that the appellants were electricity providers which were active on the balancing market was not sufficient to establish an individual concern, since the decision also affected the interests of other

51 Referring to 27 October 2016, *ECB v Cerafogli*, T-787/14 P, § 49.
52 Article 19(1) of regulation (EC) 713/2009 and article 28(1) of regulation (EU) 2019/942.
53 Which holds 100% of shares in Austrian Power Grid AG.
54 In a paragraph which we cannot comment since it is confidential and does not appear in the published version.
55 A collective representative association of energy producers, traders and retailers in the Netherlands.
56 Judgement of 12 July 2022, *Nord Stream 2 AG v European Parliament and Council of the European Union*, C-348/20.

competing companies, of companies active on other markets and of final customers (9 December 2022, *RWE*, A-002-2022 ; *Uniper Global Commodities SE*, A-003-2022). It also noted that, since the decision was a regulatory act and did not entail any implementing measures, the appeals would be admissible if article 263(4) TFEU applied to proceedings before the BoA, but were not pursuant to **the ACER regulation**, which does not include similar provisions, and as a consequence **sets out more restrictive admissibility criteria for appeals before the BoA than the TFEU does for appeals before the European Courts**. "*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*"[57]. Uniper and RWE have both filed appeals before the General Court (T-95/23 and T-96/23), which could contribute to clarify this situation.

Limited options for other forms of contributions to the BoA's proceedings

The ACER regulation does not include any provisions on interventions nor on any other form of participation of other persons in the BoA's proceedings. However, the RoP provide that "*any person establishing direct and existing interest in the result of the case submitted to the Board of Appeal may intervene in the proceedings*" and sets out a procedure to do so. These criteria are inspired by case law on interventions before the Court of Justice.

Interventions – in support of the appeal or of its rejection — may be submitted within a limited timeframe from the publication of the announcement of the appeal. The BoA rules on the admissibility of interventions at an early stages of proceedings, in order to grant effective access to non-confidential documents of the procedure to admitted intervenants.

The BoA received up to 19 leaves of intervention per appeal in the 4 consolidated appeals against ACER's decision on capacity calculation regions (A-001-2017 consolidated). A majority of admitted interventions are submitted by NRAs - in support of the agency's defence or of the appeals. A minority comes from addressees of the decisions. Other intervenants have not succeeded in establishing a direct and existing interest in the result of the cases (industry associations and energy companies in the CCR, Prisma, FRRIF and Core RDCT methodology cases)[58]. The BoA ruled on the admissibility of interventions on basis of case law on interventions before the Court of Justice. Two appeals against its decisions dismissing interventions were rejected by the General Court (Judgements of 20 September 2018, *Exaa Abwicklungstelle für Energieprodukte AG*, T-123/17 ; *Mondi AG*, T-146/17). Some interveners presented applications for leave to intervene before the General Court in cases against the BoAs decision. The Court came to the same conclusions as the BoA on their admissibility, except for Verbund in the CCR case[59].

Hence interventions — as they have been conceived in the RoP – have not been a way of opening the proceedings beyond the closed circle of potential appellants.

The RoP also provides for the possibility to hear experts or witnesses during formal hearings. The BoA has seldom used them during our mandate[60].

The quasi-judicial nature of the procedure before the BoA, as it was conceived by the ACER regulations, does not leave significant room for interactions with a broader range of stakeholders.

57 The frequency of this situation depends from the number of decisions of ACER qualifying as regulatory acts which do not entail implementing measures, which depends on the architecture of the implementation of network codes.

58 Cases A-001-201 Cons., A-002-2018, A-001-2020 Cons., A-002-2020 Cons.and A-001-2021 Cons.

59 Judgements of 24 October 2019, E-Control v. ACER, T-332-17, APG and VUEN v. ACER, T-333-17 (points 13 to 17). Neither the Court's orders nor the BoA's decisions are interventions are published.

60 It heard witnesses proposed by the appellants in the Aquind (A-001-2018) and HUAT (A-004-2019) cases.

2.3. A brief summary of cases reviewed by the second BoA

Appeals before the BoA have focused on a limited number of areas, which include **sensitive and disputed questions of major importance for the integration of European energy markets** : the definition of regions and of methodologies which structure the flows and exchanges of electricity — such as CCRs, or methodologies establishing priorities between external and internal flows — and the operation of networks (system operation regions), and bilateral disagreements between NRAs on the development or operation of interconnection capacities[61].

The following summary follows a chronological approach to these cases (in which it is difficult to separate matters of procedure and of substance), breaking them down between 3 periods, with differences in parameters structuring the BoA's review : the regulation governing the BoA's review and ACER's competence and the BoA's approach as regards the depth of its control.

2.3.1. Regulation (EC) n° 713/2009 and the transition between the two regulations (2017- July 2019)

Under regulation (EC) n° 713/2009, the BoA had to issue its decisions within **two months**. During our mandate, the BoA took three decisions within this timeframe, and decided to **limit its control of the merits of the case to manifest error**. The regulation also imposed **strict procedural constraints to determine ACER's competence** to step in the decision process.

3 of the 5 decisions the BoA took during initial this period were annulled by the General Court, which invalidated its approach of limited control and part of its (pragmatic) interpretation of the conditions and scope of ACER's decision power (on which the ACER regulation was subsequently adjusted), and ruled that the BoA should review cases in the view of the examination the situation, in fact and in law, at the time it made its decision (and not at the time of ACER's decision).

Germany and Austria operated between 2002 and 2018 as a single electricity bidding zone, with a uniform price. This meant there was no constraints on transactions within that zone, regardless of the actual physical capacity and flows on the transmission network. However, the lack of transmission capacities between the North and the South of this zone resulted in "*loop flows*", with electric currents bypassing the congested parts of the direct lines within the zone and passing through the netwoks of neighbouring countries. The two decisions taken by the BoA during its first mandate had dismissed appeals against a non-binding opinion of ACER on this issue[62] (as inadmissible, 16 December 2015, *E-control*, A-001-2015 ; APG, A-002-2015). Three of the five first decisions taken by the BoA during our mandate relate to this matter.

1. The CACM Regulation provides that by 3 months after its entry into force, TSOs were to jointly develop a common proposal for the **determination of CCRs**, including the definition of the bidding zone borders, which all NRAs were to jointly approve within 6 months. This proposal included the establishment of a bidding zone border between Germany and Austria. After E-control, the Austrian regulator, requested TSOs to amend their proposal in particular by removing this border, the chair of the energy regulators' forum (ERF) referred the matter to ACER, which approved the proposal, subject to an amendment merging the central west Europe (CWE) and central east Europe (CEE) CCRs into the Core CCR[63].

61 Between France and the UK, Hungary and Austria, and Poland and Germany.

62 On the compliance of decisions of the NRAs approving the methods of allocation of cross-border transmission capacity in the CEE region with regulation (EC) n° 714/2009 and with the guidelines on the management and allocation of available transfer capacity of interconnections between national systems. See appendix II, 1.1..

63 Which includes the bidding zone borders between France, Belgium, the Netherlands, Germany/Luxembourg, Poland, Austria, the Czech Republic, Slovakia, Hungary, Slovenia, Croatia and Romania. There are 9 other CCRs : Baltic, Nordic, Hansa, Ireland-UK, Channel, South East Europe, Italy North, Greece-Italy, South East Europe.

In its decision of 17 March 2017 (A-001-2017 cons.), which is the first it issued on the merits of a case, the BoA dismissed the appeals filed by E-control and by the Austrian TSOs. It ruled on several difficult legal questions : that ACER was competent to decide on the TSOs proposal, despite the fact that one NRA had requested an amendment to this proposal, as well as to amend this proposal and to decide on bidding zone borders in a decision on CCRs. Preventing ACER from using the arbitration procedure provided for by article 9(11) of the CACM regulation — which is designed to adopt a decision when the NRAs have not been able to reach an agreement — in a case where a single NRA disagrees with all the others, would render such procedure ineffective. As regards the proof of the existence of a congestion on the German-Austrian border, the BoA, considering the limited time it had to decide, the complexity of economic and technical issues involved and ACER's margin of appreciation, ruled that it should not carry out its own analysis of the correct methodology to define congestion but **control only whether the ACER made a manifest error of assessment**. It concluded, rather abruptly, that the appellants had not established such error.

The BoA's decision was appealed before the General Court which, after 2 and a half years of procedure, annulled it on the grounds of an **error of law on ACER's competence**. On the basis of an interpretation of the combination of the CACM and of the ACER regulation, the Court considered that an amendment request by a single NRA within the 6 months period could prevent the NRAs from referring the matter to ACER, and impose a new procedural loop with two months for the submission of an amended proposal and two months for its approval (Judgement of 24 October 2019, *E-control v. ACER*, T-332/17, § 51, *APG and VUEN v ACER*, T-333/17, § 60). The issues raised by this case probably contributed to the change in the decision procedure on the implementation of network codes in regulation (EU) 2019/942, which in the meantime (before the General Court's judgement) had given ACER a direct power of approval and amendment on decisions previously submitted to the approval of all NRAs.

2. The BoA's second decision concerns an undersea electricity interconnector between France and Great Britain. **Aquind** submitted a request to each of the regulators for exemptions from certain regulatory requirements laid down in Regulation (EC) n° 714/2009. CRE found that it was"*not in a position to decide whether any new interconnector project between France and the United Kingdom is beneficial to the EU*" before the conditions of withdrawal of the UK from the EU were clarified. CRE and Ofgem referred the case to ACER, which rejected the exemption request, among other reasons, on the grounds that Aquind, which had not applied for financial support as a PCI, did not establish the risk of a lack of 'financial underpinning'. The BoA[64] dismissed Aquind's appeal (17 October 2018, A-001-2018), considering that ACER had not erred in law nor committed a manifest error in assessing whether the level of risk required for an exemption was reached (in particular in assessing legal restrictions in France and the ability to secure financing, pts 75-99).

Aquind appealed the BoA's decision before the General Court, which cancelled it, after 2 years of procedure, on the grounds that the **BoA had erred in law by deciding to limit its review**, as regards complex and technical assessments underlying ACER's decision, **to a control of manifest errors**. The Court considered that the provisions of regulation (EC) n° 713/2009, which had provided the BoA with expert members and with "a power of discretion" (in the exercise of the agency's powers) and barred direct actions before the General Court (which limits itself to performing a review of manifest errors in cases where authorities have a broad discretion in relation to highly complex technical facts), supported the finding that the BoA was not established to perform a limited review, in spite of the fact that it relies on part time members and has less resources than other BoAs[65] (which it is the onus of the agency to adjust). The Court added, for the sake of completeness, that ACER, and the BoA in confirming its decision, had also erred in law by establishing a condition (request for financial support as a PCI) which is not laid down in Regulation n° 714/2009 (18 November 2020,

64 By application of the conflict of interest rules, the members deciding on this case did not include one of the authors, who had been general manager of CRE until a few months before its deliberation on this case.

65 ACER had mentioned in its defence before the Court that the members of the BoA of ECHA were employed full time and relied on the support of 11 full time members staff for the provision of legal assistance and secretariat services.

Aquind Ltd v. ACER, T-735/18). ACER appealed it before the Court of Justice, which dismissed its appeal, confirming the General Court's judgement on the first point (Judgement of 9 March 2023, *ACER v Aquind Ltd*, C-46/21 P).

The challenge of the extent the the BoA's review in this case had a major impact on our practice: while continuing to affirm (until the Court's judgement) the limits of its review of the agency's assessments, the board progressively increased the depth of its scrutiny.

3. The third case, on the selection the booking platform for the allocation of gas transmission capacities at the Mallnow interconnection point between Poland and Germany, has been mentioned above, as the only decision in which **the BoA used its power to annul a decision**. It was motivated by the absence of proof that ACER had used a predetermined evaluation method to select the best offer, resulting in an infringement of the duty to duly reason its decision and to document the procedure leading to it, in breach the principle of good administration, which rendered the BoA unable to review whether it had made a manifest error in its evaluation (14 February 2019, *PRISMA European Capacity Platform GmbH*, A-002-2018).

In two cases, the parties agreed to extend the duration of the procedure to 3 months, with the unanticipated result (recently revealed by the General Court's judgement) of changing the applicable legal framework.

4 and 5. The CACM regulation also provides for the development of a common coordinated capacity calculation methodology (CCM) in each CCR, which its TSOs were to propose 10 months after the approval of the establishment of the CCR. In the case of the **Core CCR**, after receiving an amended proposal from TSOs, the chair of the ERF informed ACER that the NRAs has not reached an agreement, and requested the extension of the deadline or a decision on the amended proposals. ACER took a decision on the intraday and day-ahead Core CCMs, which was appealed before the BoA by two German TSOs and by the German regulator. They challenged the determination of (i) the minimal level of remaining available margin for cross-zonal exchanges (min-RAM)[66], at 70% instead of 20% in the TSOs proposal, and the resulting limitation of reliability margins, of intra-zone exchanges and of loop flows, and of (ii) the critical network elements and contingencies (CNECs) which were the basis of the calculation.

The BoA dismissed the three appeals (11 July 2019, *Amprion BW GmBH and Transnet BW GmBH*, A-001-2019 Cons; *BNetzA*, A-003-2019). **It considered that ACER's competence was not limited to issues on which NRAs had disagreed and that it had the power to amend the TSOs proposal** on the minRAM. It noted that decisions on zonal congestion management aimed at reaching an acceptable and optimal discrimination between internal and cross-zonal trade, and were set to create a fully functional internal market : " *A low level of cross-border exchanges limits the transport of electricity between Member States, discriminates between network users in different parts of the network, distorts competition between market participants, does not provide the correct incentives and efficient economic signals to TSOs and can result in free-riding on neighbouring networks via loop flows*. " It dismissed the pleas that ACER had violated the obligation to closely collaborate with NRAs, that the determination of the minRAM and CNEC was not duly justified, that it was erroneous[67] and that it had unlawfully limited loop flows. It found the decision needed to be assessed in the view of the "*significantly adverse impact that the existing internal congestions within Germany have on consumers outside Germany*", and not just from the narrow focus of its impact on the consumers of one country. **Though it reaffirmed that its control was limited to manifest error, the BoA provided a detailed reasoning on these pleas[68]**. It also noted the decision had correctly relied on regulation n° 714/2009, and not on an anticipation of rules set out by article

66 Min-RAM is the share of the maximum allowable flow at interconnections which is reserved for exchanges across bidding zones. This sets a limitation on the maximum availability for the rest of the capacity (internal flows, loop flows and reliability margin).

67 In particular as regards the discrimination between internal and cross-zonal trade and the decision's impacts on operational security and redispatching costs.

68 In decisions of respectively 252 and 192 paragraphs.

16(8) regulation (EU) 2019/943 of 5 June 2019 (which establishes a mandatory minRAM of 70% of CNECs). Arguments on potential inconsistencies with this regulation, which had not been adopted at the time of ACER's initial decision, were dismissed as irrelevant.

BNetzA appealed decision A-003-2019 before the **General Court**, which **ruled that the BoA's decision should be regarded as replacing ACER's initial decision**[69](based on an analogy with the *Heli-Flight/AESA case*, see above, 2.2), and thus definitively establishing the agency position on the matter following a full **examination by the BoA of the situation, in fact and in law, at the time it made its decision**. It determined the applicable law, *ratione temporis*, in consideration of this substitution. This had an unfortunate consequence, as the BoA had issued its decision on 11 July 2019, after 2 months and 16 days of procedure, and … 7 days after the entry into force of regulation (EU) 2019/943. The Court ruled that the BoA was obliged to determine whether the CCMs approved by ACER in the initial decision complied with the rules emanating from the new provisions, and had erred in law by not doing so. It annuled the BoA's decision. However, the Court **dismissed the plea that ACER's competence to decide was confined to points of disagreement between NRAs**, based on regulation (EU) 2019/942, which it applied to the entire procedure[70] (Judgement of 7 September 2022, *BNetzA v ACER*, T-631/19). A direct appeal of Germany against ACER's initial decision is still pending (T-283/19). The way the annulment of the BoA's decision will impact the CCMs approved by ACER (which have since been amended) is unclear to the authors[71].

2.3.2. From the entry into force of regulation (EU) 2019/942 to the judgement of the General Court on the Aquind case (July 2019 - November 2020): towards a full review of complex and technical assessments

The new regulation extended the timeframe for the BOA's review to 4 months and limited its power. It also simplified the rules applying to ACER's competence. While the BoA reaffirmed its initial approach of a limited control on the merits of ACER's decision (until it was invalidated by the General Court in the Aquind case), **it reviewed ACER's assessments with an increasing degree of detail**, on complex, technical and highly disputed issues, in a manner that de facto, complied with its obligations as regards the intensity of the review, as recently judged by the General Court, which rejected the appeals targeting two decisions decisions issued by the BoA during this period.

6. The context of the **HUAT case** and the reason for which the BoA's decision was **annuled by the General Court**, have been presented above (2.1). The BoA dismissed the plea that ACER was neither competent to amend the proposal nor to oblige a TSO to execute an investment in incremental capacity which could not be passed on through the regulated tariff. It found that the obligation to build the project did not derive from ACER's decision, but directly from the CAM regulation, and was conditional upon the results of the economic test and of an auction. It dismissed the plea that parameters for the economic test were not clearly defined and that it was not executable. It found that the CAM regulation did not require a cost benefit analysis or an alternative modelling analysis to be conducted, and that the appellants did not establish that ACER had comitted a manifest error in assessing the impacts of the project, in particular on competition and on the HUSKAT pipeline, nor that the decision was insufficiently reasoned (6 August 2019, A-004-2019 Cons.). While reaffirming in this case as in the following ones that it limited its control to manifest error, it extensively reviewed the reasoning of ACER on these matters (pts 227 to 308).

7. Following the annulment of its decision in the Prisma case, ACER ran a new procedure, resulting in the selection of a new candidate, which was challenged unsuccessfully before the BoA. It provided a detailed response to the pleas on the assessment of the offers as regards the evaluation and scoring of case studies (7 February, 2020, *GSA*, A-006-2019, pts 143 to 199). GSA's appeal against the BoA's decision is still pending before the General Court (T-212/20).

69 Even following the limitation of its power by the new regulation.

70 On this matter, the change in the applicable regulation had no obvious effect on the powers of ACER which, in the case of regional methodologies to be approved by all NRAs in a given region, steps in only in case of disagreement or of referral by NRAs (by contrast with proposals submitted to the approval of all NRAs within the EU, see above 1.2).

71 The amended version of the Core ID CCM, dated 19 April 2022, mentions that it brings about targeted improvements in areas that are not the subject of the actions before the General Court.

8. The BoA **relaunched the CCR case** following the annulment of its first decision by the General Court (cf. 2.1), and remitted the matter to ACER's director, specifying that he should refer the decision to the party or parties which were competent under the current regulation (22 May 2020, A-001-2017 R). ACER's director invited all TSOs to prepare an proposal for the determination of CCRs, taking into account the relevant developments since ACER's previous decision, and approved (on the basis of the direct competence it had acquired pursuant to regulation (EU) n° 2019/942) the proposal submitted by ENTSO-E on their behalf, subject to several amendments.

9 to 11. Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a **guideline on electricity balancing** (EB) (the EB Guideline) sets down rules on the operation of balancing markets, i.e. the markets that TSOs use to procure energy and capacity to keep the system in balance in real time. Balancing energy can be provided in real-time or secured in advance as balancing reserve products (BRPs)[72]. Three types of BRPs are available, which are part of a sequential process based on successive layers of control: frequency containment reserves, frequency restoration reserves (FRRs) and replacement reserves (RR). The EB Guideline foresees the creation of common European platforms to exchange balancing energy from FRR and RR. All TSOs were required, within one year, to develop common proposals on the implementation framework for aFRR and mFRR[73] on these platforms and on the methodology to price balancing energy and cross-zonal capacity resulting from the activation of balancing energy bids. The matter was referred to ACER by NRAs, which had failed to reach a unanimous decision.

7 TSOs filed joint appeals against each of ACER's decisions on aFRR and mFRR and TenneT filed an appeal against the two decisions. The TSOs' amended proposals provided for the designation of a single TSO the perform the activation optimisation function (AOF)[74] and the TSO-TSO settlement function (`TTSF)[75], and for the *ad hoc* designation, each time the capacity management function [CMF) was implemented[76], of a TSO which could be different for the former. ACER's decisions provided that the AOF/TTSF entity could as well be a company owned by TSOs, and requested the TSOs to propose amendments to designate the same entity for the CMF function, or different entities (including a consortium) complying with art. 21(3)(e)[77] of the EB Guideline. The BoA dismissed the pleas that ACER had exceeded its competence by revising aspects of the proposals on which the NRAs were in agreement and by requesting the TSOs to submit an amended proposal, that the requirement for the platform to perform the CMF function and the imposition of a single entity structure violated the EB Guideline and the principle of proportionality, and that ACER had failed to properly consult the TSOs and NRAs. It found the decisions did not impose a single entity structure for the CMF (16 July 2020, A-001-2020 cons. and A-002-2020 cons.).

ACER's decision on the methodology to determine prices for the balancing that results from the activation of energy bids was appealed by TenneT TSO B.V. and Vereniging Energie-Nederland (VEN). The BoA ruled VEN was inadmissible (see 2.1) and dismissed Tennet's pleas. It found that setting prices per optimisation cycle (of one or few seconds) instead of imbalance setting periods (15 minutes) did not breach the EB Guideline nor give inadequate price signals and incentive and did not impose disproportionate measures in the view of the objectives of the integration of balancing markets and the efficiency of balancing processes (16 July 2020, A-003-2020).

The three decisions of the BoA are supported by a fairly detailed reasoning on the technical and economic elements underlying the agency's governance choices.

72 I.e. available generation or demand capacity that can be activated to inject or withdraw balancing energy into or from the network and balance the system real-time.

73 FRRs can be activated either manually (mFRR), e.g., by a phone call, or by means of an automated system in which auctions are made using algorithms (aFRR).

74 Which takes, inter alia, FRR demands, the common merit order lists and cross-zonal capacities as input and determines the amount of energy exchange between load-frequency control areas, aiming to ensure the activation of the most cost-efficient bids through an optimisation algorithm.

75 Which calculates the settlement between TSOs of intended energy exchanges as a result of the cross-border processes.

76 Which continuously updates cross-zonal capacities available for balancing energy exchanges on bidding zone borders and can be implemented in a decentralised or centralised way.

77 On the coherence of the allocation of functions and their coordination and on the efficiency of governance and of the decision making process to resolve conflicts between the entities operating in the platform.

The General Court recently dismissed appeals against decisions A-001-2020 and A-002-2020 (Judgements of 15 February 2023, *APG and others*, T-606/2020 and T-607/2020). **It confirmed**, under regulation (EU) 2019/942, **that ACER's competence to decide was not confined to points of disagreement between NRAs** (pt 60 of both decisions), as "*ACER has been granted, inter alia, regulatory functions and decision-making powers of its own, which it exercises independently and under its own responsibility, in order to be able to deputise for the NRAs when their voluntary cooperation does not allow them to take individual decisions on particular issues falling within their regulatory competence*" (pt 48). As regards the extent of the review performed by the BoA the Court found that, despite the fact that it reaffirmed that it had carried out a limited review of manifest error, a careful examination of the contested decisions showed that, in it, the BoA essentially focused its review on legal assessments made by ACER, with respect to which it exercised a full review and that in the rare cases where it was called upon to review complex technical assessments, the BoA in practice carried out a review which went beyond a mere limited review, so that, ***de facto*, it complied with its obligations as regards the intensity of the review** it was required to carry out (pts 203-204).

12. Regional cooperation on **electricity system operation** was initiated by the TSOs and the national authorities through voluntary regional initiatives in the 1950´s. These regional initiatives developed into the creation as of 2008 of voluntary Regional Security Coordinators (`RSCs´), offering non-binding services to the TSOs. The System Operation guideline and Regulation (EU) 2017/2196 establishing a network code on electricity emergency and restoration regulated these RSCs, to which the participation of TSOs was made mandatory. Regulation (EU) 2019/943 (the Electricity Regulation) replaces RSCs by regional coordination centers (RCCs) and extends the scope of their tasks[78]. Whereas the geographical scope of the RSCs corresponded to one or more CCRs and their number was limited to six, the Electricity Regulation does not limit the number of RCCs and provides them with a geographical scope of their own: **System Operation Regions** (SORs). It required ENTSO-E to submit to ACER a proposal for the definition of SORs, specifying which TSOs, bidding zones and borders, CCRs and outage coordination regions they cover.

While ENTSO-E's proposal defined 7 SORs, including Greece-Italy (GRIT) and South-West Europe (SWE), ACER's decision reduced their number to 5 : Central Europe (CE including SWE and GRIT), Nordic, Baltic, Ireland-UK (IU) and South East Europe. ENTSO-E appealed the decision before the BoA insofar as it did not include a SWE nor a GRIT SOR. ACER had essentially based its amendment of the proposal on its interpretation of article 36(2) of the Electricity Regulation as preventing any TSO from participating in several SORs. The BoA found that ACER had **failed to duly reason this amendment**[79] in relation with the criteria set out by article 36(1) : " (…) *grid topology, including the degree of interconnection and of interdependency of the electricity system in terms of flows and the size of the region which shall cover at least one CCR.* ". As a consequence of ACER's lack of substantial reasoning on these criteria, the BoA did not have the elements to rule on the pleas relating to the merits of the decision. It **remitted the case** to the director of ACER, after having dismissed the plea on the failure to consult as unfounded (24 September 2020, A-007-2020).

ACER issued a new decision on 29 June 2021 which repealed the previous one and reduced the number of SORs to 4, suppressing SWE (included in CE), GRIT (included in SEE) and of IU (following Brexit, Ireland being included in CE). ENTSO-E appealed this new decision, claiming inter alia, that ACER had breached the obligations to state reasons, since it had not disclosed the calculations supporting it's modelling. ACER acknowledged that this omission could have had an influence on the proceedings and the content of the decision, and withdrew its decision on 19 October 2021. On 7 April 2022, it eventually decided to maintain SWE as a separate SOR, as proposed by ENTSO-E. The fact that these two appeals before the BoA were filed by ENTSO-E (and are the only case in which it did) instead of some of its members reveals the extent of disagreements which were reached at one point on this major issue.

78 Which include functions of coordinated security analysis and of coordinated capacity calculation which are binding upon TSOs

79 Article 14(7) of regulation (EU) 2019/942 provides that " *Individual decisions of ACER shall state the reasons on which they are based for the purpose of allowing an appeal on the merits*. "

2.3.3. The formal endorsement of a full review (December 2020 – October 2021)

13. Within six months of the entry into force of the **EB Guideline**, TSOs were required to develop a common proposal on the imbalance netting implementation framework (INIF). The NRAs having requested amendments to the TSOs' proposal and failed to agree on their 4th proposal, the chair of the ERF referred the matter to ACER, which amended the proposal an adopted the INIF. RTE appealed this decision. The BoA dismissed the pleas, on substantially the same questions of governance than to those at stake in the appeals against the three other decisions on the implementation of the EB Guideline (above, 9 to 11) (22 December 2020, A-008-2020).

The judgement of the General Court in the *Aquind* case was issued a month before the end of this procedure. **The BoA's decision abandons the reference to a control of manifest error, but the depth of its review does not substantially differ from the one it had exercised on the same matte**r five months earlier, **with a high degree of detail**.

The conjuction of six cases, of which four were highly complex, in a period of two months, was a challenge which **stretched the board's resources and capacities to their limits** between January and May 2021.

14. Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation (the **FCA Regulation**) sets up a framework for the calculation and allocation of interconnection capacity and for cross-border trading in forward markets — i.e. timeframes longer than the day-ahead and intra-day markets covered by the CACM regulation. It requires TSOs to issue long-term transmission rights (LTTRs)[80] in explicit auctions[81], held for each bidding zone border. It foresees a methodology to distribute the congestion income (resulting from the auction of LTTRs) among TSOs (FCA CIDM). When LTTRs which have not been nominated and have been returned to TSOs (and to the day-ahead market, where they generate revenues which are allocated pursuant to the CACM CIDM), TSOs need to remunerate their holders . Within 6 months of the approval of the FCA CIDM, TSOs were to propose a methodology to share these costs among TSOs, namely the methodology for sharing costs incurred to ensure firmness and remuneration of LTTRs (FRCM). This methodology is interlinked with the CIDMs for both time horizons (FCA and CACM), and with the day-ahead and long term capacity calculation processes used at bidding zone borders (flow-based or coordinated net transmission capacity).

Pursuant to the new ACER regulation, the TSOs directly submitted their FRCM proposal for approval to ACER (instead of all NRAS). PSE, the Polish TSO, appealed ACER's decision, arguing that the FRCM might lead to a distortion in the primary distribution of congestion income, resulting in inefficient incentives, in breach of the FCA regulation and of the Electricity regulation, and that it was not supported by sufficient analysis nor reasoning. The BoA sought the advice of an independent technical expert to support its assessment of technical elements underlying this case. The BoA found that the compliance of the FRCM with certain provisions could not be assessed, given the uncertainties on the development of the flow-based approach in the implementation of the FCA (which will imply amendments to the FCA CIDM), and that the absence of a necessary contingency in the decision to ensure the consistency of FRCM with the FCA CIDM infringed other provisions and amounted to a failure to duly reason the decision. It remitted the decision to the Agency (19 April 2021, A-009-2020), which issued an amended decision on 4 October 2021.

15 to 17. Loop flows, which were a key issue in the first appeals reviewed by the second BoA, were also at the heart of the last three appeals on which it decided on merits, concerning methodologies in the **Core CCR**.

80 Physical LTTRs allow their owners to nominate flow on a particular bidding zone borders or to return them back to TSOs. Financial LTTRs do not allow nomination and can only entitle their holders to a payment.

81 Auctions of capacity without a simultaneous matching of energy trade and capacity allocation.

The **CACM regulation** requires TSOs in each CCR to submit proposals for a common methodology for **redispatching and countertrading**[82] (RDCT) and a redispatching and countertrading cost sharing methodology (RDCTCS) within 16 months of the decision on the CCM. The RDCT identifies relevant remedial actions to relieve congestions and sets out rules for the coordination of TSOs. The RDCTCS determines how some of the costs incurred from these actions should be shared between the TSOs of the CCR. Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation (the **System Operation Guideline**)[83] requires TSOs in each CCR to submit a proposal for **regional operating security coordination** (ROSC) within 6 months of the approval of the methodology for regional security analysis. Core NRAs informed ACER that they had not been able to agree on the TSOs proposals on the RDCT and RDCTS methodologies, and requested ACER to adopt a decision on the ROSC proposal. ACER's decisions on these three methodologies are intricately linked. The RDCTCS decision was appealed before the BoA by two regulators (BNetzA, CRE), and by four TSOs (PSE, Transnet BW, Tennet and RTE), with very different geographical perspectives on the matters at stake. The appeals of TransnetBW and PSE were also directed against the ROSC decision. In addition, TransnetBW also targeted the RDCT decision. It was decided to consolidate the cases, as well as to divide them on the basis of the decision they appealed.

In a decision of 260 pages on the RDCTCS, the BoA dismissed approximately a hundred pleas, relating *inter alia* to the scope of the methodology (as regards relevant network elements and remedial actions), the link between methodologies (RDCTM, RDCTCS and ROSC), the relevance and legality of method used for the decomposition of flows, the overestimation of loop flows and internal flows from importing zones, the failure to net flow components, the priority given to loop flows over internal flows to determine the contribution of 'polluting flows' to congestion, and the implementation timeline (28 May 2021, A-001-2021 consolidated). The BoA rejected all of Transnet BW's pleas against the RDCT, which related to an unlawful link between methodologies and to illegalities deriving from the RDCTCS (as regards its scope and the way loop flows are taken into account) (28 May 2021, A-011-2021). Finally, the BoA dismissed the appeals of TransnetBW and PSE against ACER's decision on the ROSC proposal (28 May 2021, A007-2021 Cons.). It rejected TransnetBW's pleas on the unlawful link between methodologies, and PSE's pleas on an illegal transfer of responsibilities from TSOs to regional coodination centers regarding certain remedial actions, on the disruption of the central dispatching model, on the misalignment between locally and regionally optimal remedial actions to solve congestions, and on the violation of the TSOs' responsibilities on the management of voltage limits under the System Operation guideline. Each of the six appellants before the BoA has filed and appeal before the General Court against decision A-001-2021 and PSE has appealed decision A-007-2021.

The BoA took its last two decisions of our mandate during the following week.

18. It dismissed an appeal against REMIT debit notes as inadmissible (31 May 2021, *Vp Energieportfolio*, n° A-008-2021, see above).

19. Finally, the BoA resumed the proceedings in the **Aquind.** It found that, since the UK had ceased to be an EU Member State on 31 Dec. 2020, the exemption request was no longer governed by EU law, ACER and its board of appeal no longer competent to decide on the matter. It dismissed the appeal case as inadmissible (4 June 2021, A-001-2018 R). The General Court recently confirmed this conclusions and rejected Aquind's appeal against the BoA's decision (Judgement of 15 February 2023, *Aquind v ACER*, T-492/21).

82 'Redispatching' is a measure activated by one or several system operators by altering the generation and/or load pattern in order to change physical flows in the transmission system and relieve a physical congestion. 'Countertrading' is a cross-zonal exchange initiated by TSOs between two bidding zones to relieve physical congestion.' The general idea of Redispatching and Countertrading is to alter the generation and/or load pattern by one or several TSO(s) in order to change physical flows and thereby relieve the physical congestion (cf. ENTSO-E, explanatory document for the redispatching and countertrading methodology for CCR Core).

83 System Operation specifies what TSOs should do in managing their grid. The System Operation Guideline lays down common rules for system operation, taking into account the extent of interconnections and the integration of renewable energies. It makes regional cooperation a legal obligation for TSOs.

Conclusion

The status and role of the boards of appeals of EU decentralised agencies is a relatively new area of EU governance and of EU regulatory law. This paper does not ambition to bring a significant contribution to the academic and legal debates on the qualification of these peculiar institutional animals, as administrative or as quasi-jurisdictional bodies.

The authors have sought to describe the issues and questions they faced as chair and member of ACER's BoA between 2016 and 2021, as this board was called, for the first time and in a rapidly increasing number of cases, to review the merits of ACER's decisions.

Challenges

The challenges stem from the particular position of ACER in the governance of the implementation of the EU energy policy as regards cross-border issues, which is either to step in and to decide in areas where the agreement of up 27 or 28 regulators and more than 30 transmission system operators is or was required on EU-wide or regional terms and conditions and methodologies (without being bound by the scope of their disagreement) or, increasingly, to directly decide on such matters. In both cases, it acts as a European regulator. These decisions, despite being labelled as "*individual decisions*", are of general application, and some of them have or will have a major impact in shaping the architecture and the regional organisation of integrated energy markets, of the operation of transport networks, and of energy flows within the EU. Their complexity derives from the interactions between different markets (e.g., time horizons on electricity markets) and between technical and economic components, combined with a variety of regional choices and with the tension between domestic and common policy considerations. The nature and impact of the agency's role and of its decisions should be acknowledged and considered in future adjustment of the design of their quasi-judicial and judicial review.

The BoA stands in between ACER's competent bodies (the director, subject to a favourable opinion of the board of regulators) and the General Court, as internal appeal mechanism and a gateway to the Court designed to function in a very short timeframe (2, then 4 months, instead of more than 2 years), with limited resources.

Activity

The BoA has been activated against 30% of decisions falling within its scope, and has issued 19 decisions on 29 appeals during our mandate. In some of these cases, it cancelled ACER's initial decision (as it considered it had the power to do under regulation (EC) n° 713/2009) or remitted it to the director (under the new regulation) and changed the course of the decision process: on the selection of the operator of a booking platform for the allocation of gas transmission capacities at the interconnection between two countries, on the definition of system operation regions, on the methodology for sharing costs incurred to ensure firmness and remuneration of long term transmission rights. In more than 80% of cases, the BoA dismissed the appeals.

Lessons learned

More than half of these decisions have been challenged before the General Court. The annulment of four of the BoA's first decisions reflects initial ambiguities on the conditions for ACER to step in the decision process (which were clarified in the new regulation) and on the application of law in time (as one of the consequences of the fact that ACER's initial decision is replaced by the BoA's), the fragility of the BoA's initial choice to limit its review to manifest errors of assessment, as well as elements which are beyond its judgement (such as the illegality of certain provisions of the CAM regulation).

Recent judgements rejecting appeals against decisions the BoA took in 2020 and 2021 seem to confirm that it has progressively adjusted the depth of its scrutiny at the appropriate level, and contributed to the legal stability of the decisions produced by this coordinated governance architecture. The status of BoA members has been adjusted twice to reflect the substance of the part-time engagement which their functions require.

Outstanding questions

The Court of Justice, in the request for the amendment of its statute it introduced on 30 November 2022, recommends to include the decisions of ACER's BoA, as well as of the boards of other agencies, in the scope of the mechanism pursuant to which an appeal against a judgement of the General Court will be allowed to proceed only if it raises significant issues with respect to the coherence or development of EU law (article 58 a, which already applies to the BoAs of the EUIPO, the CPVO, ECHA and the EASA).

In this context, the role of ACER's BoA will be even more important. Its resources should be consolidated, in particular the staffing of the registry, in order to limit its reliance on external support. Its powers and the procedure should be clarified where necessary – including by amendments to regulation (EU) 2019/942 - in consideration of the regulatory nature of most of ACER's decisions and of their impact, in particular as regards the categories of stakeholders which are entitled to form an appeal, which could be extended, and the status of the decisions the board remits to the agency, pending a new decision of the competent body. This would allow the BoA to fully play its part within the forthcoming EU architecture of judicial and quasi-judicial control, applying to this critical EU policy.

Annex I. List of BoA decisions

ACER decision n°	Subject	Addressees	BoA decision n°	Appelants	Admitted interveners	Non admitted interveners	Date of BoA decision	§§*	Decision	Appeal before the General Court
First mandate of the BoA (2011-2016)										
Opinion 09/2015	Compliance of NRAs decisions approving the methods of allocation of cross-border transmission capacity in the CEE region	Not specified	A-001-2015	E-control (Austrian NRA)	In support of the appeal : 8 Austrian industry association and companies. Def : Slovakian and Polish NRAs, PSE (TSO), 1 Polish industry association, 1 Polish company		16 December 2015	41	Inadmissible	29 June 2017, *E-control v ACER*, T-63/16, dismissed
			A-002-2015	Austrian Power Grid (TSO)	App : Wirtschatskammer Österreich. Def : same as above.		16 December 2015	38	Inadmissible	
Second mandate of the BoA (2016-2021)										
06/2016	on the TSO's proposal for the determination of CCRs	All electricity TSOs (list)	A-001-2017 (Cons.)	E-control (A-001) Verbund (A-002, inadm.) APG, VUEN (A-003 and A-004) (TSOs)	App: E-control. Def : HEA, ERO, ERO (Hungarian Czech and Polish NRAs), MAVIR, PSE (TSOs)	9 Austrian industry associations and companies	17 March 2017	128	Dismissed	24 October 2019, *E-Control v ACER*, T-332/17 and *APG and VUEN v ACER*, T-333/17, annuled
05/2018	on the exemption request for the Aquind Interconnector	Aquind Ltd	A-001-2018	Aquind Ltd (applicant)	Def : CRE (French NRA)	-	17 October 2018	124	Dismissed	18 November 2020, *Aquind ltd v. ACER*, T-735/18, annuled, 9 March 2023, C-46/21 P, appeal of ACER rejected.
11/2018	on establishing the capacity booking platform to be used at "Mallnow" physical Interconnection Point and "GCP" Virtual Interconnection Point	Polish and German gas TSOs (list)	A-002-2018	PRISMA European Capacity Platform GmbH	Def : Polish ERO Gaz System SA (GSA, Polish TSO)	6 Polish industry associations and companies	14 February 2019	155	Decision annulled and case remitted to the agency	

02/2019	on the Core CCR TSOs' proposal for the regional design of the day-ahead and intraday common capacity calculation methodologies	All electricity TSOs of the Core CCR (list)	A-001-2019 (Cons.)	Amprion (A-001-2019) Transnet (A-002-2019)	Def : CRE, CREG (Belgian NRA)	-	11 July 2019	252	Dismissed	
			A-003-2019	BnetzA	Def : CRE, CREG	-	11 July 2019	192	Dismissed	7 Sept. 2022, *BNetzA v ACER*, T-631/19, annuled,. (+ direct appeal of Germany against ACER's decision T-283/19),
05/2019	on the incremental capacity project proposal for the Mosonmagyarovar interconnection point approving the HUAT project proposal	Hungarian and Austrian gas TSOs (list)	A-004-2019	HEA (A-004-2019) FGSZ (TSO) (A-005-2019)	App : Polish ERO, RONI (Slovakian NRA)	-	20 August 2019	316	Dismissed	16 March 2022, *MEKH and FGSZ v ACER*, T-684/19 and T-704/19, annuled
10/2019	same as 11/2018		A-006-2019	GSA	Def : PRISMA. App : Polish ERO	-	7 February 2020	199	Dismissed	GSA, T-212/20, pending
06-2016	Relaunch of appeal procedure following annulment by the ECJ		A-001-2017 R		Same as in initial case	-	28 May 2020	49	Remitted to the agency	
02/2020	on the implementation framework for a European platform for the exchange of balancing enregy from frequency restoration reserves with automatic (02) / manual (03) activation	« All [electricity] TSOs » (followed by a list)	A-001-2020 (Cons.)	APG and 6 otherTSOs (A-001-2020), TenneT TSO GmbH; TenneT TSO B.V. (A-004-2020)	App : MAVIR (TSO)	App : Vereniging Energie Nederland	16 July 2020	285	Dismissed	15 February 2023, APG and others, T-606/2020, dismissed
03/2020			A-002-2020 (Cons.	APG and others (A-002-2020) TenneT TSO GmbH; TenneT TSO B.V. (A-004-2020)	App : MAVIR	App : Vereniging Energie Nederland	16 July 2020	286	Dismissed	15 February 2023, APG and others, T-607/2020, dismissed
01/2020	on the methodology to determine price for the balancing energy that results from the activation of balancing energy bids		A-003-2020	Tennet (A-003-2020), Vereniging Energie Nederland (A-006-2020)	-	-	16 July 2020	244	Inadmissible (Energie Nederland), dismissed (Tennet)	
10/2020	on the definition of system operation regions (SORs)	ENTSO-E	A-007-2020	ENTSO-E	-	-	24 September 2020	108	Remitted to the agency	

13/2020	on the implementation framework for a European platform for the imbalance netting process	« All [electricity] TSOs » (+ list)	A-008-2020	RTE (TSO)	-	-	22 December 2020	363	Dismissed	
25/2020	on sharing costs incurred to ensure firmness and remuneration of long-term transmission rights	All electricity TSOs (list)	A-009-2020	PSE	App : Polish ERO	-	19 April 2021	30	Remitted to the agency	
30/2020	on the Core CCR TSOs' proposal for the methodology for cost sharing of redispatching and countertrading	« All [electricity] TSOs of the Core CCR » (+ list)	A-001-2021 (Cons.)	PSE, (A-001, TSO), CRE (A-002), Transnet (A-003), BNetzA (A-004), TenneT (A-005), RTE (A-006)	App : Amprion. Def : HEA, CREG, Czech ERO, MAVIR, URSO (Slovenian NRA)	App : UFE (French industry association). Def : ACM (Dutch NRA)	28 May 2021	1472	Dismissed	CRE, T-446/21, RTE, T-472/21, TransnetBW, T-476/21, Tennet, T-482/21, PSE, T-484/21, BNetzA, T-485/21
33/2020	on the methodology for regional operational security coordination (ROSC) for the Core CCR		A-007-2021 (Cons.)	Transnet BW, PSE (A-007-2021)	Def : Czech ERO	-	28 May 2021	690	Dismissed	PSE, T-483-21
35/2020	On the methodology for coordinated redispatching and countertrading (RDCT) of the Core CCR	« [All electricity] Core TSOs « (+ list)	A-011-2021	Transnet BW	Def : Czech ERO		28 May 2021	511	Dismissed	
	Debit note on REMIT fees	Vp Energieportfolio	A-008-2021	Vp Energieportfolio	-	-	31 May 2021	35	Inadmissible	
05/2018	Relaunch of appeal procedure following annulment by the ECJ		A-01-2018 R		Def : CRE	-	4 June 2021	123	Dismissed	15 Feb. 2023, Aquind, T-492/21, dismissed

* number of paragraphs

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